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COURT OF APPEALS

Potomac Valley Orthopaedic Associates, et al. v. Maryland State Board of Physicians, et al., No. 18, September Term, 2008. Opinion filed on January 24, 2011 by Murphy, J.

http://mdcourts.gov/opinions/coa/2011/18a08.pdf

ADMINISTRATIVE LAW - DECLARATORY RULING OF THE MARYLAND STATE BOARD OF PHYSICIANS - THE MARYLAND SELF-REFERRAL LAW: The prohibition against physician self-referrals applies to an orthopedic surgeon's referral of a patient to another health care provider in the same group practice for a MRI or a CT scan that will involve the use of an imaging or scanning machine in which the referring physician has a financial interest. The "group practice" and/or "direct supervision" exemptions to the Maryland Self-Referral Law are not applicable to such a referral.

Facts: Petitioners appealed from a declaratory ruling, issued by the Maryland State Board of Physicians pursuant to SG 10-305(a), regarding the "group practice" and "direct supervision" exemptions to the Maryland Self-Referral Law. After that ruling was affirmed by the Circuit Court for Montgomery County pursuant to SG § 10-305(c), the Appellants – twelve medical practices that specialize in the fields of orthopedics, urology, radiation oncology and emergency medicine -- noted an appeal to the Court of Special Appeals pursuant to SG § 10-223(b)(1), and presented that Court with the following question:

> "Whether the Maryland Patient Referral Law [(Subtitle 3 of Title 1 of the Health Occupations Article)] prohibits an orthopaedic surgeon from furnishing patients with MRI or CT diagnostic services within his or her office or group, even when the orthopaedist complies with the 'group practice' exemption in Health Occ. § 1-302(d)(2) or the 'direct supervision' exemption in Health Occ. § 1-302(d)(3)?"

Before the Appellees filed their briefs in the Court of Special Appeals, the Court of Appeals issued a writ of certiorari on its own initiative.

Held: The Court of Appeals upheld the judgment of the Board finding that it was correct in ruling that (1) the "group

practice" exemption does not permit an orthopedic surgeon to refer his or her patient for a MRI or CT scan to be performed by another member of the orthopedic surgeon's practice group, and (2) the "direct supervision" exemption, which is limited to referrals to "outside" entities, requires that the referring physician be "personally present within the treatment area when the service is performed and either personally providing the service or directly supervising that service."

The Court explained it's holding, "As the Board and the Attorney General have pointed out, a contrary conclusion would offend several well established principles of statutory construction. Our conclusion is confirmed by the fact that, in 2007, 2008, 2009, and 2010, the General Assembly 'rejected efforts to achieve legislatively that which we [are being] asked to grant judicially.'" (citations omitted.)

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Babak Najafi v. Motor Vehicle Administration, No. 44, September Term 2010. Opinion filed on January 31, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/44a10.pdf

ADMINISTRATIVE LAW – JUDICIAL REVIEW – MOTOR VEHICLE ADMINISTRATION – ADMINISTRATIVE LICENSE SUSPENSION HEARING

Facts: In 2009, Babak Najafi had been detained on suspicion of driving under the influence of alcohol by a Montgomery County police officer and subsequently had his license suspended for refusing to submit to a breathalyzer test, pursuant to Maryland's implied consent statute, Section 16-205.1 of the Transportation Article. Najafi requested an administrative hearing, at which he was the only person to testify. The Motor Vehicle Administration presented its case through Najafi's DR-15A and DR-15 forms, which were filled out by the detaining officer and contained general factual information about Najafi and the incident, as well as the officer's certification that Najafi was advised of his rights and that he refused to take a breathalyzer test.

At the hearing, Najafi's counsel made a motion that no action be taken by the ALJ, contending that Najafi was denied a reasonable opportunity to consult counsel because, at the police station, the officer failed to give Najafi privacy when he attempted to contact his attorney on the phone. The ALJ denied the motion, however, determining that, in the context of an administrative hearing, there is no right for an individual to consult with counsel before making an election of whether to submit to a breathalyzer test, and that, even if there were a right, here, Najafi was given a reasonable opportunity to contact counsel, because the police officer allowed him to make a phone call, although Najafi was only able to reach his attorney's voicemail.

Najafi also contended that he never affirmatively refused to take the breathalyzer test. The ALJ determined, however, that Najafi did refuse to take the breathlyzer test, observing that, when faced with conflicting evidence such as the forms presented by the MVA and Najafi's testimony, she was entitled to make a determination that the detaining officer's certification that Najafi refused the test was more credible. The ALJ ruled that Najafi was subject to sanctions under Section 16-205.1 of the Transportation Article and suspended his license for 120 days but modified the sanction so that Najafi could have an ignition interlock system placed in his car.

Najafi filed a Petition for Judicial Review of the ALJ's

decision in the Circuit Court for Montgomery County, which affirmed.

Held: The Court of Appeals affirmed, holding that, even if there were a right to consult counsel prior to submitting to a breathalyzer test in the context of an administrative license suspension hearing, Najafi was clearly given a reasonable opportunity to consult with counsel in the present case. With regard to Najafi's contention that he never affirmatively refused to take a breathalyzer test, the Court observed that the ALJ was entitled to make a determination that the officer's certification that Najafi refused to take the breathalyzer test was more credible than Najafi's testimony.

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John Menefee, et al. v. State of Maryland, No. 37, September Term 2010, filed 24 January 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/37a10.pdf

CIVIL PROCEDURE – PROPER PARTY TO LITIGATION – TORT – HEALTH AND HUMAN SERVICES – MONTGOMERY COUNTY

NOTWITHSTANDING MARYLAND CODE (1984, 2009 REPL. VOL.), STATE GOVERNMENT ARTICLE, § 12-103.2's MANDATE THAT MONTGOMERY COUNTY IS RESPONSIBLE FOR DEFENDING AND PAYING ANY JUDGMENT RESULTING FROM A SUIT AGAINST THE COUNTY OR ITS PERSONNEL IN CARRYING OUT SOCIAL SERVICE PROGRAMMING UNDER ARTICLE 3, SUBTITLE 4 OF THE HUMAN SERVICES ARTICLE, THE STATE OF MARYLAND IS A PROPER PARTY DEFENDANT TO SUCH A SUIT. PURSUANT TO THE MARYLAND TORT CLAIMS ACT, MONTGOMERY COUNTY AND ITS EMPLOYEES, WHEN CARRYING OUT STATE SOCIAL SERVICE PROGRAMMING UNDER ARTICLE 3, SUBTITLE 4 OF THE HUMAN SERVICES ARTICLE, ARE CONSIDERED A "STATE UNIT" AND "STATE PERSONNEL," RESPECTIVELY, WHEREBY THE STATE WAIVES SOVEREIGN AND GOVERNMENTAL IMMUNITY AND ASSUMES LIABILITY FOR ANY WRONGDOING ON BEHALF OF THE COUNTY OR ITS EMPLOYEES.

Facts: John Menefee (Menefee) and Sheila Menefee (Sheila) shared joint legal and physical custody of their child, John Damien. While changing John Damien's diaper, Menefee noticed bruises on the child's back and buttocks, and called Child Protective Services (CPS) and/or the Department of Health and Human Services in Montgomery County. The case was referred ultimately to two employees of CPS, who concluded that no determination could be made as to the source of the possible abuse. Although the CPS employees directed Menefee and Sheila to participate in a parenting program, Menenfee contends that neither of the CPS workers conducted any further investigation into John Damien's injuries.

Thereafter, Menefee became aware of the violent nature of Sheila's boyfriend, Ruben Diaz. Menefee apparently reported to CPS and/or DHHS that he suspected Diaz to be the source of the physical abuse to both John Damien and Sheila. Menefee reports that none of these claims were investigated or reported to any other relevant authorities by CPS or DHHS. On 6 September 2004, Diaz broke into Sheila's home and stabbed her to death. When the police arrived, they found John Damien – then two years of age – in the room with Diaz and the now-deceased Sheila. Three years later, John Damien was diagnosed with Posttraumatic Stress Disorder (PTSD).

On 4 March 2009, Menefee filed a four-count complaint

against the State of Maryland in the Circuit Court for Montgomery County, alleging negligence, negligence per se, gross negligence, and negligent infliction of emotional distress, alleging that the State, through the CPS/DHHS, failed to investigate the abuse suffered by John Damien, and that such failures were the proximate cause of John Damien's PTSD.

On 20 April 2009, the State filed a motion to dismiss the complaint, alleging that the State of Maryland was not the proper party to the litigation, considering that Md. Code (1984, 2009 Repl. Vol.), State Gov't Art. § 12-103.2(b), provides that, in a suit against Montgomery County CPS or DHHS, "a tort claim shall be considered, defended, settled, and paid in the same manner as any other claim covered by the Montgomery County Self-Insurance Fund." The Circuit Court granted the State's motion to dismiss, explaining that: "I think clearly the intent of the legislature was that in this particular instance, with this set of facts, that the proper party in this case would be Montgomery County, not the State of Maryland." Menefee noted a timely appeal to the Court of Special Appeals. On our initiative, we issued a writ of certiorari, before the intermediate appellate court decided the appeal, to consider "whether the State of Maryland is a proper party to a suit alleging negligence and negligence per se stemming from the alleged acts (or lack thereof) of Montgomery County DHHS employees in administering social service programming under Title 3, Subtitle 4 of the Human Services Article."

Held: Reversed. The Court first explained what is meant by a "proper party defendant." The Court cited with approval authority stating that a proper party defendant is one "who, by reason of the relation between him and the actual perpetrator has a liability in law cast upon him for the acts or omissions of the actual perpetrator." Thus, the issue before the Court was whether the State had a "direct interest" in the litigation or whether it has assumed potentially "liability in law" for the asserted damage to John Damien.

The Court traced the history of the Montgomery County Department of Health and Human Services. Before 1996, the Montgomery County Department of Social Services staff were State employees and were paid by the State Department of Human Resources. House Bill 669 of the 1996 Legislative Session, however, transferred the duties of the local department of social services in Montgomery County to the Montgomery County government.

Along with transferring responsibility for Health and Human Services programming from the State to the County government, the

Legislature made a number of related changes to the Maryland Tort Claims Act (MTCA). Under the MTCA, generally, State "units" and "personnel" are immune from tort liability in State courts. House Bill 669 included in the definition of "state personnel" (for purposes of the MTCA), "an employee of a county who is assigned to a local department of social services, including a Montgomery County employee who carries out State programs administered under Title 3, Subtitle 4 of the Human Services Article." Further, it provided that "a unit of the State government includes the Montgomery County government to the extent that Montgomery County administers a State program under Title 3, Subtitle 4 of the Human Services Article."

On the other hand, also added to the MTCA through House Bill 669 was a provision stating that "[a] tort claim shall be considered, defended, settled, and paid in the same manner as any other claim covered by the Montgomery County Self-Insurance Fund," and that "[f]or tort claims, the duties, responsibilities, and liabilities of the [State] Treasurer . . . shall be assumed by the Montgomery County Self-Insurance Fund." It was these "mixed signals," the Court stated, that served as the basis for the present dispute.

The Court subscribed to Menefee's understanding of the complex relationship between the State of Maryland and the Montgomery County DHHS. The Court explained that, in including "an employee of a county who is assigned to a local department of social services, including a Montgomery County employee who carries out State programs administered under Title 3, Subtitle 4 of the Human Services Article" in the definition (for purposes of the MTCA) of "state personnel," the State waives immunity and assumes liability for the County and/or its employees (as they are a "state unit" and "state personnel," respectively) acting negligently when administering social-service programming under Title 3, Subtitle 4 of the Human Service Article. The Court explained that it would be inconsistent to say, on one hand, that the State has assumed liability for certain County employees, yet say, on the other hand, that it has no "direct interest" in the litigation.

Finally, while there is a provision of the MTCA that provides that claims relating to Montgomery County's administration of a State program under Title 3, Subtitle 4 of the Human Services Article are to "be considered, defended, settled, and paid in the same manner as any other claim covered by the Montgomery County Self-Insurance Fund," nowhere in the statute does it state that Montgomery County alone is the proper named party in a suit under these circumstances. Accordingly,

the Court held that, in passing House Bill 669, the Legislature did not intend to preclude the State from being a proper party to a lawsuit stemming from those services now performed by the Montgomery County DHHS.

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Miller and Smith at Quercus, LLC, et al. v. Casey PMN, LLC, No. 29, September Term 2009. Opinion filed January 11, 2010, by Battaglia, J.

http://mdcourts.gov/opinions/coa/2010/29a09.pdf

COMMERCIAL LAW - PRIVATE CONTRACT

Facts: Casey PMN, LLC, filed a four count complaint in the Circuit Court for Montgomery County against Miller and Smith and Miller and Smith Holding, Inc., alleging that Miller and Smith, after selling property secured by a Note and Deed of Trust held by Casey, had "not properly calculated and paid Additional Contingent Interest to Casey based on the fair market value of the Property, as contemplated by the Note and Deed of Trust . . . ." Miller and Smith filed a Motion to Dismiss Count II, and Answer to the remaining three counts, and a Counterclaim. The Circuit Court granted Miller and Smith's Motion to Dismiss Count II of the Complaint. The parties then filed a joint "Stipulation of Dismissal" pursuant to Rule 2-506, dismissing "with prejudice" Counts I and III of the Complaint and also purportedly dismissing Count IV and the Counterclaim "with prejudice," but with an important caveat that the dismissal of Count IV and the Counterclaim would be "without prejudice to the extent that the Court's earlier interlocutory Opinion and Order dismissing Count II, is vacated or reversed on appeal and remanded to this Court." On appeal, the Court of Special Appeals reached the merits of the case after stating that it did "not perceive the parties' Stipulation of Dismissal to flout the final judgment rule, despite its caveat," thereby indicating that the admonition against circumventing the final judgment rule should require an intent analysis, relying on *Collins v. Li*, 158 Md. App. 252, 273-74, 857 A.2d 135, 148 (2004).

Held: The Court of Appeals vacated the Court of Special Appeals' decision and held that the parties could not agree to confer appellate jurisdiction after the dismissal of Count II of the complaint when they created a dismissal without prejudice of Count IV and the Counterclaim, and when both were inexorably intertwined with Count II. The Court stated that the "without prejudice" exception of the Stipulation, no matter how narrow, still created an exception that attempted to confer appellate jurisdiction. The Court noted that the Court of Special Appeals, by engaging in an intent analysis, attempted to give more power to the parties to determine finality. The Court stated that the intermediate appellate court misconstrued the use of the word "circumvent" in *Collins* to permit a without prejudice stipulation to constitute a final judgment because the parties did not intend

to flout the final judgment rule, thereby inferring that the word circumvent requires bad intent. Because neither the Circuit Court judge's dismissal of Count II, nor the parties' Stipulation of Dismissal of Count IV and the Counterclaim without prejudice, created a final, appealable judgment, the appeal was vacated and remanded to the Court of Special Appeals with instructions to dismiss.

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Christian Darrell Lee v. State of Maryland, No. 115, September Term, 2009, Filed January 31, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/115a09.pdf

CONSTITUTIONAL CRIMINAL PROCEDURE – FIFTH AMENDMENT – *MIRANDA* WARNINGS AND WAIVER – SUBSEQUENT ACTS THAT VITIATE PRIOR WARNINGS

Facts: On September 9, 2006, Baltimore County Police arrested Petitioner, Christian Darrell Lee, in connection with a homicide and robbery investigation. Detective Craig Schrott interrogated Petitioner, and began by having Petitioner read aloud the *Miranda* warnings, including that "anything you say can and will be used against you in a court of law." Detective Schrott confirmed with Petitioner that Petitioner understood the warnings. Petitioner then signed a written waiver of the *Miranda* rights.

During the interrogation, Petitioner admitted to being present at the scene of the crime, but denied any personal involvement in the shooting. Petitioner then asked whether the interrogation was being recorded and Detective Schrott responded, "This is between you and me, bud. Only me and you are here, all right? All right?" Not long after this exchange, Petitioner admitted for the first time that he shot the deceased victim.

Petitioner filed a pre-trial motion to suppress all statements made by Petitioner after Detective Schrott's statement—"This is between you and me, bud,"—arguing that the statement violated his *Miranda* rights by effectively undermining the warning that anything he said during the interrogation would be used against him in court. Petitioner also argued that statements he made following Detective Schrott's comment were involuntary under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Article 22 of the Maryland Declaration of Rights, and Maryland common law. The trial court denied the motion. The State introduced Petitioner's statements at trial, and a jury later found Petitioner guilty of felony murder, first degree burglary, first degree assault, and related handgun offenses.

The Court of Special Appeals affirmed the ruling of the trial court, holding that Detective Schrott's statement did not undermine the prior *Miranda* warnings and the statement did not render Petitioner's subsequent statements involuntary. *Lee v. State*, 186 Md. App. 631, 975 A.2d 240 (2009). Petitioner filed a petition for writ of certiorari, which the Court of Appeals granted, to answer the question: Whether the interrogating

officer made a promise of confidentiality, violated the protections of *Miranda v. Arizona*, and induced an involuntary statement when, an hour into an interrogation in which Petitioner continually denied involvement in the shooting, the officer stated: "This is between you and me, bud. Only you and me here, all right? All right?"

Held: Reversed. The Court of Appeals held that Detective Schrott's statement that the interrogation is "between you and me, bud" subverted the otherwise valid *Miranda* warnings and waiver, rendering in violation of *Miranda* all statements the suspect thereafter made during that interrogation. Additionally, the Court of Appeals held that Petitioner's statements, made after the improper promise of confidentiality, were not involuntary under the Due Process Clause of the Fourteenth Amendment, Article 22 of the Maryland Declaration of Rights, or Maryland common law.

The Court noted that in *Miranda*, the United States Supreme Court recognized that a waiver of the rights included in the *Miranda* warnings can be undermined by words or actions on the part of police. The Court cited cases in various jurisdictions that have applied the principles of *Miranda* and its progeny to hold that, after proper warnings and a knowing, intelligent, and voluntary waiver, the interrogator may not say or do something during the ensuing interrogation that subverts those warnings and thereby vitiates the suspect's earlier waiver by rendering it ineffective for all purposes, going forward.

Applying that standard to the instant case, the Court of Appeals found that Detective Schrott's statement, on its face, implied confidentiality and thereby directly contradicted the advisement that "anything you say can and will be used against you in a court of law." The resulting *Miranda* violation lay in the officer's words themselves, so the Court did not examine further whether Petitioner subjectively relied on the words to his detriment.

In holding that Petitioner's statements were not involuntary under either the federal or Maryland constitutions, or Maryland common law, the Court recognized that a confession is involuntary under the federal and state constitutions if police conduct overbears the will of the suspect and induces the suspect to confess, and is involuntary under Maryland common law if it is the product of certain improper threats, promises, or inducements by the police. The Court held that Detective Schrott's statement alone was insufficient to demonstrate that Petitioner's will was overborne and declined to expand the rule of common law

voluntariness to cover promises of confidentiality.

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Office of the Public Defender, et al. v. State of Maryland, No. 9, September Term 2009, filed 16 April 2010, Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/9a09.pdf

CRIMINAL PROCEDURE - INDIGENCY - APPOINTMENT OF COUNSEL - WHERE THE LOCAL OFFICE OF THE PUBLIC DEFENDER ("OPD") DECLINES REPRESENTATION TO A CRIMINAL DEFENDANT ERRONEOUSLY, BECAUSE OF THE LOCAL OPD'S FAILURE TO CONSIDER PROPERLY THE STATUTORILY-MANDATED CRITERIA FOR DETERMINING INDIGENCY, AND WHERE A COURT FINDS, UPON ITS SUBSEQUENT MANDATORY INDEPENDENT REVIEW, THAT THE INDIVIDUAL QUALIFIES FOR REPRESENTATION, THE TRIAL COURT MAY APPOINT AN ATTORNEY FROM THE LOCAL OPD TO REPRESENT THE INDIGENT INDIVIDUAL UNLESS AN ACTUAL AND UNWAIVED OR UNWAIVABLE CONFLICT OF INTEREST WOULD RESULT THEREBY.

Facts: Jason Flynn Stinnett was indicted by a grand jury in Cecil County on multiple burglary charges and other related offenses. Stinnett applied timely for public legal representation from the local Office of the State Public Defender ("OPD"). On 19 March 2008, the local OPD determined that Stinnett failed to meet the requirements for its services because his income exceeded 110% of the Federal Poverty Guidelines, the limit to qualify for representation by the OPD according to COMAR 14.06.03.05A and D(2). Thus, the local OPD informed Stinnett, by letter dated 19 March 2008, that, because his income exceeded the maximum net income level, he did not qualify for representation by that agency.

On 7 April 2008, Stinnett appeared, unrepresented by counsel, at a status hearing before the Circuit Court and requested that an attorney be appointed for him because he could not afford to retain private counsel and the local OPD had denied representation. Following this explication, the court proceeded to conduct an indigency hearing, examining the factors to be considered in determining indigency contained in Maryland Code, Article 27A, § 7, and COMAR 14.06.03.05A, rather than applying the maximum income level rule contained in COMAR 14.06.03.05A and D(2), the standard used by the local OPD. In doing so, the Circuit Court maintained that any determination of indigency, whether conducted by the local OPD or a trial court, must take into account the statutory indigency factors contained in Art. 27A, § 7, and COMAR 14.06.03.05A, and that the local OPD acted contrary to established case law when it considered solely whether Stinnett's net annual income exceeded 110% of the Federal

Poverty Guidelines.

Turning to examine the specifics of Stinnett's financial situation, in response to the court's questioning, Stinnett testified that: (1) he was employed with Mid-Atlantic Electrical Contractors, a job which paid him $19 per hour (resulting in a net take-home income of approximately $2123 per month), without any opportunity for overtime; (2) he had approximately $400 in a bank account and no other assets that could be liquidated to pay for an attorney; (3) at the time of the hearing, he resided in a halfway house, paying $650 per month in boarding costs and $65 per month for food; (4) he had been ordered by the Circuit Court for Harford County to pay $331 per month in restitution arising from a prior robbery conviction; (5) he paid the entirety of his daughter's private school tuition, at a cost of $440 per month; (6) he spent approximately $108 per month to purchase lunch; and, (7) he paid $520 per month for transportation operating costs to and from work in a vehicle loaned to him by his father. In addition, based on standard child support calculations, the Circuit Court determined that Stinnett's expenses relating to the shared custody of his daughter amounted to $420 per month.

Totaling Stinnett's income and expenses, each aspect of which it found to be "fair and reasonable," the Circuit Court determined that Stinnett had, in fact, no net income; Stinnett's net income of $2123 per month fell well below the $2534 in expenses he incurred each month. In addition, the Circuit Court found that the reasonable cost for a private attorney to represent Stinnett would be between $3000 and $5000. On this basis, the judge determined that, despite the local OPD's conclusion to the contrary, Stinnett, in fact, was indigent under the factors enumerated in Art. 27A, § 7, and COMAR 14.06.03.05A, and was entitled to the appointment of an attorney at the State's expense. Accordingly, the Circuit Court issued an order naming John K. Northrop, the Deputy District Public Defender for Cecil County, or another qualified attorney from the local OPD or its list of panel attorneys, to represent Stinnett. In appointing Northrop, the court noted that, well before any consideration of indigency by either the local OPD or the Circuit Court in Stinnett's case, the court was informed that the Board of County Commissioners had no funds to pay for public defender or private court-appointed counsel fees, and that the members of the local bar association were not willing to serve pro bono in criminal cases.

At a later hearing in Stinnett's case, held on 8 August 2008, Northrop did not appear. As a result, the trial judge found him in direct contempt of court and fined him $10.00.

Subsequent to the contempt finding against Northrop, Stinnett entered a guilty plea, which the Circuit Court accepted, and was sentenced. Stinnett did not appeal the judgment entered against him. On the other hand, Northrop noted an appeal to the Court of Special Appeals from the 8 August 2008 order finding him in direct contempt. He also filed with the Court of Appeals a petition for writ of certiorari, in which he raised two questions: (1) whether the Circuit Court erred in ordering the local OPD to represent Stinnett after the local OPD declined to provide representation to the defendant, and (2) whether the Circuit Court erred in finding Northrop in contempt. The Court granted Northrop's petition before the intermediate appellate court decided the appeal.

Held: Reversed. As to the question of Northrop's appointment, the Court held that, where the local OPD declines representation to a defendant erroneously, because of the local OPD's failure to consider properly the statutorily-mandated criteria for determining indigency, and where a court finds, upon its subsequent mandatory independent review, that the individual qualifies for representation, the trial court, in carrying out its role as "ultimate protector" of the Constitutional right to counsel, may appoint an attorney from the local OPD to represent the indigent individual unless an actual and unwaived or unwaivable conflict of interest would result thereby. Regarding the contempt finding against Northrop, however, the Court reversed on the ground that the Circuit Court's order of contempt failed to comply with the applicable Maryland Rules.

As a threshold matter, the Court considered whether Northrop's appeal was moot because Stinnett was convicted and sentenced, but did not appeal. The Court found that, although the criminal proceedings against Stinnett concluded with a final judgment from which Stinnett did not appeal, the Circuit Court's finding of contempt against Northrop instituted an entirely new controversy, separate from Stinnett's case. As such, because Northrop's appeal presented an existing controversy yet to be resolved, the appeal was not moot. In addition, the Court noted that, even if the matter was moot technically, the Court nevertheless would consider Northrop's appeal as a recurring matter of public concern which otherwise likely would evade review.

Turning to the Circuit Court's appointment of Northrop, the Court noted at the outset that the local OPD denied erroneously representation to Stinnett. Rather than apply the statutorily-mandated criteria for determining indigency provided by Art. 27A, § 7(a), the local OPD, in denying representation to Stinnett,

relied solely on certain language contained in COMAR 14.06.03.05A and D(2), which purports to permit the local OPD to consider an applicant's maximum net annual income level and asset ceiling in determining whether to provide representation. The Court found that, by evaluating Stinnett's application solely under the maximum net annual income and asset ceiling standard of COMAR 14.06.03.05A and D(2), while ignoring wholly the statutorily-mandated indigency factors contained in Art. 27A, § 7(a), and COMAR 14.06.03.05A, the local OPD applied the incorrect standard for determining indigency of applicants and erred, both legally and factually, in concluding that Stinnett did not qualify for representation by its attorneys.

Regarding the Circuit Court's power to appoint an attorney from the local OPD after the local OPD denies erroneously representation to an indigent defendant, the Court observed that certain dicta in prior cases (Thompson v. State, 284 Md. 113, 394 A.2d 1190 (1978), and Baldwin v. State, 51 Md. App. 538, 444 A.2d 1058 (1982), in particular) seemed to suggest that, if the local OPD declines to represent a defendant, even on grounds of non-eligibility (as opposed to conflict of interest), the court has no authority to order the local OPD to provide representation. Upon review, the Court found such dicta to be unpersuasive, particularly in light of the statutory scheme designed by the General Assembly to govern the respective responsibilities of the OPD and the courts in determining whether a criminal defendant qualifies as indigent and whether such individual is entitled to representation paid for by the taxpayers. The Court noted that, although the initial determination of indigency is to be made by the local OPD, the local OPD's decision is not final. Rather, the General Assembly provided, in Art. 27A, § 6(f), a clear oversight and corrective role for the courts in the indigency determination and appointed-counsel process.

Of utmost importance, the Court underscored the fact that Art. 27A, § 6(f), which permits the trial court the authority to appoint "an attorney" to represent an indigent individual where the local OPD declines to provide representation, contains no language indicating a legislative intent to prohibit the trial court from appointing an attorney from the local OPD to represent an individual that the court determines qualifies as indigent. As such, the Court held that, where the local OPD declines representation to a defendant erroneously, because of the local OPD's failure to consider properly the statutorily-mandated criteria for determining indigency, and where a court finds, upon its subsequent mandatory independent review, that the individual qualifies for representation, the trial court, in carrying out its role as "ultimate protector" of the Constitutional right to

counsel, may appoint an attorney from the local OPD to represent the indigent individual unless an actual and unwaived or unwaivable conflict of interest would result thereby.

Although it found that the Circuit Court acted within its authority when it appointed Northrop to represent Stinnett, the Court reversed the Circuit Court's order finding Northrop in direct contempt for refusing to appear as Stinnett's counsel. The Court noted that Maryland Rule 15-203(b)(1) requires that a written order of direct contempt specify whether the contempt is civil or criminal, and that, in general, failure to comply with the Rule's requirements mandates reversal of the judgment of contempt. As such, because the Circuit Court's contempt order against Northrop failed to specify whether the contempt was civil or criminal, the Court reversed the judgment of contempt against Northrop.

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Franklin Morris v. State of Maryland, No. 34, September Term, 2010, filed 23 February 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/34a10.pdf

CRIMINAL LAW – JOINT TRIAL – PLEA-TYPE AGREEMENTS – RIGHT TO CONFRONT WITNESSES – RIGHT TO PRESENT A DEFENSE – WHERE A DEFENDANT STANDS TRIAL ALONGSIDE A CO-DEFENDANT WHO HAS STRUCK A DEAL WITH THE STATE AND TRIAL COURT TO NOT PRESENT A DEFENSE BUT PREDOMINANTLY TO STAND MUTE DURING THE PROCEEDING, THE NON-PARTICIPATING CO-DEFENDANT IS NOT TRULY ON TRIAL. BY USING THE APPEARANCE OF A TRIAL TO INTRODUCE THE CONFESSION OF THE CO-DEFENDANT, WHO WAS NOT SUBJECT TO CROSS-EXAMINATION AND WHO HAD NOT BEEN DEEMED GUILTY PREVIOUSLY, THE STATE VIOLATED THE CONFRONTATION RIGHT OF THE DEFENDANT ACTUALLY ON TRIAL. SUCH VIOLATION WAS DEEMED HARMFUL BECAUSE IT WAS UNCLEAR, BEYOND A REASONABLE DOUBT, THAT THE CO-DEFENDANT'S CONFESSION DID NOT IMPACT THE JURY'S CONCLUSION REGARDING THE DEFENDANT'S GUILT.

Facts: On 23 February 2007, Stewart Williams ("Williams") and a compatriot attempted to rob The Wine Underground, a retail store located at 4400 Evans Chapel Road in Baltimore City. After the incident, police arrived and gathered descriptive information about the crime, including a possible getaway vehicle.

Officer Raul Alvarez, sitting in his marked police cruiser at the corner of Millbrook Road and Cold Spring Lane and hearing via dispatch the description of a white sedan, saw a matching vehicle traveling east on Cold Spring Lane. Alvarez, and nearby officers in a separate unmarked police car, followed the vehicle and activated their emergency lights. In response, the vehicle increased its speed.

The two police cars tracked the white sedan to the 600 block of Willow Avenue, a residential area. The front passenger, later identified as Williams, ran into a house (numbered 609) where he stowed a handgun. Police learned eventually that the front seat passenger was Williams and that 609 Willow Avenue was his residence.

The driver of the white sedan, Franklin Morris ("Morris"), the back-seat passenger, and ultimately Williams were taken into custody. They were transported to the Robbery Division, where Detectives Byron Conaway and Robert Jackson interviewed them separately. Williams provided written and taped statements in which he confessed to the crimes at The Wine Underground.

Pertinently, Williams stated also that, after the attempted

robbery, he ran towards Falls Road, where he got into a sedan. Williams was asked to describe the color of vehicle he entered "*at the scene*." (Emphasis added.) He responded "white." When police searched Williams's house, pursuant to a search warrant, they recovered a handgun, which ballistics placed at the crime scene.

On the theory that Williams was the gunman/ robber and Morris the getaway driver, the State charged both men with various offenses and sought a joint trial in the Circuit Court for Baltimore City. Because Williams wanted a bench trial and Morris wanted a jury trial, the trial judge suggested that the parties enter into a miscellaneous agreement where the co-defendants would be tried together. In exchange for waiving his rights to challenge peremptorily potential juror members, to make opening and closing arguments, and to testify in his own defense, Williams, at the end of trial, "would be the beneficiary of [a previously proposed] plea agreement" – seventeen years, suspend all but ten.

Morris objected to the miscellaneous agreement and instead sought a severance. He argued ultimately that Williams's statement incriminated him and its introduction would violate his Sixth Amendment confrontation right. The trial judge overruled Morris's objection on the grounds that the miscellaneous agreement did not violate *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). *Bruton* provides that, even if a court delivers a limiting instruction, the confession of a defendant in a joint trial, which incriminates facially a co-defendant, may not be admitted against that co-defendant – unless the original defendant is available for cross-examination.

The joint trial commenced. Williams did not participate in voir dire, did not make an opening or closing statement, did not cross-examine any witness, and generally did not present a defense. When Detective Conaway testified that he recovered certain items from the white sedan because they were "described on the scene of the robbery," the trial judge intervened and tried to clarify the purpose the detective's statement. Morris testified that, over the course of a fifteen-year friendship, Williams had telephoned him often and asked for rides – approximately 40-50 times. On the morning of 23 February 2007, Williams assertedly phoned Morris around 11:30 a.m., asking to be picked up at the corner of Falls Road and Coldspring Lane. When the police officers activated their emergency lights, Morris did not pull over the car and stop immediately because he claimed not to have noticed the lights. Upon hearing the police cruiser's siren, however, he stopped the sedan, albeit virtually at the

intended destination – Williams's house.

The judge was not asked to, and did not, instruct the jury that Williams's statements should not be considered as regards Morris guilt or innocence. Ultimately, the jury found Morris, as a principle in the second degree, guilty of various offenses. Thereafter, the trial judge imposed a twenty-year sentence for first-degree assault and two concurrent twenty-year sentences for use of a handgun in a crime of violence and conspiracy.

On appeal, Morris posited that the miscellaneous agreement defrauded the jury and permitted the State to circumvent Morris's Sixth Amendment confrontation right, as defined by *Crawford* [*v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *Crawford* holds the State may not introduce a out-of-court testimonial statement against a defendant by a witness who is unavailable for cross-examination. Moreover, Morris claimed that the trial court erred by not only permitting Detective Conaway's statement, but also by asking subsequent questions. Finally, Morris alleges that the trial judge should have, on his own initiative, instructed the jury that Williams's statement may not be used to determine Morris's guilt.

The Court of Special Appeals held that Morris waived his *Crawford* argument, the detective's testimony and the trial judge's subsequent questioning helped establish why the detective recovered certain items from the vehicle, and the trial judge did not err by neglecting to give a limiting instruction, as Williams's statement, in fact, did not inculpate Morris. The Court of Appeals granted Morris's petition for writ of certiorari. *Morris v. State*, 414 Md. 330, 995 A.2d 296 (2010).

Held: Reversed. Because the terms of the miscellaneous agreement rendered the trial not bona fide, *Crawford*, rather than *Bruton*, provided the applicable analytical framework. As Morris did not enjoy an opportunity to cross-examine Williams, the State violated *Crawford* when it introduced Williams's, *i.e.*, a witness's, out-of-court statement against Morris. The violation was not harmless beyond a reasonable doubt because it created a potential conflict between where Williams intimated he entered the white sedan ("at the scene") and the more remote location testified to by Morris.

Moreover, the detective's testimony and the trial judge's subsequent questioning helped clarify the detective's reason for recovering and documenting certain evidentiary items. Finally, there was no discussion as to the absence of a limiting instruction, as the issue would likely not re-appear in any new

trial.

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Enoch Jermaine Hill v. State of Maryland, No. 149, September Term, 2009, Filed January 26, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/149a09.pdf

CRIMINAL LAW – MARYLAND COMMON LAW – CONFESSION – IMPROPER INDUCEMENT – *HILLARD* TEST

Facts: Following a jury trial, Enoch Jermaine Hill was convicted of the crimes of sexual abuse of a minor, second degree sexual offense, and unnatural or perverted sexual practice. Prior to that trial, Hill filed a motion to suppress two inculpatory statements that he made to police in the course of an interrogation, asserting that the statements were the product of an improper inducement in violation of Maryland common law. At the suppression hearing that followed, the following facts were adduced.

Detective McLaughlin of the Anne Arundel Police Department began investigating Hill after receiving information that Hill may have sexually abused a young boy named Randy. During the course of that investigation, Detective McLaughlin arranged a recorded telephone call (unbeknownst to Hill) from Randy to Hill in an attempt to obtain from Hill an apology for the alleged sexual abuse. Hill made several ambiguous though seemingly inculpatory statements during the phone call.

Detective McLaughlin subsequently contacted Hill to arrange an interview. Hill agreed to be interviewed and met the detective at the police station. Detective McLaughlin was assisted by Detective Hill, both of whom were dressed in business attire and unarmed during the thirty minute interview. McLaughlin began the interview by asking Hill "if he knew why [Detective McLaughlin] had asked him to come to the office." Petitioner replied that "he was surprised that he received a call, but had a suspicion as to why [the detective] called him." Shortly thereafter, Detective McLaughlin advised Petitioner that the police had recorded the telephone call from Randy to Petitioner, during which Petitioner apologized to Randy for touching him inappropriately. Detective McLaughlin informed Petitioner that "Randy and his mother did not want to see him get into trouble, but they only wanted an apology." He then questioned Petitioner about the frequency of the sexual encounters between Petitioner and the victim. Petitioner responded that he had "masturbated Randy" on six occasions. Detective McLaughlin then suggested that Petitioner write an apology note to Randy and provided Petitioner with writing materials. Petitioner presented Detective McLaughlin with the following letter:

> Hi Randy:
>
> I am very sorry for everything that happened between us, God knows! I wish this had never happened and it will never happen again. God is blessing both of us greatly and since we have forgiven each other, I know God has forgiven us to [sic].
>
> /s/ Rev. Enoch Hill

At the conclusion of the interview, Detective McLaughlin informed Petitioner that the Anne Arundel County State's Attorney's Office reviews all of the police department's cases.

The suppression court denied Hill's suppression motion, finding that Detective McLaughlin's telling Hill that "Randy and his mother did not want to see him get into trouble, but they only wanted an apology" was not an improper inducement. Thus, Hill's statements to Detective McLaughlin were admitted into evidence at trial and he was subsequently convicted.

Hill noted a timely appeal to the Court of Special Appeals, arguing that Detective McLaughlin's statement was an improper inducement rendering Hill's subsequent statements involuntary. The Court of Special Appeals, in an unreported opinion, affirmed the suppression court's ruling.

Held: Reversed. The Court of Appeals held that Detective McLaughlin's statement to Hill was an improper inducement upon which Hill relied, rendering involuntary Hill's subsequent statements under Maryland common law.

The Court began by noting that, for a confession to be voluntary, it must satisfy federal and state constitutional strictures as well as the Maryland common law rule that a confession is involuntary if it is the product of an improper threat, promise, or inducement by the police. With regard to common law voluntariness, the court noted that, although a totality of the circumstances analysis is standard practice for determining whether an accused's statement to the police was voluntarily made, not all of the factors that bear on voluntariness are of equal weight; some factors are decisive. One such decisive factor is the use by police of threats or a promise of advantage to a suspect, which renders any subsequent confession made by the suspect involuntary under Maryland common law, unless the State can establish that the suspect did not rely on such threats or promises in making his or her confession.

The Court explained that resolution of the common law voluntariness question required application of the two-pronged test

established in *Hillard v. State*, 286 Md. 145, 406 A.2d 415 (1979). Under *Hillard*, an inculpatory statement is involuntary and must be suppressed if: (1) any officer or agent of the police force promises or implies to a suspect that he will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession, and (2) the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement.

The first prong of *Hillard*, noted the Court, is an objective one that requires the Court to determine whether a reasonable person, in Hill's position, would have believed Detective McLaughlin's statement to have been a promise of assistance or non-prosecution in exchange for an inculpatory statement. Applying that standard, the Court concluded that a reasonable person in Hill's position would have interpreted Detective McLaughlin's statement to mean that by making an inculpatory statement that included an apology to the victim's family he might avoid criminal charges or, at the least, lessen the likelihood of a successful criminal prosecution. Having found that Detective McLaughlin offered an improper inducement, the Court proceeded to the second prong under *Hillard*: whether Hill relied on the improper inducement in making his inculpatory statements. The Court explained that it is not Hill's burden to prove reliance; rather, the State has the burden of establishing that Hill had not relied on the improper inducement in supplying his inculpatory statements. Looking to the record established at the suppression hearing, the Court concluded that the State had not met that burden. Accordingly, the Court held that Detective McLaughlin's statement constituted an improper inducement upon which Hill relied, rendering his subsequent inculpatory statements involuntary and inadmissible at trial.

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Sheila Boulden v. State of Maryland, No. 49, September Term 2009, filed 15 May 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/49a09.pdf

CRIMINAL LAW – WAIVER OF RIGHT TO JURY TRIAL – MARYLAND RULE 4-246 – REQUIREMENT THAT WAIVER OF RIGHT TO JURY TRIAL BE PLACED ON THE RECORD PRIOR TO THE COMMENCEMENT OF TRIAL IS WAIVED FOR PURPOSES OF APPEAL WHERE DEFENDANT FAILS TO OBJECT WHEN WAIVER IS CONDUCTED AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF

CRIMINAL LAW – HARMLESS ERROR – WAIVER OF RIGHT TO JURY TRIAL – MARYLAND RULE 4-246 – WHERE WAIVER OF JURY TRIAL IS OTHERWISE VALID, A WAIVER PLACED ON THE RECORD MID-TRIAL MAY BE HARMLESS ERROR

Facts: Sheila Boulden received a bench trial in the Circuit Court for Cecil County on single counts of child abuse and second degree assault. She was represented by counsel. Although Boulden's waiver of her right to a jury trial was not placed on the record at the outset, when the court asked defense counsel if the trial was to be a court trial, defense counsel initially responded in the affirmative.

The State rested its case-in-chief at the end of the first day. At the start of the second day of trial, the State brought up the failure to place on the record Boulden's waiver of her right to trial. The trial court then explained to Boulden what a jury was and that she had a constitutional right to a jury trial which she could waive. She stated that she wished to waive her right to a jury trial; she was waiving her right to trial by jury voluntarily, freely, and of her own free will; and, she did not have any questions regarding her right to a jury trial. The court stated that it was satisfied that Boulden waived her right to a jury trial.

Defense counsel then moved for a judgment of acquittal, arguing that the State had not proven all elements of the child abuse charge. The delayed jury trial waiver inquiry was not challenged. The court denied the motion, the defense rested (without putting on evidence), and the judge found Boulden guilty of both counts.

Defense counsel filed a timely motion for a new trial alleging multiple errors. She did not object, however, to the timing of the jury trial waiver colloquy or validity of the waiver and its acceptance. The court denied the motion and sentenced Boulden to six years imprisonment, with all but three

years suspended.

Boulden filed an appeal to the Court of Special Appeals, arguing, for the first time, that her waiver of her right to trial by jury was defective because the inquiry, waiver, and acceptance were conducted after the commencement of trial. The intermediate appellate court affirmed in an unreported opinion.

The Court of Appeals issued a writ of certiorari upon Boulden's petition. 409 Md. 44, 972 A.2d 859 (2009).

HELD: The Court of Appeals affirmed the judgment of the Circuit Court. The right to a jury trial in Maryland in qualifying criminal cases is guaranteed by the Sixth Amendment to the United States Constitution, Articles 5, 21, and 24 of the Maryland Declaration of Rights. A defendant may elect to waive this right and instead be tried by the court.

Maryland Rule 4-246 governs the procedure for the waiver of a jury trial in a criminal case. The Rule provides, in pertinent part that "[a] defendant may waive the right to a trial by jury at any time before the commencement of trial." Although Rule 4-246 provides the procedures for waiver of the right to trial by jury, the ultimate inquiry regarding the validity of a waiver is whether there has been an intentional relinquishment or abandonment of a known right or privilege.

The Court held that Boulden waived her right to complain about the timing and effectiveness of the jury trial waiver colloquy. Pursuant to Maryland Rule 8-131(a), an appellate court's scope of review is ordinarily limited to an issue that was raised in or decided by the trial court. The Court may decide, however, an issue that was not raised in or decided by the trial court if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal. The Court will not consider an unpreserved issue when it will work an unfair prejudice to the parties or to the trial court. Furthermore, the court will not review an un-objected to claim of error under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent. This is true even where the complained of error is of Constitutional dimension.

Although the Court of Appeals held on prior occasions that the waiver of fundamental constitutional trial rights, such as the right to a jury trial and the right to counsel, must be conducted before the trial commences, those cases were distinguishable on the grounds that they involved substantive

violations of the defendant's core constitutional rights and they did not occur mid-trial, as Boulden's waiver colloquy did. Boulden's waiver otherwise complied with Rule 4-246 and there was no indication in the record that she made the waiver involuntarily. Furthermore, there was no indication in the record of subtle coercion such as might taint confidence when a post-trial waiver situation was presented. At the beginning of the trial, Boulden did not object when asked by the trial judge, "are we going forward with a court trial?" Instead, defense counsel answered affirmatively. Moreover, defense counsel could have objected to the failure to place on the record Boulden's waiver of her right to trial by jury when the State brought the error to everyone's attention at the close of the State's case-in-chief and before the defense was to put on its case. Additionally, she could have raised the issue in her motion for new trial. Petitioner, who was represented by counsel throughout the trial and post-verdict proceedings, had ample opportunity to object to the tardy jury trial waiver. The Court declined to hold that any waiver that occurs after commencement of trial, but prior to the end of trial, is coercive inherently.

Moreover, the Court opined that Boulden's failure to object may have been a matter of strategy. Boulden and her defense counsel may have thought they had a "free look" at the State's case-in-chief. There are many strategic reasons for electing a court trial, instead of a jury trial. For example, the defendant may wish to waive a jury trial when he or she feels that a jury panel composed of members of the community will be prejudiced against her because of the inflammatory nature of the charge(s). Such a circumstance may be present where, as here, the defendant is charged with child abuse.

The Court also held that, under the facts and circumstances of this case, the violation of Rule 4-246 constituted harmless error. An error is harmless and does not entitle a defendant to a new trial if the reviewing court is able to determine beyond a reasonable doubt that the error in no way influenced the verdict.

The actual denial of the unwaived right to trial by jury is ordinarily a structural error and is not subject to harmless error review. A structural error is one that amounted to structural defects in the trial itself. Clearly, the violation here of Rule 4-246 was error, though not structural. Having established that it was error, the next inquiry is whether Petitioner was prejudiced by the tardy waiver. The Court determined that she could not be prejudiced by a late waiver when it was knowing and voluntary.

The failure to inform Boulden that, if she did not waive her right to a jury trial, the court would have to declare a mistrial, was not error. There is no fixed colloquy or litany that the trial court must recite in order to elicit a valid waiver. Where, under the facts and circumstances of this case, it is clear that otherwise the waiver was made knowingly and voluntarily, the waiver is valid, even if conducted mid-trial.

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Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, et al. v. Moreland, LLC, et al., Case No. 55, September Term 2010. Opinion filed January 28, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/55a10.pdf

ENVIRONMENTAL LAW - CRITICAL AREA

Facts: In 2003, Moreland, LLC purchased two lots, Site #1 and Site #2, on the north shore of Warehouse Creek in Anne Arundel County within the Chesapeake Bay Critical Area upon which the developer sought to construct two single-family homes. Thereafter, Moreland requested variances from the Anne Arundel County Office of Planning and Zoning in order to construct the houses and accompanying septic systems within the buffer, a protected 100-foot strip of land near the shoreline and also to remove more vegetation than otherwise permitted within the buffer. In support of the variance requests, Moreland asserted that, "without variance relief from the prohibition on development within the buffer area and from tree clearing limitations, [it] [could] not build any reasonably sized home on these residentially zoned lots."

Specifically, on Site #1, Moreland proposed to construct a single-family home, attached garage, screened porch and deck totaling 3,343 square feet. Section 17-8-301(b) of the Anne Arundel County Code prohibited the construction of new structures within the buffer, such that Moreland requested a variance to encroach 34 feet into the buffer. In addition, the developer sought to clear more than 51 percent of the lot's vegetation, exceeding the maximum percentage permitted by the Code.

On Site #2, Moreland sought to construct a home, attached garage, screened porch and uncovered deck totaling 2,615 square feet. To overcome the prohibition in Section 17-8-301(b) of the Code against construction of new structures within the 100-foot buffer, the developer requested another variance of 34 feet into the buffer. In addition, Moreland sought to clear nearly 34 percent of the total vegetation on Site #2, exceeding the maximum permitted by the Code, and therefore requested an additional variance.

An administrative hearing officer denied Moreland's variance requests, and the Board of Appeals affirmed. The Board determined that Moreland had failed to meet several criteria for granting the variances set forth in Section 3-1-207 of the Anne Arundel County Code. Specifically, the Board found that granting

the variances would adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the critical area, in contravention of Section 3-1-207(b)(5)(i), that the variances requested were not the minimum necessary to afford relief pursuant to (c)(1), and that granting the variances would alter the essential character of the neighborhood pursuant to (c)(2)(i), substantially impair the appropriate use or development of adjacent property pursuant to (c)(2)(ii), and be detrimental to the public welfare pursuant to (c)(2)(v). The crux of all of the Board's adverse findings was that the large area of impervious surface of the proposed construction, coupled with clearing large areas of vegetation on the sites, would contribute to excess runoff and the flow of harmful matter into Warehouse Creek.

On appeal, the Circuit Court, applying *Becker v. Anne Arundel County*, 174 Md. App. 114, 920 A.2d 1118 (2007), reversed, reasoning that the Board failed to make "clear findings" so as to "facilitate meaningful judicial review." The Court of Special Appeals affirmed, also relying upon *Becker*, and determined that the Board failed to indicate "what specific evidence it relied upon" to reach any of its controverted findings.

Before the Court of Appeals, Moreland argued that, as in *Becker*, the Board of Appeals's opinion in the present case failed to provide sufficient detail and reasoning to enable meaningful judicial review, because each of the Board's findings was not immediately followed by supportive and specific evidentiary references. The Commission countered that the Board of Appeals's opinion adequately reflected that substantial evidence existed in support of its penultimate finding that the proposed construction, because of the large area of impervious surface and the removal of significant amounts of vegetation, would adversely affect the water quality of Warehouse Creek. The Commission further argued that *Becker* is inapposite, because in the present case, evidence was adduced in opposition to the variance requests upon which the Board explicitly relied.

Held: The Court of Appeals reversed. The Court reasoned that the Board of Appeals's opinion contained clear adverse findings as well as summaries of substantial evidence supporting those findings, in contrast with the Board's opinion in *Becker*, in which the Board failed to articulate any evidence supporting its adverse findings. In the present case, the Board referred to the testimony of South River resident and environmental consultant, John Flood, and others, supporting the findings that the removal of large amounts of vegetation, despite proposed replantings, would adversely impact the water quality of

Warehouse Creek, subverting the spirit and intent of the critical area program.

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C. Phillip Johnson Full Gospel Ministries, Inc. v. Investors Financial Services, LLC, No. 115, September Term 2008. Opinion filed on January 28, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/115a08.pdf

REAL PROPERTY – MORTGAGES – DEED IN LIEU OF FORECLOSURE – CLOGGING THE EQUITY OF REDEMPTION

Facts: C. Phillip Johnson Full Gospel Ministries, Inc. ("Ministries") purchased land in Martinsville, Virginia (the "Property") from the Catholic Diocese of Richmond, to be used as a church. Ministries turned to Investors Financial Services, LLC ("Investors"), a Maryland limited liability company with its principal place of business in Silver Spring, Montgomery County, Maryland, to obtain financing. Ministries issued a Promissory Note to Investors for $93,000, which was used to finance the Property. The Note was secured by two deeds: a Deed of Trust, which included an acceleration clause containing a Power of Sale, as well as a Deed in Lieu of Foreclosure, which Ministries also was required to execute at closing. The Deed in Lieu purported to grant to Investors title to the Property "in order to avoid foreclosure of the . . . Deed of Trust," immediately upon default for any reason. The Deed in Lieu was executed under seal and held in escrow by Investors.

Several months later, Ministries defaulted on the Note, and Investors recorded the Deed in Lieu in the land records of Virginia, without any foreclosure proceedings. Ministries filed a Complaint in the Circuit Court for Montgomery County, alleging, *inter alia*, breach of contract, which was premised on the theory that Investors was "required by the terms of the contract" to conduct a public sale of the Property, rather than simply record the Deed in Lieu, and another count seeking a declaratory judgment that the Deed in Lieu was invalid for lack of consideration. The Circuit Court ruled that, because the contract between the parties had been executed under seal, there was adequate consideration.

Ministries noted an appeal to the Court of Special Appeals, on the issue of whether the contract under seal was invalid for lack of consideration. The Court of Appeals granted certiorari prior to proceedings in the intermediate appellate court. After oral argument, the Court requested supplemental briefs on the issue of whether Maryland courts could exercise jurisdiction and venue over the subject matter and relief sought and whether a declaratory judgment could be used to litigate defenses in a foreclosure action. After argument on these issues, the Court

again requested supplemental briefs on the issue of whether a deed in lieu of foreclosure, executed at the outset of a mortgage and prior to any default on the loan, was valid under Maryland law.

Before the Court of Appeals, Ministries argued that a deed of lieu of foreclosure executed at the outset of a mortgage was invalid because it impermissibly terminates the mortgagor's equity of redemption in the property. Investors countered that Ministries never lost its equity of redemption, because it could redeem the Property by either paying the two or more months in arrears or making other satisfactory payment arrangements with Investors.

Held: The Court of Appeals vacated and remanded. With regard to the jurisdictional issue, the Court determined that, while a declaratory judgment action seeking to invalidate a deed recorded in Virginia could not lie in Maryland, a transitory breach of contract action regarding Investors's failure to utilize the remedy of judicial foreclosure, could lie in Maryland, because the contract involved a party whose principal place of business was in Montgomery County.

The Court next considered the dispositive issue of whether a deed in lieu of foreclosure, executed at the outset of a mortgage and prior to any default, was valid under Maryland law. The Court recognized that, for centuries, courts of equity have recognized a mortgagor's right, in an event of default, to tender payment in full at any time prior to foreclosure, thereby retaining title to his or her property, a right known as the equity of redemption. The Court further observed that courts have consistently refused to recognize creditors' attempts to cut off that right as a precondition for originating a mortgage, a rule known as the prohibition against "clogging" the equity of redemption. A borrower's equity of redemption, the Court noted, has been codified at Section 7-101 of the Real Property Article, and provides that a deed executed at the outset of a mortgage, though expressed as an absolute grant, is considered a mortgage. Because Investors required Ministries to execute an escrow deed at the time of loan origination, the Court determined, Investors cut off Ministries's right to its equity of redemption from the outset. Therefore, the Court held, under Maryland law, the Deed in Lieu would have to be regarded as a mere mortgage and could not effectively convey the land to Investors absent a foreclosure action. The Court further determined that clogging a borrower's equity of redemption would also be barred under Virginia common law.

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Motor Vehicle Admin. v. Brittany Faith Aiken, No. 69, September Term, 2009, Filed January 25, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/69a09.pdf

TRANSPORTATION - MOTOR VEHICLE ADMINISTRATION - DRUNKEN DRIVING - PRIMA FACIE CASE

Facts: Brittany Faith Aiken was stopped by Maryland State Trooper Kolle for driving 77 miles per hour in a 55-mile-per-hour zone on northbound I-270. Trooper Kolle, upon talking to Aiken, detected a strong odor of alcohol on her breath. He conducted field sobriety tests, which Aiken failed. Trooper Kolle arrested Aiken on suspicion of driving under the influence of alcohol and transported her to the State Police barracks in Rockville.

Pursuant to Maryland Code (2009 Repl. Vol.), § 16-205.1 of the Transportation Article ("TR"), Trooper Kolle requested that Aiken submit to a chemical breath test. Trooper Kolle advised Aiken of her right to refuse the test and of the resulting administrative sanctions, and provided her Form DR-15, titled "Advice of Rights DR-15," which also sets out this information and other rights afforded a driver under § 16-205.1. Aiken agreed to submit to a chemical breath test and signed the DR-15 form.

Sergeant Bowling of the Maryland State Police administered the breath test. The result of the test indicated Aiken's blood alcohol concentration was 0.16 at the time of testing. Consequently, Trooper Kolle issued Aiken an Order of Suspension, in accordance with TR § 16-205.1(b)(3).

Trooper Kolle and Sergeant Bowling then completed and signed Form DR-15A, titled "Officer's Certification and Order of Suspension." By signing the form, the troopers affirmed under penalty of perjury that, inter alia: Trooper Kolle had reasonable grounds to believe that Aiken was operating her vehicle while impaired; Sergeant Bowling had explained to Aiken the testing procedures and found her to be cooperative; Sergeant Bowling administered the test using Intox EC/IR equipment; and, based on the test, Aiken's blood alcohol concentration was shown to be 0.16 at the time of testing. Trooper Kolle and Sergeant Bowling made those sworn statements pursuant to TR § 16-205.1(b)(3)(vii) of the Statute. Also pursuant to that subsection, the State Police forwarded to the Motor Vehicle Administration ("MVA") Aiken's driver license, the completed Form DR-15, and the completed Form DR-15A.

At a subsequent administrative show cause hearing requested by Aiken, the MVA appeared through its paper record, which consisted only of the completed Form DR-15 and Form DR-15A. Absent from the record were two documents typically included: Maryland State Police Form 33, titled "Notification to Defendant of Result of Test for Alcohol Concentration," which contains, inter alia, a certification that the testing equipment is approved, and the Intox EC/IR testing strip produced during Aiken's test, which includes information related to the timing of the test and the identification of the testing instrument.

Based on the absence of those documents, Aiken moved for "No Action." Aiken argued that the MVA failed to make a prima facie case of drunken driving because there was nothing in the record to show that a "qualified person" performed the chemical breath test or that certified testing equipment was used, as required by Maryland Code (2009 Repl. Vol.), § 10-304 of the Courts and Judicial Proceedings Article (CJP). A prima facie case must include those additional showings, Aiken argued, based on TR § 16-205.1(a), which provides "[a]ny person who drives or attempts to drive a motor vehicle on a highway . . . in this State is deemed to have consented, subject to the provisions of §§ 10-302 through 10-309, inclusive, of the Courts and Judicial Proceedings Article, to take a test if the person should be detained on suspicion of driving or attempting to drive while under the influence of alcohol . . . ."

The Administrative Law Judge (ALJ) disagreed, noting that, based on TR § 16-205.1(f)(7)(ii), "the sworn statement of the police officer and of the test technician or analyst shall be prima facie evidence" of a test refusal or of a test result indicating an alcohol concentration above the legal limits. The ALJ found that the completed Form DR-15A provided the requisite sworn statement and, thus, was prima facie evidence of drunken driving. Accordingly, the ALJ affirmed the MVA's suspension of Aiken's driver's license.

Aiken filed in the Circuit Court for Montgomery County a petition for judicial review of the ALJ's decision, where she repeated the arguments she made before the ALJ. The Circuit Court, agreeing with Aiken that a prima facie case of drunken driving requires a showing that a "qualified person" conducted the test using certified equipment, reversed the decision of the ALJ. The Court granted the MVA's petition of certiorari.

Held: Reversed. The Court of Appeals held that the ALJ correctly suspended Aiken's license based upon the MVA's prima facie showing of drunken driving.

The Court began by noting that the purpose behind TR § 16-205.1 is to reduce the incidence of drunken driving and to protect public safety by encouraging drivers to take alcohol concentration tests. The Court then turned to the plain language of TR § 16-205.1(f)(7)(ii), which provides that "the sworn statement of the police officer and of the test technician or analyst shall be prima facie evidence of a test refusal, a test result indicating an alcohol concentration of 0.08 or more at the time of testing, or a test result indicating an alcohol concentration of 0.15 or more at the time of testing." The Court looked to TR § 16-205.1(b)(3)(viii) for the meaning of "sworn statement," which, based on that provision, must include in pertinent part a statement that the person detained on suspicion of driving under the influence of alcohol either refused the test, or as here, "submitted to the test" and the test "indicated an alcohol concentration of 0.15 or more at the time of testing." Moreover, the Court explained that the MVA is not required to show, as part of its prima facie case, that a "qualified person" performed the test using certified equipment. Those requirements, found within CJP §§ 10-302 through 10-309, are not applicable to TR § 16-205.1 administrative proceedings. Because the Form DR-15A contained the sworn statements of the police officer and test technician, it was sufficient to make a prima facie showing of drunken driving as required by TR § 16-205.1(f)(7)(ii).

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COURT OF SPECIAL APPEALS

Marks V. Criminal Injuries Compensation Board, No. 921, Sept. Term, 2009, filed October 29, 2010. Opinion by Thieme, Raymond G., Jr., Retired, Specially Assigned.

http://mdcourts.gov/opinions/cosa/2010/921s09.pdf

ADMINISTRATIVE LAW – CLAIM FOR BENEFITS UNDER THE CRIMINAL INJURIES COMPENSATION ACT – STANDARD OF APPELLATE REVIEW -- DISCLOSURE OF CRIMINAL HISTORY INFORMATION –PROXIMATE CAUSATION STANDARD -- ELIGIBILITY FOR BENEFITS BARRED BY BEHAVIOR OF VICTIM THAT CONTRIBUTES TO INJURIES – JUDICIAL NOTICE

Facts: Petitioner Marks suffered gunshot wounds and filed a claim for victim's compensation under the Maryland Criminal Injuries Compensation Act. Md. Code (2001 & 2008 Repl. Vol.), §§ 11-801 *et seq.* of the Criminal Procedure Article ("the Act"). The claim was adjudicated by the Criminal Injuries Compensation Board, which denied benefits. The Board's decision was upheld by the Secretary, Department of Public Safety and Correctional Services. On a petition for judicial review, the Circuit Court for Baltimore City vacated the denial and remanded to the Board for a hearing and directed the Board to consider whether there was evidence that Petitioner's conduct contributed to his injuries. The Act sets forth various conditions for entitlement, and also provides when a victim's conduct precludes entitlement to an award.

After a hearing, the Board again denied benefits. The Board found that Petitioner's conduct contributed to the infliction of his injuries. The Board specifically credited testimony that Petitioner's involvement in the narcotics trade amounted to conduct that contributed to the infliction of his injury. The circuit court affirmed.

Held: Affirmed. The Court of Special Appeals upheld the Board's denial of the claim. Although the Court affirmed the Board's credibility determinations, the Court's ruling took place within a complicated legal context.

Sections 11-808 of the Act lists the types of persons who are eligible for an award under the Act. Section 11-810 in turn places conditions for an award. Section 11-810(d) articulates factors that, if shown to apply in a particular case, disqualify a victim from receipt of an award in whole or in part as a

consequence of that person's "contributory conduct." The theory of Section 11-810(d) is that a victim's behavior has consequences, and that entitlement suffers if that behavior, or conduct, contributes to the harm suffered by the victim. The inquiry into whether a victim forfeits entitlement is straightforward where he or she participates in the crime that results in the injury, or where he or she "initiated, consented to, provoked, or unreasonably failed to avoid a physical confrontation with the offender." In these cases, the conduct has a direct and straightforward causal effect on the infliction of the victim's injuries.

There are instances, however, where the causal link between a victim and injury is not remote, easily foreseeable or straightforward. To solve this causation inquiry, the Court looked to authority from sister states and adopted the proximate cause standard to determine the effects of a victim's conduct on the infliction of his or her injury. The Court held that the victim's conduct must be a proximate cause of his or her injuries before he or she would be disqualified from an award pursuant to Sections 11-810(d)(1)(i) and 11-810(d)(3)(ii) of the Act.

In its decision, the Court emphasized the appellate deference to the fact-finding of an administrative body. In this case, the Court affirmed the Board's credibility determinations, and in so doing rejected the argument that the Board's ruling was entirely subject to de novo review. This holding emphasizes that an appellate court is not empowered to make credibility determinations or find facts, and that plenary review is reserved for legal determinations.

The Court rejected the Petitioner's claim that the Board had improperly considered his criminal history record. The Court points out that the Board's consideration of such information met with no objection, and that this issue was not preserved. The Court emphasized that Md. Rule 8-131(a), regarding the preservation of an issue for appellate review, also applies to review of administrative proceedings. Further, there is no reason to apply an "exclusionary rule" as a remedy for the consideration of such evidence, where similar evidence is now freely available through online records provided by the Maryland Judiciary and public records.

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Gallagher Evelius & Jones, LLP v. Joppa Drive-Thru, Inc. d/b/a Checkers, No. 356, September Term, 2009. Filed on October 28, 2010. Opinion by Thieme, J.

http://mdcourts.gov/opinions/cosa/2010/356s09.pdf

CIVIL LAW - DECLARATORY JUDGMENT - DISCOVERY DIRECTED TO NON PARTY - MOTION TO COMPEL - ATTORNEY/CLIENT PRIVILEGE - WORK PRODUCT PRIVILEGE

Facts: In 1998, appellee Joppa Drive-Thru, Inc. d/b/a Checkers ("Checkers") entered into a lease with Joppa Perring Limited Partnership ("JPLP"), which enabled Checkers to operate a restaurant at the Joppa Heights Shopping Center in Baltimore County. The lease provided Checkers the right to extend for seven consecutive five year periods if it provided written notice of its intent to extend the lease to JPLP at least 365 days prior to the expiration of the current term.

In 2008, Joppa Perring, LLC ("Joppa Perring") sought to purchase the shopping center from JPLP, and appellant Gallagher Evelius & Jones, LLP ("GEJ"), a Baltimore law firm, represented Joppa Perring in the purchase. GEJ, on behalf of its client, Joppa Perring, contacted Philip Dorsey III, Checkers' president, to ask Dorsey to execute a tenant estoppel certificate, a standard document detailing the status of the lease, which is routinely executed by a commercial tenant upon a new party's assumption of a landlord's interest in a lease. GEJ had previously represented Route 5 Corporation, a corporation in which Dorsey was a partner, and Tudor Hall Farm, Inc., an entity whose stock was wholly owned by Route 5 Corporation. Although GEJ was thus acquainted with Dorsey, the firm had never represented Dorsey personally, and the matters it handled for Route 5 and Tudor Hall Farm were unrelated to the purchase of the shopping center and the lease between JPLP and Checkers.

Dorsey executed the estoppel certificate and, therein, affirmed that the then-current lease term expired on June 30, 2009. In Joppa Perring's estimation, to extend its lease, Checkers would have been required to deliver to Joppa Perring, written notice of its election to renew no later than July 1, 2008. Although it was undisputed that Checkers did provide Joppa Perring written notice of its intent to extend its lease, it did not do so until July 23, 2008. As a result, Joppa Perring informed Checkers its lease would not be renewed and would expire on June 30, 2009. Checkers disputed the claim that the lease had not been timely renewed, maintaining it had given oral notice of its intent and that the previous landlord's waiver of the 365 day

notice requirement was binding on Joppa Perring as the party assuming the previous landlord's interest in the lease.

In October 2008, Joppa Perring filed a complaint for declaratory judgment against Checkers, seeking a declaration that Checkers had failed to exercise its option to renew its lease in a timely manner and that Joppa Perring was thus entitled to take possession of the leased property on July 1, 2009. Checkers disputed the claim.

In December 2008, Checkers served a subpoena and notice of deposition duces tecum upon GEJ, which sought to have GEJ produce documents and electronically stored information pertaining to communications between GEJ and Joppa Perring regarding the acquisition of the shopping center and Checkers' execution of the estoppel certificate. GEJ objected to the subpoena and notice of deposition, alleging, among other things, that the requested discovery sought the production of documents protected by attorney-client privilege. Joppa Perring also objected, adopting the grounds asserted by GEJ in its opposition.

In February 2009, Checkers filed a motion for an order to compel production of the disputed documents by GEJ and Joppa Perring, arguing that as GEJ had represented both Joppa Perring and Checkers in the completion of the estoppel certificate, attorney-client privilege did not attach between the commonly represented clients. Checkers alternatively contended that an implicit attorney-client relationship existed between it and GEJ because Dorsey, Checkers' president, assumed GEJ would act in his best interests, given GEJ's prior representation of entities in which he maintained a partnership interest, as well as the long-standing relationship between him and the law firm. GEJ and Joppa Perring filed oppositions to Checkers' motion for an order to compel.

In April 2009, the circuit court entered an order granting Checkers' motion for an order to compel. The order did not address the issue of whether Checkers was entitled to access the disputed documents based on Checkers' allegation of dual representation. Instead, the court ruled that GEJ's opposition to the motion for an order to compel had not been presented in the proper "set-up format" and thus could not be ruled upon by the court; in its view, the issue was one of procedure, not substantive law.

GEJ noted a timely appeal to the Court of Special Appeals from the grant of Checkers' motion for an order to compel.

Held: Affirmed. The Court of Special Appeals held that the circuit court's ruling regarding GEJ's failure to comply with its required format was dispositive of the appeal. When there is a claim of failure of discovery, the circuit court has broad discretion to fashion a remedy based on a party's failure to abide by the rules of discovery. In imposing those sanctions for discovery failures, a circuit court has "considerable latitude." In addition to having been granted specific powers under the discovery rules, a circuit court also has the inherent power to control and supervise discovery as it sees fit. When there is no hard and fast rule governing a discovery situation, a circuit court must exercise its judicial discretion in arriving at a decision, and once the court resolves the discovery dispute, an appellate court's review of that resolution is very narrow; an appellate court may not reverse unless it finds an abuse of discretion. As the circuit court found itself unable to determine from GEJ's opposition to Checkers' motion for an order to compel whether the disputed documents were subject to legitimate withholding from Checkers, it did not abuse its discretion in controlling the discovery process by granting Checkers' motion on that basis.

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Priority Trust, LLC v. The Aliceanna Group, et al., No. 1296, September Term 2009, filed February 2, 2011. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2011/1296s09.pdf

CIVIL PROCEDURE – JUDGMENTS – RELIEF FROM JUDGMENT
GOVERNMENTS – LEGISLATION – INTERPRETATION

Facts: On June 28, 2007, appellant, Priority Trust, LLC ("Priority Trust") filed a complaint in the Circuit Court for Baltimore City, seeking to eject appellees, The Aliceanna Group, from the property at 1822 Aliceanna Street, Baltimore, Maryland ("Property"). Priority Trust, the ground rent owner, alleged that appellees, the leasehold owners, had not paid ground rent and thus, Priority Trust sought recovery of the Property and damages in the amount of $5,000.00.

On May 7, 2008, the court entered a default judgment for possession of the Property against appellees and on August 13, 2008, Priority Trust filed a request for writ of possession. A writ of possession was subsequently issued. On February 13, 2009, appellees filed a motion for relief from judgment of possession in the underlying action, pursuant to Maryland Code (1974), § 8-402.2(c)(2) of the Real Property Article ("RP"). Priority Trust filed a response arguing, in part, that "Maryland Rule 2-535 . . . preclude[s] the relief sought by [appellees]." After hearing the matter on May 14, 2009, the circuit court granted appellees' motion. On July 14, 2009, the court ordered appellees to pay Priority Trust the redemption amount of $1,972.00 within 30 days. This appeal followed.

Held: Affirmed. Pursuant to RP § 8-402.2(c)(2), a tenant or any other person seeking relief from judgment in a ground rent ejectment action need not file the request for relief in a separate action, but may file the request in the underlying action. While under appropriate circumstances, Maryland Rule 2-535 may be used to strike out a judgment in a ground rent ejectment action, it is not the exclusive remedy and does not in any way prohibit or modify relief under RP § 8.402.2(c)(2).

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Eyrania Smith v. Michael Bortner, Case No. 2667, Sept. Term 2008. Opinion filed on July 7, 2010 by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2010/2667s08.pdf

CONSTITUTIONAL LAW - DUE PROCESS - PRE-TRIAL DETAINEES - POLICE MISCONDUCT

Facts: Appellant was stopped for speeding in Baltimore County. She was arrested when the officer learned there was an outstanding warrant, although she maintained that the record of a warrant was mistaken. She was handcuffed and transported to the Cockeysville precinct, where she was photographed and fingerprinted at 9:20 a.m. Appellee, the booking officer, then sat her on a bench in the fingerprinting room and handcuffed her left wrist to a pole above her seat, and shackled her ankles to a pole running along the bottom of the wall. She was not placed in one of the three cells because all were occupied by male suspects. County police notified the Baltimore City Police Department that she was in custody and requested that they come pick her up. They contacted the City police twice in the afternoon to check when they would arrive and they were also unable to place her in another facility. She remained shackled and handcuffed for most of the day. For security reasons, the police refused her request to retrieve her insulin needle from her car or to allow her husband to bring it to her. At 5:15 p.m., she was moved from the fingerprinting room to the hallway, where she remained handcuffed. She used the restroom twice that day and was fed once, at 5 p.m. Appellee was present for approximately four and a half hours of appellant's detention.

At midnight, when the City police still had not arrived, the County police transported her the City police station. She was then informed that there was no outstanding warrant for her arrest. She was released by City police at approximately 12:54 a.m. The District Court for Baltimore City later recalled the errant warrant that led to her arrest. Appellant was examined by a doctor the next week, and he diagnosed her as suffering from several strained and bruised muscles, as well as post-traumatic headaches and anxiety.

Appellant filed a complaint only against appellee, individually and in his official capacity, alleging counts of battery, false arrest, false imprisonment, and violations of Articles 24 (due process) and 26 (search and seizure) of the Maryland Declaration of Rights. After appellee was deposed, he filed a Motion for Summary Judgment on all counts. The court granted the motion as to the first three counts, but reserved

judgment on the constitutional claims. She later granted summary judgment on the constitutional claim as well, finding that appellee's conduct did not rise to the level of "shocking the judicial conscience" and was "objectively reasonable." Appellant timely appealed the rejection of her due process claim.

Held: Appellee's conduct did not violate appellant's due process rights as guaranteed by Article 24. Appellant abandoned her Article 26 claim and focused on the Article 24's due process requirements. The appropriate test for pre-trial detainees claiming Article 24 due process violations is not the more burdensome "shock-the-conscience" standard, but the test stated in *Bell v. Wolfish*, 441 U.S. 520 (1979): police conduct (1) must not amount to punishment, and (2) must be reasonably related to a legitimate government purpose.

Although appellant was an innocent and injured party, she had not shown a due process violation committed by the single person she has sued. Appellee was not to blame for most of the alleged misdeeds, including the mistaken outstanding warrant and the failure of Baltimore City police to pick up appellant in a reasonable time frame. Moreover, the evidence did not suggest that the County police intended to punish appellant. They called the City police twice to hasten her transfer, inquired about the availability of another facility, and ultimately transported her to the City themselves. She was not placed in a cell because they were all occupied by men. Finally, the police actions were reasonably related to maintaining order and security at the station.

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Nancy Lee Kathryn Thompson, et al. v. Gordon Witherspoon, et al., No. 12, September Term 2009, filed February 1, 2011, Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2011/12s09.pdf

CONTRACTS – ARBITRATION – FEDERAL ARBITRATION ACT – ENFORCEMENT OF ARBITRATION AGREEMENT AGAINST A NON-SIGNATORY BY ESTOPPEL

Facts: Appellants, the beneficiaries and owners of a life insurance policy on their parents' lives, filed a complaint in the Circuit Court for Baltimore City against the insurance producer, Gordon H. Witherspoon, the insurance company, Manufacturer's Life Insurance Company, and UBS Financial Services, Witherspoon's employer, for negligently failing to inform them of the non-payment of policy premiums. The parents obtained the life insurance policy in 1990 and established financial accounts at UBS in 2003.

Witherspoon and UBS filed motions to compel arbitration pursuant to certain UBS agreements associated with the parents' accounts. The agreements contained several provisions stating that all controversies arising out of the agreements shall be determined by arbitration. Appellees argued that arbitration was proper because the dispute arose out of the agreements and because appellants, as beneficiaries of the agreements, were equitably estopped from avoiding arbitration. The circuit court granted appellees' motions to compel arbitration, finding appellants' claims inextricably intertwined with the contractual relationship between the parents and UBS. The children appealed, raising the sole question of whether the circuit court erred in granting UBS's and Witherspoon's motions to compel arbitration.

Held: The Court of Special Appeals reversed the circuit court's order to compel arbitration. Appellants were not bound by the arbitration provisions in the UBS agreements. The Court held that a mandatory arbitration provision in a contract between parents and a financial services company is not enforceable against children pursuing claims against the company when (1) the children had neither directly benefitted from nor sought to enforce the agreement, and (2) the children's claims against the financial services company neither arose out of, nor were inextricably intertwined with, the contract provisions.

In considering these issues, Maryland courts look to the substantive federal law of arbitrability. Under federal law, arbitration is strictly a matter of contract and if the parties have not agreed to arbitrate, courts ordinarily have no authority

to mandate that they do so. Under certain circumstances, an arbitration provision may be enforced against a non-signatory by estoppel. Here, however, the plaintiffs received no direct benefit from the parents' account agreements with UBS nor did their claims arise out of the terms of those agreements. The policy itself did not contain an arbitration provision and the children were not bound by the arbitration provisions in contracts between their parents – whose lives are insured under the policy – and UBS when the UBS agreements did not refer to the policy, and the UBS agreements were executed years after the policy was issued.

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Wasserman v. Kay, No. 2836, Sept. Term, 2009, filed February 9, 2011. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2011/2836s09.pdf

CORPORATIONS AND ASSOCIATIONS - GENERAL PARTNERSHIPS - LLCs - DERIVATIVE CLAIMS - DEMAND/FUTILITY - FRAUD; BREACH OF FIDUCIARY DUTY - CONVERSION - TORTIOUS INTERFERENCE WITH CONTRACT - BREACH OF PARTNERSHIP AGREEMENTS AND OPERATING AGREEMENTS - CIVIL CONSPIRACY - AIDING AND ABETTING - NEGLIGENCE - UNJUST ENRICHMENT

Facts: Appellants in this case are partners in five general partnerships and members in two LLCs. The general partnerships and LLCs are referred to collectively as the 'investment vehicles.' Appellees are Jack Kay ('Mr. Kay'), the managing member or partner of the investment vehicles; Kay Management Company, Inc. ('Kay Management'), an entity that is owned and controlled entirely by Mr. Kay and of which Mr. Kay is president; and Kay Investment Group, LLC ('Kay Investment'), a separate investment entity managed and controlled solely by Mr. Kay.

Appellants filed a complaint (individually and on behalf of the entities) against appellees. The complaint alleged principally that Mr. Kay unlawfully took money from the investment vehicles and, mostly through Kay Management, invested the money with Kay Investment. Kay Investment, in turn, invested the money with Bernard Madoff entities, and the money was lost when Madoff's ponzi scheme collapsed.

Among other things, the complaint asserted claims of (1) fraud against Mr. Kay, and aiding and abetting fraud against Kay Investment and Kay Management; (2) breach of fiduciary duty against Mr. Kay, and aiding and abetting breach of fiduciary duty against Kay Investment and Kay Management; (3) conversion against all three appellees; (4) tortious interference with the contractual relationship between Kay Management and the investment vehicles against Mr. Kay; (5) breach of the investment vehicles' partnership and operating agreements against Mr. Kay; (6) breach of the Kay Investment operating agreement against Mr. Kay alone; (7) breach of management agreements against Kay Management; (8) civil conspiracy against all three appellees under Maryland law; (9) statutory conspiracy against all appellees under Virginia law; (10) negligence, gross negligence, and reckless misconduct against all appellees; and (11) unjust enrichment against Kay Management alone.

Appellees filed motions to dismiss, arguing that, despite appellants' attempt to bring their claims individually and

derivatively, all of appellants' claims are derivative. Appellees argued further that appellants' derivative claims fail because (1) a partner in a general partnership cannot, as a matter of law, file a derivative claim on behalf of the partnership; and (2) while derivative claims on behalf of LLCs are available, appellants failed to make demand on the two LLCs prior to filing their derivative claims, and no excuse for demand applied (*i.e.*, appellants failed to show that demand would be futile).

The court agreed with appellees, and dismissed the complaint. Appellants filed a motion for reconsideration of the court's dismissal and a proposed amended complaint. The amended complaint augmented two aspects of the original complaint: (1) the reasons why demand upon the various investment vehicles would be unlikely to succeed; and (2) the nature of appellants' alleged individual losses. The court issued an order striking the amended complaint and denying appellants' motion for reconsideration. Appellants timely appealed to the Court of Special Appeals.

Held: The Court of Special Appeals reversed the lower court's order granting the motions to dismiss; granted in part and denied in part the orders denying appellants' motion for leave to amend and granting appellees' motion to strike the amended complaint; and granted leave to file an amended complaint consistent with its opinion.

Before ruling, the Court engaged in a detailed background discussion on corporations, general partnerships and LLCs. The discussion focused mainly on fiduciary duties and derivative suit procedures within each type of entity.

Then, the court held that: (1) appellants adequately alleged individual and direct (as opposed to derivative) injury, and could bring individual claims directly against Mr. Kay; and (2) because appellants adequately alleged individual injury, appellants had no need to bring derivative claims against Mr. Kay. Despite the latter holding, the Court addressed some of the parties' questions concerning derivative suits. First, the Court explained that, under the Revised Uniform Partnership Act (RUPA), minority partners can bring claims against another partner or a third party on behalf of the partnership. The Court noted that such a suit against another partner would likely be 'outside the ordinary course of business,' and would require the unanimous consent of non-defendant, non-interested partners. The Court explained further that the term 'derivative' is inappropriate in the partnership context. Second, the Court noted that, within the context of derivative suits on behalf of LLCs, the term 'not likely to succeed' under C.A. § 4A-801(b) equates to the term

'futility' as that term is used in the corporate context.

Finally, the Court applied its conclusions to appellants' proposed amended complaint. The Court held that appellants stated a cause of action (as to direct claims only) as follows.

First, appellants adequately alleged fraud on Mr. Kay's part. The aiding and abetting allegations against Kay Management and Kay Investment also sufficed to survive a motion to dismiss. In so holding, the Court rejected appellees' argument that Mr. Kay, the person facilitating Kay Management and Kay Investment's involvement in the Madoff investments, could not have 'aided and abetted himself.'

Next, the Court affirmed the circuit court's dismissal of appellants' breach of fiduciary duty allegations. It reasoned that those allegations are related to other causes of action alleged (*e.g.*, fraud, tortious interference, breach of contract and negligence), and, standing alone, they do not constitute a nonduplicative cause of action.

Third, the Court deemed appellants' conversion allegations inadequate, noting that, in general, one cannot convert monies. Accordingly, the Court concluded that appellants failed to state a cause of action for civil conspiracy to convert the monies.

The Court then concluded that appellants adequately alleged a cause of action against Mr. Kay for tortious interference and breach of the investment vehicles' partnership and operating agreements.

However, the Court concluded that appellants failed to adequately allege that Mr. Kay breached the Kay Investment operating agreement because appellants are not members in Kay Investment. Thus, Mr. Kay owed no contractual duty to appellants based on the Kay Investment operating agreement.

Appellants also failed to state a direct cause of action against Kay Management for breach of the management agreements. Such a claim could appropriately be brought by the investment entities themselves, but not appellants.

The Court also rejected appellants' claim against all three appellees for statutory conspiracy because appellants did not adequately demonstrate why Virginia law should apply.

Next, the Court addressed appellants' claims against Mr. Kay and Kay Management for negligence, gross negligence and reckless

misconduct. The Court concluded that appellants adequately stated a cause of action against Mr. Kay in his capacity as *partner* for gross negligence and reckless conduct, but not for mere negligence. Further, appellants adequately alleged that Mr. Kay, in his capacity as *member*, committed all three torts. However, the Court concluded that appellants stated no direct cause of action against Kay Management because it owed no non-intentional tort duties to appellants individually.

The Court proceeded to reject appellants' claims against Kay Management for unjust enrichment.

Last, the Court concluded that appellants were not entitled to punitive damages on any claims.

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Robert Frazier v. State of Maryland, No. 1472, September Term 2009, filed February 3, 2011. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2011/1472s09.pdf

CRIMINAL LAW & PROCEDURE – CLOSING ARGUMENTS

Facts: Appellant, Robert Frazier, was charged in the Circuit Court for Baltimore City with distribution of cocaine, possession with intent to distribute cocaine, and possession of cocaine. In its rebuttal closing argument, the State asked the jury why Frazier would "want a trial if he's already . . . signed a confession." Further, the State informed the jury: "Guilty people have a right to trial. That's what we had today." Defense counsel's objections were overruled.

Following the jury trial, Frazier was convicted on all counts and was subsequently sentenced to fifteen years for distribution of cocaine. He timely appealed.

Held: Affirmed. While the prosecutor's statements were improper, they were not so prejudicial as to warrant reversal because the remarks were an isolated instance, the court instructed the jury that "closing arguments of lawyers are not evidence," and there was overwhelming evidence presented at trial to establish Frazier's guilt.

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Lincoln Miller v. State of Maryland, No. 1907, September Term, 2009, filed December 29, 2010. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2010/1907s09.pdf

CRIMINAL LAW - DEPORTATION AS A CONSEQUENCE OF A GUILTY PLEA – CORAM NOBIS – PADILLA V. KENTUCKY – RETROACTIVITY VERSUS PROSPECTIVITY – NEW LAW

Facts: On June 1, 1999, appellant, a native of Belize, pled guilty to a charge of possession of cocaine with intent to distribute. Appellant was never advised by the court or by counsel about the possible adverse immigration consequences that might result from the plea. His plea was accepted, and appellant finished serving his sentence on June 1, 2004.

In the spring of 2008, appellant traveled to Belize. Upon his return to the United States on May 27, 2008, he was detained by Immigration and Customs Enforcement agents at the Miami International Airport. Based on the 1999 conviction, deportation proceedings against him commenced on September 29, 2008. Those proceedings were suspended pending the resolution of appellant's petition for a writ of error coram nobis, filed in the Circuit Court for Prince George's County on June 18, 2009. In the circuit court, appellant argued that his guilty plea had not been tendered knowingly, voluntarily, and intelligently because (1) he was not advised of the adverse immigration consequences attendant to his plea; and (2) he was not advised that by pleading guilty he was foregoing his right to direct appeal. On October 5, 2009, the circuit court denied the coram nobis petition, holding that the consequences of which the appellant complained he was not advised of prior to entering his plea were collateral. Quoting Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364 (4th Cir. 1973), the court held that a consequence is direct only if "'the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'"

On appeal to this Court, appellant argued that the circuit court's ruling was no longer proper in light of the Supreme Court's majority opinion in *Padilla v. Kentucky*, decided on March 31, 2010. In Padilla, the Supreme Court held that a defense attorney fails the performance prong under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984), if the defendant is not advised of the possible adverse immigration consequences of a guilty plea prior to entering the plea. Accordingly, the issue facing this Court was whether Padilla applied to the appellant's guilty plea of June 1, 1999.

Held: Affirmed. "The general rule of retroactivity vel non is that if the subject case merely applies settled precedents to new facts, the case is given retroactive effect, for the case is viewed as not changing the law in any material way. On the other hand, if the subject case creates a new rule that is a 'clear break' with the past, retrospective application is inappropriate." Warrick v. State, 108 Md. App. 108, 113, 671 A.2d 51, cert denied, 342 Md. 507, 677 A.2d 583 (1996). A "new" legal ruling will be given retroactive effect, however, to cases which are not yet final, for instance, if they are pending on direct appeal.

Here, the appellant plead guilty on June 1, 1999. The case was final and beyond any possibility for direct review as of July 1, 1999, the end of the 30-day window within which an appeal or application for leave to appeal from the June 1, 1999 judgment of guilty might have been filed. For cases which are no longer on direct review, but only on collateral review, newly announced legal principles do not apply.

In general, a case announces a new legal rule when it breaks new ground. Padilla overruled the longstanding practice in federal and state courts, including Maryland, that a guilty plea would not be invalidated by the failure of the court or of the defense attorney to advise the defendant about a collateral consequence of a plea. It was not dictated by precedent existing on June 1, or July 1, 1999, and therefore constitutes a new rule of law. Accordingly, Padilla does not apply retroactively to appellant's case.

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Carpenter v. State, No. 2927, Sept. Term, 2008, filed December 1, 2010. Opinion by Thieme, J.

http://mdcourts.gov/opinions/cosa/2010/2927s08.pdf

CRIMINAL LAW – EVIDENCE – HEARSAY – AUTHENTICATION – INFORMATION STORED IN CELL PHONE – SENTENCING – MERGER – ILLEGAL SENTENCE

Facts: Everette Alexander Carpenter, appellant, robbed Fenton Forestal of his wallet. As Carpenter took the wallet, he dropped a cell phone, which Forestal picked up. After Forestal attempted to retrieve his wallet, Carpenter assaulted Forestal. After Forestal pushed Carpenter away and ran, Forestal received numerous calls on the cell phone that Carpenter had dropped. When Forestal finally answered a call, the caller offered to exchange Forestal's wallet for the cell phone. Forestal agreed to meet the caller at a gas station. At the gas station, Forestal saw Carpenter and returned the cell phone to him. Carpenter then drew a gun and shot Forestal.

At trial, Detective Milton Orellano of the Easton Police Department testified that, after he seized a cell phone from Carpenter during Carpenter's arrest, he checked the cell phone's lists of received, missed, and dialed calls. Over defense counsel's objection, Detective Orellano testified as to the calls received and missed by the cell phone, including "what the telephone numbers were and what time they were." Following trial, the jury convicted Carpenter of attempted first degree murder, first degree assault, robbery, and handgun offenses.

Held: Judgments for all offenses but wearing, carrying, and transporting a handgun affirmed. The Court held that the trial court did not err or abuse its discretion in admitting Detective Orellano's testimony. Because the calls were not assertions or statements, the lists of calls did not constitute hearsay. The State presented direct and circumstantial evidence sufficient to authenticate the calls. Because Carpenter did not argue below that the testimony regarding the calls did not accurately reflect the calls, the State did not need to produce a witness to explain how the lists came to be stored in the cell phone, or any other expert information technology evidence. Even if the trial court erred or abused its discretion in admitting the testimony, moreover, the error or abuse of discretion was harmless.

With respect to Carpenter's sentences, the Court held that, because Carpenter's convictions for attempted first degree murder and first degree assault spawned from separate acts, the trial court did not err in failing to merge the convictions. The trial

court erred, however, in failing to merge Carpenter's conviction for wearing, carrying, and transporting a handgun into his conviction for use of a handgun in the commission of a crime of violence or felony. Finally, the trial court did not err in ordering that Carpenter serve his sentence for use of a handgun in the commission of a crime of violence or felony consecutive to his sentence for attempted first degree murder. Although the State incorrectly argued that the trial court was required to order that the sentence for use of a handgun in the commission of a crime of violence or felony be served consecutive to the sentence for attempted first degree murder, there is no evidence that the trial court's determination of Carpenter's sentences was motivated by the incorrect argument.

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Shelton McCain v. State of Maryland, No. 1465, September Term 2008, filed September 3, 2010. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2010/1465s08.pdf

FOURTH AMENDMENT – EXCLUSIONARY RULE: EXCLUSIONARY RULE DOES NOT APPLY TO EVIDENCE OBTAINED IN SEARCH CONDUCTED IN GOOD FAITH RELIANCE ON MVA RECORDS

EXCLUSIONARY RULE: GOOD FAITH EXCEPTION TO EXCLUSIONARY RULE APPLICABLE TO SEARCH OF PASSENGER COMPARTMENT OF MOTOR VEHICLE EVEN THOUGH SEARCH WAS ARGUABLY UNREASONABLE UNDER SUPREME COURT DECISION IN *GANT V. ARIZONA* BECAUSE *GANT* WAS FILED AFTER SEARCH TOOK PLACE AND, AT TIME SEARCH OCCURRED, SEARCH WAS VALID UNDER CLEARLY ESTABLISHED AND LONGSTANDING MARYLAND CASELAW

Facts: Relying on information derived from a Maryland Motor Vehicle Administration database that registration for the vehicle had expired, Baltimore City police pulled over a car driven by Shelton McCain, appellant. The officers then ran McCain's name and date of birth in the MVA information system and discovered that his Maryland driving privileges were suspended. This led the officers to arrest McCain. The passenger in the vehicle, his wife, Tara McCain, was placed under arrest on an unrelated charge. The vehicle was then searched, resulting in the discovery of a handgun in Ms. McCain's purse. McCain took responsibility for it, stating that he had placed it in his wife's purse without her knowledge.

At a suppression hearing, appellant produced MVA records indicating that the vehicle may have been properly registered at the time of the arrest. He argued that the handgun discovered pursuant to his wife's arrest and his statement that the handgun was his should be suppressed as the fruit of the poisonous tree. The arrest was warrantless and without probable cause because the alleged probable cause was based on incorrect information. As such, he contended that the good faith exception to the exclusionary rule was not applicable. The suppression court determined that, based upon the officers' testimony that they had used the MVA database "thousands of times" and found errors in it to be unusual, it was reasonable for them to rely on information obtained from MVA records. The trial court denied appellant's motion to suppress without making a finding as to whether the vehicle was properly registered on the night of the incident.

On appeal, McCain raised two issues: first, whether the suppression court erred in denying appellant’s motion to suppress without making a factual finding as to whether the vehicle was

validly registered on the night in question and, second, whether the case should be remanded to the circuit court for further proceedings in light of *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710 (2009), which was filed after the date of the suppression hearing.

Held: The judgment of the circuit court was affirmed.

As to the first issue, the Court of Special Appeals concluded that the police officers' reliance upon the MVA records was reasonable and, even if the information was ultimately inaccurate, their good faith reliance on the accuracy of the MVA records was sufficient to insulate the evidence of the handgun and appellant's inculpatory statement from the operation of the exclusionary rule.

As to the second issue, McCain noted that, in *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 1723 (2009), the Supreme Court held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Because the record was silent as to whether McCain was within reaching distance of the passenger compartment at the time the search was conducted, he contended that *Gant* required a remand for a new suppression hearing.

Prior to the decision in *Gant*, many jurisdictions interpreted *New York v. Belton*, 453 U.S. 454 (1981), as standing for the proposition that the Fourth Amendment did not prohibit a police officer's search of the passenger compartment of a vehicle "incident to the arrest of a recent occupant even if there was no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 129 S. Ct. at 1718. At the time of the arrest in the case *sub judice*, Maryland had unquestionably adopted the above interpretation of *Belton*. *See, e.g., Gee v. State*, 291 Md. 663, 668 (1981). The exclusionary rule is not an individual right and applies only where it results in appreciable deterrence of Fourth Amendment violations by law enforcement. As the officers could not be charged with knowledge that the search, at the time it was conducted, violated the Fourth Amendment, there was no police misconduct and the good faith exception applied.

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Smith v. State, No. 1178, Sept. Term, 2008, filed December 28, 2010. Opinion by Thieme, Raymond G., Jr., J.

http://mdcourts.gov/opinions/cosa/2010/1178s08.pdf

CRIMINAL LAW - INSTRUCTIONS - VOLUNTARY INTOXICATION - DEFENSE OBJECTION - HARMLESS ERROR

Facts: Michael McQueen died of a contact gunshot wound to the head in the early morning hours of September 26, 2006. His roommate, Gary Smith, the appellant, was the only one present at the time of the shooting. Over the course of several hours earlier that same evening, Smith and McQueen smoked marijuana and consumed a number of alcoholic beverages at various establishments. The shooting occurred after they returned home. While appellant told police he was not present in the same room when McQueen was shot, appellant initially disposed of the handgun in a nearby lake before reporting the shooting. After making this admission, the handgun was eventually recovered and appellant was tried by a jury on charges of murder and use of a handgun in the commission of a felony. Because appellant denied being involved in the shooting, in fact claiming that McQueen committed suicide, much of the evidence admitted at trial was provided by various experts who offered their opinions about whether McQueen's death was self-inflicted or a homicide.

At the conclusion of the trial, the State requested a voluntary intoxication instruction, over defense objection. After noting the quantity of alcohol consumed, as well as the marijuana use, the trial court overruled defense counsel's objections and gave the pattern instruction on voluntary intoxication. The jury convicted appellant of second-degree depraved heart murder and use of a handgun in the commission of a felony, and appellant was sentenced to a total of fifty years incarceration, with fifteen years suspended and an additional five years supervised probation upon release. On appeal, appellant raised a number of issues, with the primary issue being whether the trial court erred in propounding the voluntary intoxication instruction over defense objection. Appellant contended that he was denied due process and that the instruction was an affirmative defense that should only be given when requested by a defendant. Alternatively, appellant also argued the instruction was not generated by the evidence adduced at trial.

Held: Affirmed. The Court concluded that, whereas there is no fundamental right to a voluntary intoxication instruction, the fact that the instruction was requested by the State and not a

defendant was not determinative. The Court also found that appellant's due process claim was not preserved and meritless. However, the Court did agree that the evidence was insufficient to generate a voluntary intoxication instruction. But, while the trial court erred in giving a voluntary intoxication instruction, the Court held that any error was harmless beyond a reasonable doubt.

After observing that appellant was not so intoxicated that he could not form a specific intent to commit the charged crimes, including first degree murder, the Court noted that appellant was acquitted of first degree murder, second degree specific intent murder, and second degree murder with intent to inflict serious bodily harm. The Court also concluded that, even absent the erroneous voluntary intoxication instruction, the jury could properly consider an uncharged lesser count of second-degree depraved heart murder. As there was also sufficient evidence to support that conviction, any instructional error was harmless beyond a reasonable doubt.

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Elroy Matthews, Jr. v. State of Maryland, No. 2801, September Term, 2009, filed February 7, 2011. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2011/2801s09.pdf

CRIMINAL LAW - SEPARATE CONTEXTUAL MEANINGS OF "ILLEGAL SENTENCE" – RULE 4-354(a) – THE NARROW WINDOW OF RULE 4-345(a) REVIEW

Facts: Appellant was found guilty upon his pleas of guilty by Judge John Grason Turnbull, II in the Circuit Court for Baltimore County on December 3, 2003, for attempted first-degree murder, among other counts. In exchange for appellant's guilty plea to attempted first-degree murder, the State agreed that it would recommend a sentence "at the top of the [sentencing] guidelines," which suggested a sentence between 23 and 43 years. No express reference was ever made to a distinction between the formal sentence (before any possible suspension) and the "hard time" portion of the sentence (after a part of the sentence has been suspended).

At the sentencing hearing on April 21, 2004, the State asked the court to impose a sentence of life imprisonment, with all but 43 years suspended for the attempted first-degree murder count. Judge Turnbull sentenced appellant to life imprisonment with all but 30 years
suspended.

On June 6, 2007, appellant filed an amended petition for post-conviction relief, arguing, inter alia, that his April 21, 2004 sentence was illegal. Judge Dana M. Levitz determined that the State breached its plea agreement with appellant, in that the State recommended a sentence of life with all but 43 years suspended, rather than 43 years. Accordingly, Judge Levitz vacated Judge Turnbull's original sentence, and ordered a resentencing, at which "the trial court … shall be free to impose whatever sentence it feels
appropriate."

At the March 24, 2008 resentencing, the State made its recommendation that the sentence be one of 43 years. Despite argument by appellant's counsel to the contrary, Judge Turnbull insisted that he had never agreed to be bound by any sentencing limitation, and reimposed the precise sentence he had originally imposed in 2004. Appellant's application for leave to appeal was denied by this Court on May 18, 2004, thus foreclosing all direct appeal of the sentence.

On January 8, 2010, appellant filed a motion to correct an

illegal sentence pursuant to Maryland Rule 4-345(a), which was denied by Judge Turnbull. This appeal follows from that denial. The issue raised on appeal is whether the March 24, 2008 sentence was illegal within the contemplation of Rule 4-345(a).

Held: Affirmed. The notion of an "illegal sentence" within the meaning of Rule 4-345(a) deals with substantive law, not procedural law. An "illegal sentence" within the contemplation of Rule 4-345(a) "has obvious reference to a sentence which is beyond the statutorily granted power of the judge to impose. It does not remotely suggest that a sentence, proper on its face, becomes an 'illegal sentence' because of some arguable procedural flaw in the sentencing procedure." Corcoran v. State, 67 Md. App. 252, 255, 507 A.2d 200, cert. denied, 307 Md. 83, 512 A.2d 377 (1986).

This principle was reiterated in Evans v. State, 382 Md. 248, 278–79, 855 A.2d 291 (2004) cert. denied, 543 U.S. 1150, 125 S. Ct. 1325, 161 L. Ed. 2d 113 (2005) (citations omitted), where the Court of Appeals pointed out that a trial court error during the sentencing proceeding does not necessarily make the resulting sentence itself illegal.

The State correctly argues that, as a general rule, a Rule 4-345(a) motion to correct an illegal sentence is not appropriate where the alleged illegality "did not inhere in [the defendant's] sentence." State v. Kanaras, [357 Md. 170, 185, 742 A.2d 508 (1999)]. A motion to correct an illegal sentence ordinarily can be granted only where there is some illegality in the sentence itself or where no sentence should have been imposed. On the other hand, a trial court error during the sentencing proceeding is not ordinarily cognizable under
Rule 4-345(a) where the resulting sentence or sanction is itself lawful.

An illegal sentencing procedure does not, ipso facto, produce an illegal sentence. See Randall Book Corp. v. State, 316 Md. 315, 322–23, 558 A.2d 715 (1989). Maryland caselaw, therefore, indicates that Rule 4-345(a) is a narrow window that permits a trial judge to correct at any time a sentence that is obviously and facially illegal in the sense that it is a sentence that the court had never been statutorily authorized to impose. It cannot be used to relitigate issues that have long since become faits accompli.

It is highly unlikely that the Court of Appeals' overruled this principle in footnote 1 in Cuffley v. State, 416 Md. 568, 575, 7 A.3d 557 (2010), where it stated:

We have held that a sentence that exceeds the sentence to which the parties agreed as part of a plea agreement is an illegal sentence within the meaning of Rule 4-345(a). Dotson v. State, 321 Md. 515, 521-22, 583 A.2d 710, 713 (1991).

The Court made no reference to several prior cases holding to the contrary. Further, Dotson did not deal with or mention Rule 4-345(a). The only reasonable inference is that the subject of Rule 4-345(a)'s limited scope never came up and was never considered by the Court of Appeals in Cuffley.

Even if a sentence in ostensible violation of a plea agreement is properly on the table at a Rule 4-345(a) hearing, Judge Turnbull's March 24, 2008 resentence was not an "illegal sentence," as he complied with the mandate of Judge Levitz to impose whatever sentence he felt was appropriate.

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Jose Garcia-Perlera v. State of Maryland, Case No. 1371, Sept. Term 2009. Opinion filed on February 2, 2011 by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/1371s09.pdf

CRIMINAL LAW - SEVERANCE – MARYLAND RULE 4-253 – MOTION TO SUPPRESS EVIDENCE – FOURTH AMENDMENT – SEARCH WARRANT PARTICULARITY – PLAIN VIEW – PROBABLE CAUSE–MERGER

Facts: Between September, 2007, and September, 2008, four burglaries occurred along the "River Road corridor" of Montgomery County under similar circumstances. All of the victims were elderly women, living alone, who were"hog-tied" with their hands and feet bound together, and gagged. Two of the victims escaped after their burglaries without serious injury, one was hospitalized for five days and suffered permanent damage to her hands, and one died of blunt force trauma. Police suspected appellant of a series of unrelated vehicle break-ins and obtained a warrant to search and seize various items from the apartment in which he lived alone, including "women's jewelry" and "a gold watch." When executing that warrant, police discovered that appellant had a large collection of "old-fashioned" women's jewelry, as well as a bronze medallion commemorating the NASA Mercury mission astronauts. The officer brought the medallion to the attention of the supervising detective, who suspected that it was related to the one of the home invasions. The police suspended the search and obtained a second search warrant authorizing the seizure of items related to the four home invasion burglaries including "ladies' costume jewelry." The second search recovered items stolen from each victim. DNA recovered from three of the crime scenes was consistent with appellant's DNA. Appellant was charged with one count of felony murder, four counts of first degree burglary, one count of robbery with a dangerous weapon, four counts of false imprisonment, one count of first degree assault, and one count of use of a handgun in the commission of a felony. Appellant unsuccessfully moved to sever the trials for each burglary and to exclude evidence seized from his apartment. A jury acquitted appellant of the use of a handgun in the commission of a felony and convicted him of all remaining charges. The court sentenced appellant to incarceration for life, without parole, for the crime of felony murder, and to three concurrent sentences of life, plus thirty-five years, for the remaining crimes.

Held: Where the State had "overwhelming evidence," multiple charges stemming from the same incident were not prejudicial. The fact that a gold watch was a "talking watch" did not place it outside the scope of a warrant authorizing the seizure of a "gold

watch." Although police did not have actual knowledge that a commemorative medallion had been stolen, it was properly seized during a warranted search of appellant's residence under the "plain view" doctrine because police had reasonable suspicion that it had been stolen from an unrelated victim. A warrant authorizing seizure of "costume jewelry" was not too vague and did not empower police to seize "any piece of jewelry." Under the circumstances, seizure of a large amount of "old-fashioned" women's jewelry in the home of a thirty year-old man who lived alone was justified. Charges for false imprisonment did not merge with robbery because the victim remained detained longer than necessary to accomplish the robbery. Sentences for first-degree assault and robbery with a dangerous weapon do not merge where accosting the victim with a handgun and tying the victim's limbs together in such a way as to cause permanent injury to her hands could be considered separate crimes, nor does it matter that both crimes were "aggravated."

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Octavian Allen v. State of Maryland, No. 1963, September Term, 2009; *Drew W. Smith v. State of Maryland*, No. 1968, September Term, 2010, filed February 4, 2011. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/1963s09.pdf

CRIMINAL LAW - WARRANTLESS SEARCH AND ARREST

Facts: On March 27, 2008, Detective Farrar was patrolling the 100 block of North Clinton Street, a "popular place to buy narcotics." At approximately 8:00 p.m., he observed a group of males, including Mr. Allen and Mr. Smith, standing at the corner of Esther Place and Clinton Street. As cars passed by, the men shouted: "We got the fat 20's here." Detective Farrar testified that, based on his training and experience, he understood "fat 20's" to be a term used to refer to $20 worth of cocaine. When a car would pull up, "the whole group would just bum rush the cars."

A truck pulled up to the men. Detective Farrar observed Mr. Allen approach the truck and engage the driver in a brief conversation. Mr. Allen was accompanied by other men, including Mr. Smith, who Detective Farrar previously had arrested for drug distribution on the same block. The driver gave Mr. Allen money, and Mr. Allen then "removed small objects from his sleeve area and handed [them] to the driver." Believing that the group was participating in narcotics sales, Detective Farrar called an arrest team to stop the truck and arrest the group of men. Police approached Mr. Allen and Mr. Smith and placed them under arrest.

Detective Beal first searched Mr. Allen's pockets and pant legs, and then he checked for "slits in the waistband area of his pants," but he did not find any narcotics. Detective Beal then pulled back Mr. Allen's pants and saw a plastic bag "protruding" from between his buttocks. While holding the waistband of Mr. Allen's pants out, Officer Beal directed Mr. Allen to "spread his legs and squat." A bag dropped from between Mr. Allen's buttocks to "his underwear area," and Officer Beal "reached in and pulled it out." The bag contained 28 orange ziploc bags filled with narcotics. Officer Beal testified that he did not touch Mr. Allen while recovering the narcotics, and the only people present during the search were six or seven police officers. Officer Beal stood "right behind" Mr. Allen when the search of Mr. Allen's pants was conducted, and he testified that no one else could have observed Mr. Allen's buttocks.

Detective Andrew Wiman, who conducted the search of Mr. Smith, similarly testified that he received a directive from

Detective Farrar to assist in the arrest of a group of men. Detective Wiman approached Mr. Smith, and he asked if Mr. Smith had "anything illegal on him." Mr. Smith responded that he had "some weed," meaning marijuana. Detective Wiman recovered marijuana from Mr. Smith's coat pocket and arrested him.

In his search of Mr. Smith incident to arrest, Detective Wiman pulled back the waistband of Mr. Smith's pants and saw "a plastic baggy kind of coming up through . . . his cheeks." The bag was "kind of half concealed" in Mr. Smith's buttocks area. Detective Wiman then "reached down and pulled it out." The bag contained 24 ziploc bags filled with narcotics. Appellants filed a motion to suppress evidence, attacking the searches conducted incident to arrest. Mr. Smith also challenged his arrest on the ground that the police lacked probable cause. The circuit court denied the motions, and appellants pled not guilty pursuant to an agreed statement of facts.

Held: Affirmed. A "reach-in" search involves a manipulation of the arrestee's clothes that enables the police to reach in and retrieve contraband without exposing the arrestee's private areas. Regardless whether such a search constitutes a strip search, to the extent it permits a police officer to view a suspect's private areas, it is not the type of search that automatically is allowed as a search incident to arrest. Rather, the analysis for a strip search incident to arrest applies, and the reasonableness of a reach-in search is to be determined by reference to the four factors set forth by the Supreme Court in *Bell*: 1) the scope of the particular intrusion; 2) the manner in which it is conducted; 3) the justification for initiating it; and 4) the place in which it is conducted.

With respect to the justification for the search, the Maryland appellate courts have held that a strip search incident to arrest may be conducted only if there is reasonable suspicion to believe that drugs are concealed on the suspect's body. The same justification is required for a "reach-in" search. When a person is arrested for drug dealing, the nature of the offense provides reasonable suspicion to believe that the arrestee is concealing drugs on his or her person.

With respect to the scope and manner of the intrusion, although a "reach-in" search that exposes a person's private area is invasive, and therefore not automatically permitted as a search incident to arrest, it is less invasive than a full strip search. Here, the police merely pulled appellants' pants and underwear away from their waist, with the officer standing directly behind each appellant so no one else could see

appellants' buttocks during the search. The scope and manner of the searches were not unreasonable.

The location of the search was a public street, but the searches were conducted out of public view. A "reach-in" search may be reasonable under the Fourth Amendment, even if it occurs in a public place, if the police take steps to protect the suspect's privacy. Here, the officers took steps to protect appellants' privacy, and the searches were reasonable.

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Nassif v. Green, Case No. 1175, September Term, 2009, filed February 2, 2011. Opinion by Eyler, James R.

http://mdcourts.gov/opinions/cosa/2011/1175s09.pdf

ESTATES AND TRUSTS - ESTATE ADMINISTRATION

Facts: On March 9, 1993, Walter L. Green (the "decedent") died testate, survived by Helen G. Nassif, his spouse, appellant; Carlton M. Green, his son; and Anne Fotos ("Ms. Fotos"), his daughter. Carlton M. Green was appointed personal representative of the estate. Carlton M. Green, individually ("Mr. Green"), and Carlton M. Green as personal representative of the estate (the "personal representative") were the appellees on appeal.

Appellant elected a statutory share in lieu of taking a bequest under the decedent's will. Settlement of the estate was difficult, because of the complexity of the assets and because of litigation between the parties. This appeal was from a declaratory judgment entered by the Circuit Court for Prince George's County, in which the court ruled on a number of issues relating to the valuation of appellant's statutory share.

At the time of decedent's death, claims against the estate had to be "presented" within 9 months after the decedent's death. ET § 8-103. Timely claims in the approximate amount of $13 million were presented. Most of the underlying obligations were in the nature of guarantees of loans on which there was a primary obligor. Some of the claims were paid by the primary obligors. Some of the claims were paid by the estate, and the estate was reimbursed by the primary obligors. By 1998, the claims were resolved. Approximately $120,000 in claims were paid and not recouped.

This estate produced extensive litigation in various courts. One of the relevant proceedings occurred in the Orphans' Court for Prince George's County which produced, *inter alia*, a 2000 opinion and order. At that time, the personal representative distributed property and/or cash to Mr. Green and Ms. Fotos, to fulfill specific bequests. The orphans' court approved the distribution. Appellant did not appeal from the 2000 decision.

Appellant contended (1) claims that were timely filed but not allowed and paid were not "enforceable claims" within the meaning of the relevant statute and could not reduce the value of appellant's interest in the estate; (2) the court permitted a double deduction of enforceable claims; (3) appellant was entitled to share in income earned by the estate, and the Uniform

Maryland Principal and Income Act applied to income and distributions after Oct. 1, 2000; (4) Mr. Green and Ms. Fotos could not cash out appellant's share pursuant to ET 3-208(b); (5) appellant's challenge to the valuation of specific bequests used to calculate the amount of the elective share was not barred by res adjudicata because of the orphans' court's 2000 opinion and order; and (6) appellant's elective share was to be valued as of the date of distribution.

Held: With respect to enforceable claims, that term was used in the definition of "net estate." At the decedent's death, the elective share was one-third of the "net estate." ET § 3-203. "[N]et estate" was defined as "the property of the decedent exclusive of the family allowance and enforceable claims against the estate . . . . " ET § 1-101(n). Court concluded that enforceable claims meant claims that were valid and were required to be paid or paid. While a claim may be potentially enforceable when filed, it is in fact enforceable only when contingencies and conditions are removed and final liability is established.

With respect to the date of valuation, Court concluded that appellant's interest in any undistributed in kind assets should be valued as of the time of distribution or, if cash is paid, valued as of the date of election. Ultimately, the amount to be distributed will be determined after ascertaining the net estate, after payment of expenses and claims.

With respect to income, at the time of decedent's death, ET § 3-203 was silent. In 2003, it was amended to provide that an electing spouse is entitled to that portion of the income earned on the net estate during the period of administration based on the one-third share. ET 2001 Repl. Vol., § 3-203. An electing spouse and an intestate spouse shared in income before 1969. Court concluded the legislature did not intend to change the law. Appellant's entitlement to income included income on a ET § 3-208 payment, up to the date of payment. The amount of income is the amount attributable to the assets that are the subject of the payment. If all assets are cashed out, the amount is one-third of all income earned on the assets since the date of election of the statutory share.

The Maryland Uniform Principal and Income Act was enacted in 2000. The bill, which later became law, stated that it applies to estates existing on the effective date of the enactment (Oct. 1, 2000) "except as otherwise expressly provided in the will . . . or under this Act." Ch. 292, 2000 Laws of Md. The Act applies to trusts and estates and "in the case of a decedent's estate," defines a "beneficiary" as including an "heir and legatee," ET

2001 Repl. Vol., § 15-501(c). The terms “heir and legatee” are not defined in the Act, but those terms are defined at ET Supp. 2000, §§ 1-101(h) and (m). An “‘heir’ is a person entitled to property of an intestate decedent pursuant to §§ 3-101 through 3-110.” A “‘legatee’ is a person who under the terms of a will would receive a legacy.”
Court concluded electing spouses are covered by the act.

The contention relevant to the 2000 opinion and order was whether appellant could revisit the valuation and distribution of certain specific bequests to the legatees and the corresponding payment for her statutory share of the specific bequests. Court concluded the order was final and appealable with respect to the distribution of the specific bequests and could not be revisited. Moreover, appellant filed a malpractice action against her former counsel, alleging that the 2000 order was final and that she had not been advised of her right to appeal. At trial, at the close of appellant’s case, the defendants moved for judgment on the ground that the evidence was insufficient to support a finding that malpractice, if it occurred, caused any loss. The parties treated the orphans’ court opinion and order as a final appealable judgment. The circuit court granted the motion and entered judgment in favor of defendants on the ground that damages, if any, were too speculative. Court concluded appellant could not take an inconsistent position and re-adjudicate the distribution of the specific bequests and the payment of her share attributable to those bequests.

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William J. Meyer, III et al. v. William J. Meyer, Jr., No. 0375, September Term 2009, filed July 8, 2010. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2010/375s09.pdf

TRUSTS - A TRANSFER OF PROPERTY BY A PARENT TO A CHILD WITHOUT CONSIDERATION IS PRESUMPTIVELY A GIFT - PARENT BEARS BURDEN TO PROVE OTHERWISE.

RIGHT OF CONTRIBUTION - A DONOR OF A PARTIAL INTEREST IN PROPERTY DOES NOT HAVE THE RIGHT TO OBTAIN CONTRIBUTION FROM DONEE FOR MORTGAGE AND SIMILAR PAYMENTS UPON THE PROPERTY'S SALE ABSENT CLEAR AND CONVINCING EVIDENCE THAT THE DONOR INTENDED TO RETAIN SUCH A RIGHT.

Facts: As part of the disposition of marital property pursuant to their divorce in 1990, William J. Meyer, Jr., "Father," and Kimberly O'Neil, "Mother," agreed that Mother would convey her interest in the marital home to Father and that, if Father ever sold the property, Mother would be entitled to $10,000 from the net proceeds. Instead, Mother and Father conveyed their interest in the marital home from themselves to Father and their two children, "Son" and "Daughter," then aged 6 and 3, respectively, as joint tenants with right of survivorship. The deed conveying the property contained a specific covenant against encumbrances. At the time of the conveyance, there was a mortgage on the house in the approximate amount of $103,000. The children lived with Father in the house for seven years following the conveyance and then moved into Mother's residence with Father continuing to live in the house. Father refinanced the house several times between the time of the conveyance and the time the children reached the age of majority. The children were not obligated on any of the mortgages.

After both children reached the age of majority, Father moved out of the house and filed a petition in the Circuit Court for Carroll County for sale in lieu of partition of the property. In his petition, Father requested contribution for mortgage, tax and insurance payments made by him after the children vacated the house. The trial court found that Father was entitled to contribution from the children. The trial court also concluded that, by transferring her interest in the marital home to Father and the children, instead of to Father alone, Mother had not performed the terms of the property settlement agreement and was not entitled to any portion of the net proceeds. Mother and the children appealed.

Held: The judgment of the Circuit Court was reversed in

part, vacated in part and remanded for further proceedings.

As far as Father's claim for contribution from the children, while the burden of proving that a conveyance is a gift normally lies with the donee, where the alleged gift is a transfer without consideration from a donor to a natural object of the donor's bounty, such as from a parent to a child, the burden shifts to the donor to demonstrate the conveyance is not a gift. A parent's deed purporting to convey an undivided interest in property to children where the deed has a specific covenant against encumbrances creates a rebuttable presumption that the grantor intended to convey the property free and clear of claims for contribution for mortgage, taxes or other similar payments.

Father's assertion that the transfer to the children was subject to a right of contribution could prevail only if he established that he intended to retain such a beneficial interest in the property. When this occurs, the property is said to be subject to a "resulting trust" in favor of the transferor. The intention to create a resulting trust in real property must be demonstrated by clear and convincing evidence. Father presented no evidence to demonstrate that he intended the property to be subject to a resulting trust in his favor.

As far as the Mother's claim for a share in the proceeds, the evidence tended to suggest that Mother's participation with Father in the transfer of their interest in the property to Father and the children discharged her duty under the property settlement agreement pursuant to the doctrine of substituted performance. *See* Restatement (Second) of Contracts § 278(1) (1981). However, because the record did not preclude other possibilities, the case was remanded for additional proceedings.

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Bonfiglio v. Fitzgerald, No. 2059, September Term 2009, filed February 7, 2011 Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2011/2059s09.pdf

FAMILY LAW - RETIREMENT BENEFITS - QUALIFIED DOMESTIC RELATIONS ORDER - 401(K) RETIREMENT PLAN GOVERNED BY ERISA AND INTERNAL REVENUE CODE - REQUIRED MINIMUM DISTRIBUTION - PLAN PARTICIPANT'S INTEREST IN RETIREMENT ACCOUNT AT TIME OF SETTLEMENT AGREEMENT.

Facts: In October of 2007 in the Circuit Court for Montgomery County, John J. Fitzgerald and Lori F. Fitzgerald were divorced. A marital settlement agreement was incorporated, but not merged, into the parties' judgment of absolute divorce. Under that agreement, Husband was to transfer to Wife his entire interest in his 401(k) retirement account valued as of the date of the divorce. A qualified domestic relations order (QDRO) prepared by the parties also was entered by the court to effectuate the transfer. Prior to entering into the agreement, Husband had reached the age of 70 ½ and already had received a "required minimum distribution" ("RMD") for the year 2006 from his retirement account. The RMD was based on the value of the account at the end of 2005.

Three months after entry of the divorce decree and QDRO, in December of 2007, Husband was paid the RMD for 2007. At that time, the QDRO had not yet been approved by the Plan Administrator. Wife passed away shortly thereafter. Her estate claimed that the RMD amount that Husband received in 2007 was part of his interest in the retirement account at the time of the divorce and therefore should have been paid to Wife under the parties' agreement. On cross-motions for summary judgment, the circuit court held that the RMD was separate and distinct from the Husband's interest at the time of the divorce because the RMD became payable to Husband as of the first day of calendar year 2007, prior to the parties' settlement agreement.

Held: Judgment affirmed. The circuit court correctly concluded that the 2007 RMD paid to Husband in December 2007 was not part of Husband's interest in the retirement account when the account was transferred to Wife in October 2007 under the terms of the parties' agreement. Controlling treasury regulations establish that an RMD must be made to the plan participant (here, the Husband) for any year in which the plan participant is alive for any part of the year. Thus, if the plan participant is alive on January 1 of a given year, the RMD for that year must be paid to him, even if he dies on January 2. Actual payment of the RMD may be made at any time during the year, however, and for tax purposes often is not made until the end of the year to which it applies.

Here, because Husband was alive on January 1, 2007, the RMD for that year, based on the plan's value at the end of 2006, had to be paid to him and him only, and that sum no longer was part of his interest in the retirement account. Therefore, when the parties entered into their agreement and the divorce was granted in October of 2007, the RMD amount, while in the retirement account, was not part of Husband's interest in the account and was not part of what was to be conveyed to the Wife. The parties' agreement provided that it would comply with ERISA and the Internal Revenue Code. Moreover, a QDRO that does not so comply will not be subject to approval by a plan administrator.

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Department of Human Resources, Montgomery County Office of Child Support Enforcement, Ex Rel. Andrea Allison v. Keith Scott Mitchell, Sr., No. 11, September Term, 2008, filed January 27, 2011. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2011/11s08.pdf

FAMILY LAW - UNIFORM INTERSTATE FAMILY SUPPORT ACT ("UIFSA") - DEFENSE OF NONPARENTAGE NOT AVAILABLE UNDER UIFSA WHERE PARENTAGE PREVIOUSLY DETERMINED BY FOREIGN TRIBUNAL

Facts: Appellee and his wife were divorced in 1992 by a New York divorce decree, which provided that the wife "shall have custody of the children of the marriage," *i.e.*, a son and a daughter, and that appellee shall pay child support "for all children" of $62.00 per week. Thereafter, appellee moved to Maryland and his ex-wife moved to Alabama.

In 2007, at the request of Alabama, the Montgomery County Office of Child Support Enforcement filed the 1992 New York divorce decree under UIFSA. Appellee initially opposed the enforcement of that decree because his son was emancipated. Later, appellee agreed to the entry of a consent modified child support order that (1) increased his child support obligation from $62.00 per week for both children to $483.00 per month for the daughter, (2) eliminated any support obligation for the son, and (3) established appellee's total arrears for both children at $41,345.83.

However, on the same day that the consent order was submitted to the circuit court, appellee filed a request to set aside the declaration of paternity, claiming that he was not the father of the daughter. A paternity test established that appellee was not the biological father of the daughter. The circuit court vacated the registration of the New York divorce decree, vacated the consent modified child support order, and nullified all child support arrears relating to the daughter.

Held: Reversed. The Court of Special Appeals held that under New York law the New York divorce decree constituted a determination of appellee's paternity of the daughter and that under Section 10-327 of UIFSA nonparentage is expressly prohibited as a defense in a UIFSA proceeding where parentage has been previously determined. The Court also rejected appellee's contention that, once the circuit court approved the consent modified child support order, and thus became "the tribunal of continuing, exclusive jurisdiction" under Section 10-350(e) of UIFSA, UIFSA no longer applied. The Court observed that there was no authority for the proposition that, when a circuit court

modifies a registered foreign child support order under UIFSA, UIFSA no longer applies. Moreover, such an interpretation of the UIFSA statute would render Section 10-327 nugatory and frustrate the purpose of UIFSA.

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Hosea Anderson, et ux., v. John S. Burson, et al., Case No. 434, September Term, 2009, filed December 22, 2010. Opinion by J. Salmon.

http://mdcourts.gov/opinions/cosa/2010/434s09.pdf

FINANCIAL INSTITUTIONS - UNIFORM COMMERCIAL CODE - A BANK THAT HAS: 1) PHYSICAL POSSESSION OF A DEED OF TRUST NOTE, AND 2) CAN PROVE ITS CHAIN OF TITLE, HAS THE RIGHT TO FORECLOSE ON THE DEED OF TRUST UNDER PRINCIPLES ENUNCIATED IN THE MARYLAND COMMERCIAL CODE, SECTION 3-203(b), EVEN THOUGH THE NOTE WAS NEVER PROPERLY ENDORSED WHEN IT WAS TRANSFERRED TO THE BANK THAT INITIATED THE FORECLOSURE.

Facts: Hosea Anderson and his wife, Bernice Anderson, owned a home in Columbia, Maryland. In 2006, the Andersons decided to refinance their home. On October 13, 2006, the Andersons' signed a thirty year Adjustable Rate Balloon Note with Wilmington Finance, Inc. ("Wilmington"). The Deed of Trust referenced Wilmington as the "Lender," defined "Borrower" as the Andersons, and listed the "Trustee" as Dominican First Title, LLC.

The Deed of Trust stated that Mortgage Electronic Registration Systems, Inc., ("MERS") would act solely as a nominee for Lender and Lender's successors and assigns, and was the beneficiary under this trust.

On February 12, 2007, MERS, as beneficiary and as nominee of Wilmington, transferred its beneficial rights under the Note and Deed of Trust to Morgan Stanley Capital Holdings, Inc. Two days later, on February 14, 2007, MERS, as beneficiary and as nominee of Wilmington, transferred its servicing rights under the Note and Deed of Trust to Saxon Mortgage Services, Inc. Sometime after February 12, 2007, Morgan Stanley Mortgage Capital Holding, Inc., transferred its ownership of the Note to Morgan Stanley ABS Capital I Inc. On March 1, 2007, Morgan Stanley ABS Capital I Inc., "sold, transferred, assigned, set-over and conveyed to Deutsche Bank Trust Company Americas, as Trustee and Custodian for Morgan Stanley Home Equity Loan Trust, MSHEL 2007-2 (hereinafter "Deutsche") all right, title, and interest in and to the Note.

The Andersons fell behind on their mortgage payments, and on February 21, 2008, Erik W. Yoder, Esq., as attorney for the Substitute Trustees named by Deutsche, filed, in the Circuit Court for Howard County, a Line to Docket Foreclosure of the Andersons' residence.

The documents filed with the court identified the Lender under

the Note as Deutsche by: Saxon Mortgage Services, Inc., f/k/a Meritech Mortgage Services, Inc., as its attorney-in-fact. Also filed by the Substitute Trustees was a Motion for Acceptance of a Lost Note Affidavit. Movant asked the court to accept the affidavit in lieu of the original Note on the grounds that the original Note was lost and could not be found by the Plaintiff or the Noteholder. On February 26, 2008, the court signed an Order stating that the Lost Note Affidavit be accepted in lieu of the original.

On November 12, 2008, the Andersons filed a motion for injunction to stay foreclosure that had been set for November 18, 2008. The Andersons alleged that the Substitute Trustees and Deutsche had no legal standing to foreclose on their residence because the Substitute Trustees had failed to establish that Deutsche was the lawful owner or holder of the Note and Deed of Trust.

The circuit court on November 17, 2008, filed a Temporary Restraining Order ("TRO") enjoining the sale scheduled for November 18th. A hearing on the TRO was held on November 26, 2008. At that hearing the circuit court enjoined the foreclosure proceedings until an evidentiary hearing could be held. The evidentiary hearing was held on March 31, 2009.

At the evidentiary hearing, the Note that was previously lost, was produced. But it was revealed that the Note signed by the Andersons' did not contain the indorsement of either Deutsche or any of the entities that had owned the Note after Wilmington transferred it. Instead, the Substitute Trustees produced a separate undated document entitled "Allonge to Note." The Allonge was signed by Wilmington sometime in March 2007, however, by February 14, 2007, Wilmington had divested itself of all its rights in the Note. The circuit court nevertheless lifted the injunction.

On Appeal the Andersons argued that the Allonge was worthless because it was signed by Wilmington after Wilmington had divested itself of all its rights in the Note, and therefore Wilmington had no rights or interest to convey. Thus, according to the appellants, the Substitute Trustees had not proven that the entity that had appointed them (Deutsche) had standing to file the foreclosure.

Held: Judgment Affirmed. Section 3-203(b) of the Commercial Law Article, provides that "transfer of an instrument whether or not the transfer is a negotiation [i.e., indorsed], vests in the transferee any right of the transferor to enforce the instrument, including any rights as a holder in due course, but the transferee

cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument." Section 3-203(b) embodies what has come to be known as the "shelter" or "umbrella principle." Wilmington was indisputably a holder in due course. Wilmington transferred the Note to Morgan Stanley Mortgage Capital Holding, Inc., which thereby acquired all Wilmington's rights to enforce the instrument including any right as a holder in due course. The second transferee, Morgan Stanley ABS Capital I Inc., in turn, acquired all the rights held by its transferor, Morgan Stanley Mortgage Capital Holding, Inc. And, when Morgan Stanley ABS Capital I, Inc., sold, transferred, assigned, and conveyed to Deutsche all its rights, title, and interest it had in the Note, Deutsche acquired all the rights that had vested in its transferor because the shelter principle operates cumulatively. Thus under applicable law, because it was not alleged that anyone in the chain of title had engaged in fraud or illegality, Deutsche was a "successor to the holder" of the Note and had the same rights as Wilmington had to name the Substitute Trustees to enforce its collection rights. Therefore, because Deutsche had a right to appoint the Substitute Trustees, the trial judge did not err in lifting the injunction.

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Benedict Kargbo v. Douglas Gaston, No. 2024, September Term 2008, filed September 30, 2010. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2010/2024s08.pdf

REAL PROPERTY - PROTECTION OF HOMEOWNERS IN FORECLOSURE ACT

Facts: Appellant, Benedict Kargbo, a homeowner whose residence was subject to a pending foreclosure action, and appellee, Douglas Gaston, entered into a contract for the sale of Kargbo's home prior to the effective date of the Protection of Homeowners in Foreclosure Act (PHIFA), codified at Section 7-301, *et seq*., of the Annotated Code of Maryland's Real Property Article. The parties did not, however, have a binding agreement as to other substantial aspects of the parties' contemplated transaction, namely a lease agreement and an option to re-purchase, prior to the Act's effective date. The settlement on the contract took place after PHIFA's effective date. The Circuit Court for Prince George's County found that, while PHIFA did apply to the parties' transaction, Gaston was not a foreclosure purchaser because he did not initiate contact with Kargbo. Additionally, the circuit court found that Gaston was not a foreclosure purchaser or consultant because he did not fall under any of the enumerated categories listed in § 7-302(a) of the Act.

Held: The Court of Special Appeals vacated the decision of the circuit court and remanded the case to that court for a new trial.

Gaston contended that, because he had signed the contract of sale with Kargbo before the effective date of the act, application of PHIFA to the transaction would deprive him of vested contractual rights. In determining whether the Act is applicable, the Court focused on what contract rights Gaston possessed on the date the Act took effect. It concluded that because substantial portions of the parties' eventual agreement were not in writing and thus not enforceable as of the PHIFA's effective date, PHIFA applies to the transaction and its application does not deprive the alleged foreclosure purchaser of vested rights under the Maryland Constitution.

PHIFA provides that it applies to "foreclosure consultants," "foreclosure purchasers," and "foreclosure conveyances" as those terms are defined in the Act. Real Property Article § 7-302(a) sets out exceptions to the general application of PHIFA. Real Property Article § 7-302(b) sets out exceptions to the exceptions. The circuit court's finding that Gaston, who by profession is a computer programmer, did not fall into any of

the categories described in § 7-302(a) means that the Act applies to him, not that it does not. Finally, that an alleged foreclosure consultant/foreclosure purchaser did not initiate contact with the homeowner is not a defense to an action under PHIFA. The Court of Special Appeals adopts the construction of PHIFA enunciated in *Johnson v. Wheeler*, 492 F. Supp. 2d 492, 506 (D. Md. 2007).

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Baltimore City Board of School Commissioners v. Koba Institute, Inc., Case No. 2314, September Term 2008, filed September 13, 2010. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2010/2314s08.pdf

STATES - SOVEREIGN IMMUNITY - LIMITATIONS - UNJUST ENRICHMENT

Facts: Koba Institute, Inc. ("Koba") operated two nonpublic special education schools for disabled children in Anne Arundel County. Twelve Baltimore City public school children were referred to Koba for educational services in 2001-02. These students were being temporarily housed in a group home in Talbot County. Koba arranged for transportation services for the students from the group home to Koba's school in Anne Arundel County. Koba billed the Baltimore City Board of School Commissioners ("Board") for reimbursement for the transportation costs, as well as educational costs for the students. The Baltimore City School System paid some of the transportation invoices, but ceased all payment after July 2003 because it questioned whether the Board was obligated to pay for transportation services for students temporarily living in Talbot County. Koba continued to receive payment for providing educational services only.

Koba filed suit on July 6, 2006, against the Board in the Circuit Court for Baltimore City alleging unjust enrichment for failing to pay the invoices for transportation. The case went to trial before a jury. Koba alleged the Board was required to pay the costs under Md. Code (1978, 2008 Repl. Vol.), Education Article (ED), § 8-410(b)(1), which obligates a school system to pay for transportation for disabled children that reside in the school system's county but attend school outside the county. Koba contended that the statute obligated the Board to pay for transportation because the children were domiciled in Baltimore City. The Board argued that Talbot County was responsible for the costs because the students resided there. Koba argued the Board was unjustly enriched because it benefitted by receiving State funds for transportation for disabled students, but did not pay costs for these twelve students. The jury returned a verdict in Koba's favor of $169,640 for the unpaid invoices. The Board timely noted its appeal.

Held: Reversed. The court held that sovereign immunity bars Koba from bringing an unjust enrichment action against the Board. As an agency of the State of Maryland, the Board is liable for written contracts, but not for implied contracts. Md. Code (1984, 2009 Repl. Vol.), State Government (SG) Article, § 12-201. Here, there was no written contract saying that the Board was liable for

transportation costs. Although there are some exceptions to sovereign immunity, there are none for unjust enrichment claims. There is also no statutory waiver of sovereign immunity under ED § 8-410 (b)(1).

Even if the suit was not barred by sovereign immunity, the court held Koba's unjust enrichment claim would have failed. The mere billing and non-payment for services does not constitute unjust enrichment. Although the court found the children were "domiciled" in Baltimore City despite their temporary residence in Talbot County, there was no unjust enrichment because the Board received no benefit from Koba. The Board could not receive funding from the State for the twelve disabled children because the funding is based on a headcount of students requiring transportation, and these twelve students were not included in Baltimore City's headcount. Also, general funding for transportation costs was not the direct result of the services provided by Koba. The general funds were provided to the Board to spend on transportation. To the extend such transportation was provided, if any benefit existed, it was passed on to other children in fulfillment of the Board's statutory duties.

The court also found no merit in the Board's argument that the suit should be dismissed because the school had not exhausted its administrative remedies before the State Board of Education because the issues in the case were pure legal issues, which the State Board does not have the power to decide.

Finally, the court noted that, if sovereign immunity were not an issue, a three-year period of limitations would apply, barring the lion's share of any award to Koba: all but $10,720. Md. Code (1974, 2006 Repl. Vol.), Courts and Judicial Proceedings Article (CJP), § 5-101.

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Nicholas Piscatelli v. Van Smith, et al, No. 2838, September Term 2008, filed January 27, 2011. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2011/2838s08.pdf

TORTS - INTENTIONAL TORTS - DEFAMATION - DEFENSES - QUALIFIED PRIVILEGES

Facts: On or about April 11, 2003, Jason Convertino, a manager of the Redwood Trust, a Baltimore nightclub, and a friend, Sean Wisniewski, were murdered at Convertino's home in the Fells Point neighborhood of Baltimore. Nicholas Piscatelli was a co-owner of the nightclub. After a police investigation, Anthony Jerome Miller, a former security guard at Redwood Trust, was charged and convicted of both murders. Van Smith, a reporter for City Paper, wrote a series of articles in City Paper regarding the murders, the police investigation and Miller's trial.

Piscatelli sued Smith and CEGW, Inc., the owner of City Paper, alleging that two of Smith's articles were defamatory, invaded his privacy and cast him in a false light by suggesting that he was involved in the murders. Smith and CEGW, Inc., appellees, filed a motion for summary judgment, arguing that the articles were not defamatory, that they did not misstate facts and that the articles were wholly privileged. A hearing on the motion and Piscatelli's opposition thereto was held on January 26, 2009. On February 17, 2009, the circuit court issued an order granting appellees' motion for summary judgment on all counts of the complaint. Piscatelli filed a timely appeal from that judgment.

Held: Judgment affirmed.

When a circuit court grants a motion for summary judgment without specifying the grounds for its decision, an appellate court assumes that the circuit court considered all grounds asserted by the moving party and concluded that one or more of them were meritorious.

Reviewing the law of defamation, the Court of Special Appeals held that, in a defamation and false light action against media defendants arising out of coverage of a criminal trial, courts must conduct an independent evaluation of the record in order to assure that a potential judgment against defendants would not infringe upon their right of free expression protected by the First Amendment of the United States Constitution and Article Forty of the Maryland Declaration of Rights. The Court further held that a circuit court does not err in granting summary judgment on behalf of defendants when a review of the newspaper articles in question

demonstrates that the contents of the articles are protected by fair reporting and fair comment privileges.

The Court determined that the two murders were matters of public interest and concern. Upon review of the allegedly defamatory passages, the Court concluded that the passages consisted entirely of true assertions of fact, honest expressions of fair and reasonable opinions on a matter of public interest and opinions based on facts which were readily ascertainable within the same quotation. While the circuit court did not expressly articulate the grounds for its decision, the Court reviewed the record and concluded that the passages were either non-defamatory by definition or were protected by the fair reporting and fair comment privileges. Therefore, the circuit court did not err in granting summary judgment.

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Giuseppina Muti, et al. v. Univ. of Md. Medical Sys. Corp., Case No. 1991, Sept. Term 2009. Opinion filed on February 4, 2011 by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/1991s09.pdf

TORTS - WRONGFUL DEATH – MD RULE 15-1001 – "USE PLAINTIFF" – EXPERT OPINION – MD RULE 5-702

Facts: Elliot Muti suffered a heart attack and submitted to the care of appellee, University of Maryland Medical System Corporation ("UMMS"). Following surgery and other measures, he developed complications from a tracheal tear and died. On September 23, 2008, appellants, Giuseppina, Tom, and David Muti, filed a complaint in the Circuit Court for Baltimore City, naming appellee as the sole defendant and claiming three counts of wrongful death and one count of medical negligence as a survival action. During deposition, the parties discovered that Elliot Muti had adopted a son during his previous marriage. One of appellants' experts testified, at his deposition, that the circumstances and injury were consistent with "improper technique or inappropriate force." On August 31, 2009, appellee moved to dismiss appellants' wrongful death claims for failure to join a necessary party and, in the alternative, for summary judgment on all counts. The trial court dismissed the wrongful death claims without leave to amend and entered summary judgment in appellee's favor on the remaining survival claim.

Held: Although appellants failed to join the decedent's adopted son as a use plaintiff under Md. Rule 15-1001, the trial court erred when it dismissed their wrongful death claims with prejudice and did not consider whether doing so would prejudice the unnamed use plaintiff. The "sufficient factual basis" of Rule 5-702 does not require a specific study or textual evidence to support an otherwise qualified expert's opinion.

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Zurich American Insurance Company v. Uninsured Employers' Fund, et al., No. 1509, September Term, 2009, filed February 3, 2011. Opinion by Eyler, James R.

http://mdcourts.gov/opinions/cosa/2011/1509s09.pdf

WORKER'S COMPENSATION - RESIDUAL MARKET LIMITED OTHER STATES INSURANCE ENDORSEMENT

Facts: The primary issue presented by this appeal involves the interpretation of a "workers compensation and employers liability" policy (the "Policy") and, specifically, a "residual market limited other states insurance endorsement" (the "Endorsement"). The Policy was issued in Delaware by American Zurich Insurance Company ("Zurich"), appellant, to A & B Enterprises, Inc., a Delaware corporation ("A & B"), with its principal place of business in Delaware.

A & B contracted with Richard Townsend, a resident of Salisbury, Maryland, to build a pole building on Mr. Townsend's land, located near Salisbury. A & B then subcontracted the work to Wayne and Marie Travis, Delaware residents, doing business as WMT Contracting ("WMT"). Dean J. Young, a Delaware resident, was employed by WMT; while working on the job site near Salisbury, he fell and was injured. A & B performed 90% of its work in Delaware and 10% of its work in Maryland. Mr. Young sustained an accidental injury while working on a pole building near Salisbury, in the course of his employment by WMT.

Mr. Young filed a workers compensation claim against WMT in Delaware but did not collect benefits because WMT was uninsured. Mr. Young then filed a workers compensation claim in Maryland against WMT. The Uninsured Employers' Fund ("UEF"), appellee, impleaded both A & B as statutory employer, and its insurer, Zurich. The Maryland Workers' Compensation Commission (the "Commission") concluded that A & B was a statutory employer, Mr. Young sustained a compensable injury, and the Policy provided coverage for the claim.

Zurich petitioned for judicial review in the Circuit Court for Montgomery County. The circuit court affirmed, and this appeal followed. In an opinion filed on November 3, 2010, we affirmed the judgment. On December 1, 2010, appellant filed a motion for reconsideration. Because we agreed that appellant's motion had merit, we granted the motion, withdrew our earlier opinion, and substituted this opinion. Albeit for a different reason than originally stated, we affirmed the judgment.

The Policy was issued in Delaware. In the application for the Policy, A & B stated that it did not conduct operations in states other than Delaware. The same page provided that the workers compensation portion of the coverage "applies to the Workers Compensation Law of [Delaware]. Under a heading entitled, "OTHER STATES INSURANCE," the Endorsement is referenced.

The Endorsement is entitled "RESIDUAL MARKET LIMITED OTHER STATES INSURANCE ENDORSEMENT" and provided:

A. How This Insurance Applies

1. We will pay promptly when due the benefits required of you by the workers compensation law of any state not listed in Item 3.A of the Information Page if all of the following conditions are met:

   a. The employee claiming benefits was either hired under a contract of employment made in a state listed in Item 3.A of the Information Page or was, at the time of injury, principally employed in a state listed in Item 3.A of the Information Page; and

   b. The employee claiming benefits is not claiming benefits in a state where, at the time of injury, (i) you have other workers compensation insurance coverage, or (ii) you were, by virtue of the nature of your operations in that state, required by that state's law to have obtained separate workers compensation insurance coverage, or (iii) you are an authorized self-insurer or participant in a self-insured group plan; and

   c. The duration of the work being performed by the employee claiming benefits in the state for which that employee is claiming benefits is temporary.

2. If we are not permitted to pay the benefits directly to persons entitled to them and all of the above conditions are met, we will reimburse you for the benefits required to be paid.

3. This insurance does not apply to fines or penalties arising out of your failure to comply with the requirements of the workers compensation law.

IMPORTANT NOTICE
If you hire any employees outside those states listed in Item 3.A on the Information Page or begin operations in any such state, you should do whatever may be required under that state's law, as this endorsement does not satisfy the requirements of that state's workers compensation law.

Held: Affirmed. The question of insurance coverage turned on the language in the Endorsement. Subsections a., b., and c. of the Endorsement are joined by "and," and all had to be satisfied. Subsection a. was satisfied if Mr. Young was hired in Delaware or was, at the time of injury, principally employed in Delaware. The three sub-parts in b. are joined by "or," and are disjunctive, but because the lead in phrase is in the negative ("We will pay when . . . the employee . . .is not claiming benefits in a state where. . . ."), satisfaction of any of the three sub-parts prevented coverage. Thus, subsection b. was satisfied if A & B had other coverage, was required, by virtue of its operations in Maryland, to have separate coverage, or was a self-insurer. Subsection c. was satisfied if the duration of the work being performed by Mr. Young was temporary.

The Endorsement provided coverage in this instance. Mr. Young was hired in Delaware, and thus, A.1.a. was satisfied. Under subsection A.1.b., A & B did not have other workers compensation insurance in Maryland and was not an authorized self-insurer in Maryland.

Thus, the question was whether A & B was required to have "separate workers compensation insurance coverage" in Maryland. A & B did not regularly do business in Maryland; Mr. Young was working in Maryland temporarily; coverage under the Endorsement satisfied Maryland law; and A & B was not required to have separate coverage in Maryland.

We also concluded that the "duration of the work being performed by [Mr. Young was] temporary," within the meaning of A.1.c. Mr. Young was expected to work in Maryland only for a few days.

To recap, Mr. Young was hired in Delaware within the meaning of A.1.a. Maryland did not require "separate workers compensation insurance coverage" within the meaning of A.1.b. of the Endorsement. Mr. Young's work in Maryland was temporary within the meaning of A.1.c.

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Jeffrey LeCronier v. United Parcel Service, et al., No. 2650, September Term 2008, filed November 3, 2010. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2010/02650s08.pdf

WORKER'S COMPENSATION ACT – VENUE FOR PETITION FOR JUDICIAL REVIEW

Facts: Jeffrey LeCronier, a resident of Anne Arundel County, sustained an on-the-job injury in Delaware. After his claim for benefits was denied by the Worker's Compensation Commission, LeCronier filed a petition for judicial review of the Commission's decision in the Circuit Court for Baltimore City. He asserted that he carried on regular business, was employed, and was regularly engaged in a vocation in Baltimore.

The employer filed a motion to transfer venue to the Circuit Court for Anne Arundel County on the basis that LeCronier resided in that county. The motion was granted by the circuit court. The case was transferred to Anne Arundel County, where a jury trial resulted in a verdict for the employer. LeCronier appealed, raising the sole issue of whether the circuit court for Baltimore City erred in granting the motion to transfer.

Held: The Court of Special Appeals reversed the judgment of the Circuit Court for Anne Arundel County and remanded the case with instructions to transfer it to the Circuit Court for Baltimore City for a new trial.

The statutory provision for appropriate venues for petitions for judicial review of decisions of the Workers' Compensation Commission is MD. CODE (1991, 2008 Repl. Vol.), § 9-738 of the Labor and Employment Article, which provides in pertinent part:

> Venue. (a) *Filing with circuit court.* – To take an appeal, a person shall file an order of appeal with the circuit court.
>
> (1) that has jurisdiction over that person; or
>
> (2) for the county where the accidental personal injury . . . occurred.

The Court noted that the substantive provisions of LE § 9-738 have been in effect since the Worker's Compensation Act was passed in 1914. At that time, "'any person who resides in one county but carries on any regular business, or habitually engages

in any avocation or employment in another county, may be sued in either county. . . . '" *Swanson v. Wilde,* 74 Md. App. 57, 62 (1988) (quoting 1888 Md. Laws ch. 456). With this in mind, the Court of Special Appeals concluded that, when the General Assembly passed the Act, it was aware that a natural person could be sued both in his or her county of residence as well as in his or her county of employment. Thus, when it provided that an appeal could be initiated "in the Circuit Court of the County . . . having jurisdiction over the place where the accident occurred or over the person appealing from such decision. . . ," the legislature intended that a person could file an appeal in either forum, as well as in the county in which the accident occurred.

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ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective January 21, 2011:

JAMES RUDOLPH BOYKINS

*

The following attorneys have been replaced upon the register of attorneys in the Court of Appeals of Maryland effective February 3, 2011:

GARY ALAN COURTOIS

SAMUEL JOSEPH LANE

**

By an Order of the Court of Appeals of Maryland dated February 8, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

JOHN DAVID LEWIS

*

JUDICIAL APPOINTMENTS

On November 7, 2010, ALISON ASTI was elected to the Circuit Court for Anne Arundel County. JUDGE ASTI was sworn in on December 20, 2010 and replaced Hon. Ronald Jarashow, who was defeated in the November election.

*

On December 29, 2010, the Governor announced the appointment of the HON. SHIRLEY M. WATTS to the Court of Special Appeals. Judge Watts was sworn in on January 27, 2011 and fills the vacancy created by the retirement of the Hon. Arrie W. Davis.

*

On December 29, 2010, the Governor announced the appointment of KEITH A. BAYNES to the Circuit Court for Cecil County. Judge Baynes was sworn in on January 21, 2011 and fills the vacancy created by the untimely death of the Hon. Richard E. Jackson.

*

On December 29, 2010, the Governor announced the appointment of BRIAN D. SHOCKLEY to the Circuit Court for Worcester County. Judge Shockley was sworn in on January 27, 2011 and fills the vacancy created by the retirement of the Hon. Theodore R. Eschenburg.

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