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ADMINISTRATIVE LAW – PRIMARY JURISDICTION – STATUTORY VIOLATIONS – ALLEGED TITLE INSURANCE OVERCHARGE – FROM THE COMPREHENSIVENESS OF THE INSURANCE ARTICLE OF THE MD. CODE, THE JURISDICTIONAL CONCEPTIONS OF THE MARYLAND INSURANCE ADMINISTRATION ("MIA"), AND THE RELEVANCE OF THE INSURANCE ARTICLE AND AGENCY EXPERTISE, THE LEGISLATURE EVINCED AN INTENT THAT THE MIA HAVE PRIMARY JURISDICTION OVER THE PRESENT CLAIM. EVEN THOUGH APPELLANT, IN HIS COMPLAINT IN THE CIRCUIT COURT, CHARACTERIZES THE CLAIM AS A COMMON LAW ACTION FOR MONEY HAD AND RECEIVED, THE CLAIM IS GROUNDED NONETHELESS IN A VIOLATION OF THE INSURANCE ARTICLE.

Facts: In the Winter of 1998, Maurice Carter ("Carter") purchased a house in Baltimore City. Generally, at closing, a home buyer pays for two title insurance policies, one with coverage for the owner and the other protecting the lender. The complaint suggests that Carter purchased only an owner's policy at that time.

Ten years later, Carter decided to take advantage of lower interest rates and refinanced his home loan. He purchased a lender's policy from Huntington Title & Escrow, LLC ("Huntington"), which provided:

> When the owner of property on which application is made for mortgagee title insurance has had the title to the property insured as owner, within the prior ten (10) years, the owner shall be entitled to the . . . reissue charge on the mortgage insurance, up to the face amount of the owner's policy[.]

Carter averred in his purported class action complaint filed in the Circuit Court for Baltimore City that Huntington applied to his refinance closing the more costly original issue rate for the lender's policy and "simply pocketed its . . . percentage [as agent] of the difference." He averred that such behavior violated Maryland Code (1997, 2006 Repl. Vol., 2010 Supp.), Insurance Article ("Ins. Art."), § 27 (otherwise known as the Unfair Trade Practices Title), and, concordantly, gave rise to a common law claim for "money had and received." Carter asserted

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also a claim for "negligent misrepresentation," as Huntington knew the rate charged was incorrect, but nevertheless made an "affirmative misrepresentation [at closing on a Housing and Urban Development form known as HUD-1] that the rate charged was the proper rate."

On 8 December 2009, Huntington filed a motion to dismiss. Without responding substantively to the factual allegations of the complaint (save for describing Carter's putative class action as part of a "[l]itigation campaign"), Huntington argued that the General Assembly's statutory scheme invested the MIA with primary jurisdiction over Carter's claim. Carter, as the argument went, was required to seek redress initially through the administrative adjudication process, as opposed to proceeding directly in a court of law. In addition, Huntington asserted that Carter's negligent misrepresentation claim did not allege falsity and, accordingly, failed to state a claim upon which relief may be granted.

Carter opposed Huntington's motion to dismiss, contending that his money had and received claim existed at common law and, as such, may be brought directly in a circuit court. With respect to the negligent misrepresentation claim, Carter retorted that Huntington knew the rate charged was incorrect, but nevertheless made an "affirmative misrepresentation [on the HUD-1 form] that the rate charged was the proper rate." According to Carter, Huntington's defense to the negligent misrepresentation count amounts to saying that, "so long as [a title insurer] lies with a straight face, it cannot be held liable under a claim of negligent misrepresentation."

The Circuit Court granted, by written order, without written opinion or verbal explanation, Huntington's motion to dismiss. Carter appealed to the Court of Special Appeals. Before the intermediate appellate court could decide the appeal, we issued a writ of certiorari, *Carter v. Huntington Title & Escrow, LLC*, 417 Md. 384, 10 A.3d 199 (2010), to consider the following questions framed in Carter's brief:

> (1) [W]hether the M[aryland] Insurance [Article] requires an exhaustion of administrative remedies before pursuing a claim for money had & received to recover title insurance premiums charged by title insurers that are in excess of the premium rates approved by the [MIA] Commissioner?
>
> (2) [W]hether a claim for money had & received to recover title insurance premiums charged by title insurers that were in excess of the premium rates approved by the [MIA]

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> Commissioner is a cause of action []dependent of the [I]nsurance [Article]?
>
> (3) [W]hether a false statement of the amount chargeable for title insurance on a HUD-1 settlement statement is an affirmative misrepresentation which can support a claim for negligent misrepresentation under M[aryland] Law?

Held: Judgment of the Circuit Court vacated and case remanded with instructions to stay further proceedings. The Court found that the Legislature evinced an intent that the MIA have primary jurisdiction over Carter's claim, which although portrayed as a common law action for money had and received, was actually an alleged violation of the Insurance Article. To support its holding, the Court analyzed the factors elucidated in *Zappone v. Liberty Life Insurance Co.*, 349 Md. 45, 706 A.2d 1060 (1998), underscoring in the present case the comprehensiveness of the Insurance Article, the jurisdictional conceptions of the MIA, and the relevance of the Insurance Article and agency expertise to the dispute at hand.

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Lee E. Stephens v. State of Maryland, No. 114, September Term, 2010, Filed July 12, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/114a10.pdf

APPELLATE JURISDICTION – FINAL JUDGMENT RULE – COLLATERAL ORDER DOCTRINE

Facts: Petitioner Lee E. Stephens was indicted on charges of first degree murder and conspiracy to commit first degree murder. As required by law, the State notified Petitioner of its intention to seek the death penalty. The State also informed Petitioner, as required by Maryland Code (1977, 2006 Repl. Vol.), §10-915 of the Courts and Judicial Proceedings Article, that at trial the State intended to introduce DNA evidence linking him to the murder in question.

Under Maryland Code (2002, 2010 Supp.), § 2-203(a)(3) of the Criminal Law Article ("CrL"), the sentence of death may not be imposed unless the State first presents to the court or jury, inter alia, biological or DNA evidence linking the defendant to the murder. Petitioner sought a pre-trial, full evidentiary hearing, at which the judge would determine whether the State would be able to present such evidence.

The Circuit Court denied the request. Petitioner noted an immediate appeal to the Court of Special Appeals. Before argument was heard by that court, the Court of Appeals granted a writ of certiorari on its own initiative and issued a stay of further proceedings in the Circuit Court.

Held: Appeal dismissed and stay vacated. The Court of Appeals held that the Circuit Court's denial of Petitioner's request for a pre-trial evidentiary hearing to determine whether the State possessed the DNA evidence required by CrL §2-202(a)(3) did not come within the collateral order doctrine and was not otherwise immediately appealable.

The Court began by noting that the appeal was neither from a final judgment nor specifically authorized by law, leaving only the collateral order doctrine as a possible source for immediate appellate review. The Court explained that, in order to come within the collateral order doctrine, the ruling sought to be reviewed must be one that (1) conclusively determines the disputed question, (2) resolves an important issue, (3) resolves an issue that is completely separate from the merits of the action, and (4) would be effectively unreviewable if the appeal had to await entry of final judgment. The Court also noted that all four requirements must be satisfied for the doctrine to apply and that the doctrine is very narrow in scope.

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The Court did not address the first and second requirements of the collateral order doctrine because the Court determined that the ruling at issue did not satisfy either the third or fourth requirement. With regard to the third requirement of the doctrine, the Court noted that the issue sought by Petitioner to be determined at the requested pre-trial full evidentiary hearing—that is, whether the State possessed DNA evidence linking Petitioner to the murder—is intimately tied to and pertinent to whether or not Petitioner would be found guilty of the charged murder. Therefore, the Court reasoned, Petitioner's claim is analogous to a Sixth Amendment right to a speedy trial claim, because in each circumstance a careful assessment of the particular facts of the case is required and can be better considered after the relevant facts have been developed at trial.

With regard to the fourth requirement, the Court explained that a determination of eligibility for the death penalty under CrL §2-202(a)(3) can be challenged effectively on appeal from a final judgment. The Court rejected Petitioner's double jeopardy analogy, and distinguished one's right to have the death penalty imposed only upon a showing of DNA evidence from one's rights under the Double Jeopardy Clause. The Double Jeopardy Clause, the Court explained, protects a defendant from having to suffer, wrongly, through the ordeal of a second trial. CrL § 2-202(a)(3), by contrast, does not give a defendant the right to avoid a capital trial altogether. Instead, it gives the defendant the right not to have the death penalty imposed upon a finding of guilt on the charged murder, unless the State has supplied the requisite statutory evidence linking the defendant to the murder. Consequently, the Court concluded that, should Petitioner be convicted and sentenced to the death penalty, his claim can be examined on appeal from final judgment, and vindicated by a remand for new sentencing, if necessary. Because a post-judgment appeal will suffice to ensure the fulfillment of the protections afforded by CrL §2-202(a)(3), the Court of Appeals held that the ruling did not come within the purview of the collateral order doctrine.

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Ford Motor Credit Company, LLC v. Maureen P. Roberson, Misc. No. 15, September Term 2010. Opinion filed on July 15, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/15a10m.pdf

CERTIFIED QUESTION OF LAW - *IPSO FACTO* CLAUSE OF VEHICLE CONTRACT

Facts: The United States Bankruptcy Court certified a question of law to the Court of Appeals pursuant to the Maryland Uniform Certification of Questions of Law Act, Maryland Code (1974, 2006 Repl. Vol.), Sections 12-601 *et seq.* of the Courts and Judicial Proceedings Article and Maryland Rule 8-305, that being:

> Whether the repossession of a vehicle based solely on the violation of an *ipso facto* clause of a vehicle retail installment contract, in the absence of any other breach, is permissible under Maryland law?

Held: The Court of Appeals answered the question “yes,” because the parties agreed that Ford Motor Credit had elected Section 12-1023 of the Credit Grantor Closed End Credit Provisions (“CLEC”), Commercial Law Article, Maryland Code (1975, 2005 Repl. Vol.), to govern the retail installment contract. The Court reasoned that Section 12-1023 of CLEC prohibits only “acceleration” when a creditor “deems itself insecure,” such as when a debtor files bankruptcy and that the plain meaning and legislative history of that Section differed significantly from Section 12-607 of the Retail Installment Sales Act (“RISA”), Commercial Law Article, Maryland Code (1975, 2005 Repl. Vol.), which prohibits both “repossession” and “acceleration” when a creditor “considers himself insecure.” The Court determined that the answer to the certified question concerning whether, under Maryland law, a creditor may repossess a car when a debtor has filed bankruptcy and has failed to reaffirm the indebtedness (thereby assuming personal liability after the bankruptcy discharge) is “yes” under CLEC.

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State of Maryland v. Perry Simms A/K/A Perry Sims, No. 112, September Term 2010, filed July 15, 2011. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/112a10.pdf

CRIMINAL LAW - EVIDENCE – ADMISSIBILITY OF AN ALIBI NOTICE

Facts: In 2007, Perry Sims was indicted for murder and other related weapons charges. Before trial, Sims's counsel filed a timely Notice of Alibi Witnesses pursuant to Md. Rule 4-263(e)(4). The notice originally listed 11 individuals, but was later redacted to include only Sims's father's name and address. At trial, Sims did not testify or present an alibi defense. The State argued that the redacted copy of the alibi notice was evidence of Sims's intent to create a false alibi because Sims had stated, in a recorded pre-trial phone call from jail that his father was out of town at the time that the crime allegedly occurred. The Circuit Court for Baltimore City admitted the redacted alibi notice, coupled with the jailhouse phone call, as probative circumstantial evidence of Sims's "consciousness of guilt." The alibi notice and transcript of the phone calls were submitted to the jury and Sims was subsequently convicted of manslaughter and two weapons charges. Sims appealed to the Court of Special Appeals, which reversed and remanded the case for a new trial. The intermediate appellate court held that the circuit court erred or abused its discretion by admitting the alibi notice because the State had not sufficiently proven Sims's intent to falsify the alibi, and that the error was not harmless beyond a reasonable doubt. The State appealed and the Court of Appeals granted certiorari.

Held: Affirmed. The Court of Appeals held that the trial judge erred in admitting the alibi notice because it was not legally relevant, and even if it were relevant, the notice was nevertheless inadmissible because it was unfairly prejudicial to Sims. In reaching this conclusion, the Court applied a "de novo" standard of review to the trial judge's determination of legal relevancy of the evidence and applied an "abuse of discretion" standard of review to the issue of admissibility of the evidence.

The Court concluded that the alibi notice was irrelevant because it did not tend to make the fact of Sims's consciousness of guilt any more probable, as required under Maryland Rule 5-401. The Court further concluded that the State cannot put forth the defendant's compliance with the notice requirement as affirmative evidence of guilt.

Additionally, the Court found that the alibi notice should have been excluded because, pursuant to Rule 5-403, the notice was more prejudicial to Sims than it was probative on the issue of ultimate guilt. In determining the probative value of the

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redacted alibi notice, the Court utilized a four-prong test, outlined in *Thomas v. State*, 372 Md. 342, 812 A.2d 1050 (2002), which requires connecting the defendant's behavior to actual guilt of the crime charged. The Court found that the alibi notice did not support an inference connecting Sims's pre-trial conduct to the actual crimes because the notice and phone call could support other inferences besides the intent to create false exculpatory evidence. Further, the Court found that the alibi notice was prejudicial to Sims because it invited the jury to speculate that Sims was guilty merely because he chose not to call the alibi witness listed on the notice.

The Court rejected the State's alternative argument that the State's admission of the alibi notice was justified by the fact that Sims put forth a *de facto* alibi defense, concluding that the State cannot rely on evidence it introduced against Sims to establish that Sims presented an alibi defense. The Court also rejected the State's arguments that the alibi notice was admissible for the purpose of impeachment or because Sims did not withdraw it before trial. Finally, the Court concluded that the erroneous admission of the notice was not harmless beyond a reasonable doubt.

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Warren Lee Ballard v. State of Maryland, No. 73, September Term 2010, Filed July 12, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/73a10.pdf

CRIMINAL LAW – FIFTH AMENDMENT – *MIRANDA* WARNINGS AND WAIVER:

Facts: On December 31, 2007, Detective Kaiser interrogated Petitioner regarding the homicide of Shirley Smith. During the videotaped interrogation, Petitioner initially waived his *Miranda* rights. Mid-way though the interrogation, however, Petitioner said: "You mind if I not say no more and just talk to an attorney about this." In response, Detective Kaiser asked Petitioner what benefit the presence of counsel would have, and Petitioner explained, "I'd feel more comfortable with one." Detective Kaiser then told Petitioner that if he chose to stop the interrogation and wait for a lawyer, any benefit to Petitioner would be lost. Petitioner then made incriminating statements about the incident.

After the interrogation, Petitioner was indicted on charges of first degree murder and related offenses. He filed a motion to suppress the statements he made to Detective Kaiser after he said, "You mind if I not say no more and just talk to an attorney about this." He argued that the statement unambiguously and unequivocally revoked his prior waiver of his *Miranda* rights, and invoked his right to counsel. Consequently, Petitioner asserted, *Edwards v. Arizona* required Detective Kaiser to stop the interrogation immediately, and any subsequent statements by Petitioner were inadmissible.

The court denied Petitioner's motion, agreeing with the State that Petitioner's statement was ambiguous and equivocal, and thus did not sufficiently invoke the right to counsel. Petitioner filed a motion to reconsider the suppression ruling, and the court, after hearing additional arguments, once again denied the motion to suppress. At trial, on an agreed statement of facts, the court found Petitioner guilty of second degree murder and lesser charges.

Petitioner appealed his conviction to the Court of Special Appeals, again challenging the denial of the motion to suppress. The court, in an unreported opinion, affirmed the judgments of conviction on the same grounds as the trial court. Petitioner filed a petition for writ of certiorari, which the Court of Appeals granted to determine whether Petitioner, during his custodial interrogation, invoked his right to counsel such that his subsequent statements to Detective Kaiser should have been suppressed.

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Held: Reversed. The Court of Appeals held that Petitioner's words constituted an unambiguous and unequivocal invocation of the right to counsel, requiring the interrogating detective, pursuant to *Miranda* and its progeny, to cease all questioning at that moment.

The Court rejected the State's claim that Petitioner's statement, "You mind if I not say no more and just talk to an attorney about this," was ambiguous and equivocal. To support its conclusion, the Court explained that Petitioner's statement was distinguishable from the ambiguous statements at issue in cases cited by the State. Unlike in those cases where, at the time the statement was uttered, the defendant made no indication that he or she actually desired to have a lawyer present, Petitioner's words, even if understood to be phrased as a question, transmitted the unambiguous and unequivocal message that Petitioner wanted an attorney. The Court based its conclusion on the common understand that a person who begins a statement with the phrase, "you mind if . . . ," suggests to his or her audience that he or she is about to express a desire to do something or have something occur. In other words, the phrase is a colloquialism; it is reasonably assumed that the speaker is not actually seeking permission to do the thing desired or to have the desired thing occur.

Alternatively, even if the phrase was not a colloquialism, the Court explained that the literal meaning of Petitioner's words was the same. Viewed from the perspective of a reasonable police officer in the position of Detective Kaiser, the most that could be said about Petitioner's words is that Petitioner, though undoubtedly asking for an attorney, sought to couch the request in polite or deferential terms. Petitioner was not posing any question other than whether Detective Kaiser minded if Petitioner stopped and spoke to an attorney. Consequently, Petitioner's words were no different than other petitioners who stated that they would "rather" have any attorney, which other jurisdictions have found to be unambiguous.

Finally, assuming for the sake of discussion that a reasonable officer in the circumstances would have understood only that Petitioner *might* have been invoking the right to counsel, the Court explained that the result would be the same. Following Petitioner's request for an attorney, Detective Kaiser asked Petitioner "what benefit would that have," evidently questioning the point of having an attorney present. Petitioner responded, "I'd feel more comfortable with one." The Court stated that, if there had been any ambiguity (which it concluded there was not), this exchange would have eliminated it because Petitioner explained why he requested counsel.

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Dedrick Tyrone Wilkerson v. State of Maryland, No. 107, September Term 2010. Opinion by Harrell, J. Filed 14 July 2011.

http://mdcourts.gov/opinions/coa/2011/107a10.pdf

CRIMINAL LAW – FIFTH AMENDMENT – PRIVILEGE AGAINST SELF-INCRIMINATION – *MIRANDA* ADVISEMENTS – *MISSOURI V. SEIBERT* – "TWO STEP"/"QUESTION-FIRST" INTERROGATION TACTICS

WHERE DEFENSE COUNSEL, GIVEN THE BENEFIT OF DOUBT, INTENDS TO ALLUDE AT TRIAL POTENTIALLY TO IMPROPER "TWO-STEP" OR "QUESTION-FIRST" INTERROGATION TACTICS – AS PROHIBITED UNDER *MISSOURI V. SEIBERT*, 542 U.S. 600, 124 S. CT. 2601, 159 L. ED. 2D 643 (2004) – BUT IN AN OBLIQUE AND OBSCURE FASHION, AND SUCH DID NOT ALERT PROPERLY EITHER THE PROSECUTOR OR THE TRIAL JUDGE THAT THEY SHOULD RESPOND TO, OR RULE ON, A *SEIBERT* CHALLENGE, JUSTICE IS SERVED BEST BY ORDERING A LIMITED REMAND SO THAT THE CIRCUIT COURT MAY CONDUCT A SUPPLEMENTAL SUPPRESSION HEARING, THE RECORD MAY BE DEVELOPED MORE FULLY ON THE POSSIBLE *SEIBERT* CONTENTION, AND THE TRIAL COURT MAY MAKE THE APPROPRIATE FINDINGS.

Facts: On the evening of 18 October 2007, Lori Lefayt ("Lefayt") sought medical treatment at the Howard County General Hospital, reporting that she had been raped earlier that night. Lefayt testified that she was attempting to withdraw money from an ATM machine at the Wilde Lake Village Center in Columbia when two young men – one of whom she identified later to police as Dedrick Tyrone Wilkerson ("Wilkerson") – approached her. Lefayt continued that, unable to withdraw money from the Wilde Lake ATM, she walked with Wilkerson to find another ATM. According to Lefayt, Wilkerson asked to borrow her cell phone battery. She claims that, as she retrieved the battery, Wilkerson attacked her, throwing her to the ground. She regained consciousness as Wilkerson was withdrawing his penis from her vagina. Wilkerson, on the other hand, testified that Lefayt asked him if he had any drugs, to which he responded in the negative. Wilkerson testified further that Lefayt agreed to have sexual intercourse with him in exchange for him arranging to acquire drugs for her. According to Wilkerson, the pair then went behind a nearby restaurant where they engaged in consensual sexual intercourse.

At approximately 7:00 a.m. on 6 December 2007, Howard County Police officers executed search and seizure and arrest warrants at Wilkerson's home. After placing him in flex cuffs, two police detectives interviewed Wilkerson in his home for approximately twenty five minutes. Before the detectives provided Wilkerson with *Miranda* advisements, Wilkerson and the detectives discussed Wilkerson's electronic monitoring (he was on home detention for an unrelated matter), how long he had been on it, and about the restrictions attendant to being on the box. After the advisements were given, Wilkerson denied being in the area where

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the alleged crime took place, explaining that because of his electronic monitoring, he would not have been allowed at the Wilde Lake Village Center at that time of the night. Further, Wilkerson told the detectives he was not familiar with anyone named Lori. Finally, Wikerson denied having any recollection of engaging in sexual intercourse with Lafayt or any other female that night. Wilkerson was charged ultimately with first- and second-degree rape, first-degree assault, false-imprisonment, and reckless endangerment.

On 28 April 2008, the Circuit Court held a hearing on Wilkerson’s motion to suppress Lafayt’s identification of Wilkerson from a photo array and his statements to the detectives, both pre-advisement and post-advisement. Defense counsel, as to the pre-advisement statements, argued generally to the trial judge that the interrogation constituted custodial interrogation within the contemplation of *Miranda* and, as such, the statements were not admissible without a voluntary waiver of his *Miranda* rights. Turning to the post-advisement statements, defense counsel argued:

> [T]here are four or five pages in the very beginning that there were some questions asked about having been at the village center, did you know a female, things like that, and that goes up to about page five before they even broach the subject of the Miranda. So, for those reasons, I think those are specifically interrogatory questions that certainly should be suppressed, *but even beyond that, I think that because that groundwork was laid, it laid the framework to taint sort of the rest of that, even after there was some Miranda*.

(Emphasis added.) Defense counsel made no mention of *Missouri v. Seibert*, nor any more specific complaint about police two-step or question-first tactics. Ultimately, the trial judge suppressed the pre-advisement statements. The trial judge denied the motion with respect to the post-advisement statements, “find[ing] that the warnings that were given were adequate, they did meet the dictates of Miranda,” and explaining that “based upon the totality of the circumstances . . . the statements made after the warnings were given were voluntary statements.” The jury acquitted Wilkerson of first-degree rape, first-degree assault, and reckless endangerment, but found him guilty of second-degree rape, second-degree assault, and false imprisonment. The trial judge sentenced Wilkerson to twenty-years imprisonment, with all but eight years suspended.

The Court of Special Appeals, in an unreported opinion,

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affirmed Wilkerson's convictions. Responding to the State's claim that Wilkerson's *Missouri v. Seibert* appellate argument was not preserved for appellate review, the Court of Special Appeals explained that, although defense "counsel did not present this argument as robustly as he does on appeal, . . . we think he sufficiently raised to the court's attention that the questioning before *Miranda* tainted the post-*Miranda* statements." Reaching the *Seibert* issue, the intermediate appellate court held that "there is no evidence to support the contention that *Seibert* was violated."

Wilkerson filed a timely petition for writ of certiorari, which we granted, *Wilkerson v. State*, 417 Md. 384, 10 A.3d 199 (2010), to consider potentially:

I. Whether the trial court erred by not suppressing all of Mr. Wilkerson's statements because the police used a prohibited form of the "two-step" technique to circumvent *Miranda*, thereby tainting the entire interrogation.

II. Whether the deliberateness inquiry under *Missouri v. Seibert* . . . requires only that police admit their deliberate use of the prohibited "two-step" interrogation technique.

III. Whether *Missouri v. Seibert* . . . applies to both exculpatory and inculpatory statements.

IV. Whether the trial court erred by failing to suppress all of Mr. Wilkerson's statements to the police because he neither knowingly nor voluntarily waived his *Miranda* rights.

The State filed a conditional cross-petition for writ of certiorari, which we granted, to consider potentially whether, "Wilkerson fail[ed] to preserve his claim that police officers deliberately used the two-step "question first" interrogation method prohibited by *Missouri v. Seibert*?"

<u>Held:</u> Judgment of the Court of Special Appeals vacated, and case remanded with instructions to remand further to the Circuit Court for Howard County for further proceedings. The Court began by discussing the Supreme Court's decisions in *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), and *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). The Court then took up the State's contention that Wilkerson's *Seibert* claim was not preserved for appellate review.

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On that issue, the State averred that Wilkerson "did not argue that the delay was deliberate, or that it was to avoid the requirements of *Miranda*, or that it was a two-step technique, or that it violated *Seibert*," and that, although arguing that the pre-advisement questioning "tainted" the post-advisement statements, "that term ['taint'] is also used to refer to many other kinds of alleged legal errors." In response, Wilkerson argued that, considering "the context in which defense counsel raised [the] 'taint' —in a hearing in a motion to suppress Mr. Wilkerson's statements made both before and after [a] *Miranda* warning[]," "'taint' could only have referred to a *Seibert* violation."

Although the State would have the Court hold that the *Seibert* issue is not preserved for appellate review, and Wilkerson would have us hold the issue preserved, reach the merits of his *Seibert* claim, find that the police detectives engaged in a deliberate two-step tactic such that certain of his post-advisement statements should have been suppressed, and remand the case to the Circuit Court for a new trial, the Court declined both parties' approaches. That is, the Court found that the issue of whether Wilkerson preserved the *Seibert* issue for appeal was "too close to call." Accordingly, the Court held that the appropriate disposition of the case is a limited remand to the Circuit Court for additional evidence – should the parties choose to introduce it – and argument on a clear *Seibert* challenge and appropriate findings by the trial judge.

The Court emphasized that a limited remand is appropriate "particularly when the purposes of justice will be advanced by permitting further proceedings." Because, the Court elaborated, it was Wilkerson's trial counsel's choice of language that her putative *Seibert* challenge did not register on the State's radar, the State was deprived of the opportunity to lift the yoke of attempting to prove that the delay in advising Wilkerson of his *Miranda* rights was not deliberate and that any question-first or two-step tactics were absent from the interrogation. Given the obscure framing at trial of Wilkerson's supposed *Seibert* challenge and the absence of responsive evidence or arguments, and most importantly the absence of *Seibert* fact-finding by the trial court, the Court held that "the purposes of justice will be advanced by permitting further proceedings."

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Leroy Evans, Jr. v. State of Maryland, No. 72, September Term 2010, Filed June 30, 2011. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/72a10.pdf

CRIMINAL LAW – REGULATED FIREARMS – STATUTORY INTERPRETATION – PENALTY PROVISION

Facts: Leroy Evans, Jr. was indicted and tried before a jury in the Circuit Court for Prince George's County in 2007 on eleven drug and firearm counts, one of which was Count Nine, which charged him with obliterating the manufacturer's mark or number on a firearm in violation of Section 5-142 of the Public Safety Article, Maryland Code (2003). Evans was convicted on Count Nine, and the court sentenced him to a five-year term of incarceration under Section 5-143 of the Public Safety Article, Maryland Code (2003), which provided:

> (a) *Prohibited*. – Except as otherwise provided in this subtitle, a dealer or other person may not knowingly participate in the illegal sale, rental, transfer, purchase, possession, or receipt of a regulated firearm in violation of this subtitle.
> (b) *Penalty*. – A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $10,000 or both.
> (c) *Separate crime*. – Each violation of this section is a separate crime.

The Court of Special Appeals affirmed Evans's sentence, reasoning that Evans had participated in an illegal possession under Section 5-143(a) of the Public Safety Article when he possessed a handgun with an obliterated serial number.

Held: The Court of Appeals reversed. Drawing upon the analysis set forth in *Chen v. State*, 370 Md. 99, 803 A.2d 518 (2002), the Court initially explained that statutory crimes are comprised of both criminalizing content and a related penalty provision, a standard rooted in the fundamental principle that "criminal statutes [must] be sufficiently clear and definite to inform a person of ordinary intelligence what conduct is punishable and what the penalty for such conduct might be *before* the criminal conduct is committed." *Gargliano v. State*, 334 Md. 428, 445, n.16, 639 A.2d 675, 683, n.16. (1994).

After highlighting the various methods the Legislature could use to provide both criminalizing content and a related penalty provision, the Court engaged in a statutory construction analysis, determining that, unlike the provisions dealt with in *Chen*, 370 Md. at 99, 803 A.2d at 518, Section 5-142 of the Public Safety Article had no related penalty provision. Specifically, the Court reasoned that the act of obliterating the manufacturer's identification mark or number on a firearm could not be reconciled with the act of possessing a regulated firearm illegally in a plain language analysis. Examining the lengthy legislative record, the Court determined that Section 5-142 had been inadvertently "orphaned" from its penalty provision in 1996 with the passage of the Maryland Gun Violence Act. The Court went on to explain that it could not correct the legislative oversight itself, even though it appeared to be "the obvious result of inadvertence." *Graves v. State*, 364 Md. 329, 351, 772 A.2d 1225, 1238 (2001). The Court concluded that Section 5-142 contained no penalty provision, had no related penalty, and thus, was not a crime in Maryland.

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Troy A. Jones, Jr. v. State of Maryland, No. 87, September Term 2010, Filed July 6, 2011. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/87a10.pdf

CRIMINAL LAW – REGULATED FIREARMS – ILLEGAL POSSESSION OF A REGULATED FIREARM – STATUTORY INTERPRETATION – PENALTY PROVISION – OUT-OF-STATE CONVICTIONS – ILLEGAL SENTENCE – APPLICATION OF WRONG STATUTORY SECTION

Facts: Troy A. Jones, Jr. was charged in two separate bills of criminal information in the Circuit Court for Baltimore City with a total of seven drug and firearm-related crimes, one of which was Count Five, involving his possession, as a felon, of a handgun in violation of Section 5-133(b) of the Public Safety Article, Maryland Code (2003). After being tried by the court on an agreed statement of facts, the trial judge found Jones guilty on Count Five, ruling that Section 5-133(b)(1) applied to Jones's out-of-state conviction and finding that Jones's "conviction in Virginia" would have "been a felony here in Maryland." Thereafter, the court sentenced Jones to a mandatory minimum five-year term of incarceration without parole under Section 5-133(c) of the Public Safety Article, Maryland Code (2003).

After the Court of Special Appeals affirmed Jones's conviction and sentence for Count Five, but vacated the "no parole" condition of Jones's sentence, the Court of Appeals granted certiorari, *Jones v. State,* 416 Md. 272, 6 A.3d 904 (2010), to consider whether Section 5-133(b) of the Public Safety Article was a crime, whether a prior out-of-state conviction could serve as the predicate conviction under Section 5-133(b), and whether the trial court gave an illegal sentence when it sentenced Jones under Section 5-133(c) of the Public Safety Article.

Held: The Court of Appeals affirmed in part and reversed in part. First, the Court held that Section 5-143 of the Public Safety Article served as the penalty provision for a violation of Section 5-133(b) of that Article. Drawing upon the Court's recent decision in *Evans v. State*, __ Md. __, __ A.3d __ (2011), the Court reiterated that statutory crimes are comprised of both criminalizing content and a related penalty provision. Noting that both Sections 5-143 and 5-133(b) of the Public Safety Article could be reconciled in a plain language analysis, the Court contrasted the case from that of *Evans*, in which the Court reached the opposite conclusion. Specifically, the Court noted that Sections 5-143 and 5-133(b) relate to "regulated firearms" and the act of "possession." The Court confirmed the plain language analysis by exploring the legislative record, concluding that, with the Maryland Gun

Violence Act of 1996, the Legislature “clearly intended to more strenuously penalize the possessory offenses enacted during that session.”

Second, the Court held that an out-of-state conviction could serve as a predicate conviction for the purposes of Section 5-133(b). Specifically, Jones argued that Section 5-101(g)(2), of the Public Safety Article, Maryland Code (2003), which defined “disqualifying crime” as a “violation classified as a felony in the State,” applied only to Maryland convictions. The Court framed its analysis by pointing out that not only do different crime classification schemes exist throughout the states, but that not all states classify crimes using the felony-misdemeanor system. The Court concluded that “the diversity of classification systems necessitates the reference to Maryland’s own felony classification to ensure uniformity of application of the law.”

Finally, although the Court affirmed Jones’s conviction, it held that the trial judge erred in imposing a mandatory five-year sentence without parole under Section 5-133(c), rather than Section 5-143. The Court remanded for a new sentencing.

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Debra Parks v. Alpharma, Inc., et. al., No. 115, September Term 2010. Opinion filed July 19, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/115a10.pdf

EMPLOYMENT LAW – WRONGFUL DISCHARGE – NO CLEAR PUBLIC POLICY MANDATE

Facts: Debra Parks filed a one-count complaint in the Circuit Court for Baltimore City alleging that Alpharma, Inc. had wrongfully discharged her in violation of Maryland public policy after she repeatedly reported her suspicions to her supervisors that Alpharma was marketing a prescription pain medication, Kadian, in violation of state and federal law. In her complaint, Ms. Parks alleged that Alpharma's failure to label Kadian with alcohol and other warnings violated the Maryland Consumer Protection Act, Maryland Code (1975, 2005 Repl. Vol.), Sections 13-101 through 13-501 of the Commercial Law Article, the Federal Trade Commission Act, 15 U.S.C. § 45 (2006), and the Food and Drug Administration's "black box" warning label regulation, 21 C.F.R. § 201.57. Judge Alfred Nance dismissed the complaint for failure to state a claim upon which relief could be granted, and Ms. Parks appealed. Before the Court of Special Appeals could consider the case, the Court of Appeals granted certiorari on its own initiative to consider the propriety of the Circuit Court's dismissal.

Held: The Court of Appeals affirmed. The Court explained the history of the employment at will doctrine, and the many statutory limits to it that had developed since The Great Depression. The Court also discussed its decision in *Adler v. American Standard Corp*., 291 Md. 31, 432 A.2d 464 (1981), the case in which Maryland first recognized the common law tort of wrongful discharge, which, like certain statutory schemes, served as a limit on the employment at will doctrine where an employee's firing violated a clear mandate of public policy. At the outset of its analysis, the Court stated that it has recognized a claim for wrongful discharge where an employee is fired for performing a specific legal duty, refusing to engage in a specific criminal act, or for exercising a specific legal right.

In addition, the Court noted that it has recognized a claim for wrongful discharge where "an employer who deficiently performs a specific legal duty" terminates an employee for "reporting the employer's failure to perform that specific legal duty." Drawing upon its analysis in *Wholey v. Sears*, 370 Md. 38, 803 A.2d 482 (2002), the Court explained that a "whistleblower" claim may exist where an employer violates a mandate of public policy that arises from "clear and articulable principles of law" sufficient that the Court could "be precise about the [mandate's] contours." The Court distinguished its decision in *Lark v. Montgomery Hospice*, 414 Md.

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215, 994 A.2d 968 (2010), which recognized a whistleblower claim premised upon the Health Care Worker Whistleblower Protection Act, Maryland Code (2000), Sections 1-501 through 1-506 of the Health Occupations Article, a statutory scheme which "dictat[ed] the quality of information" a whistleblower's report "must be premised upon and in what way the report must be made."

Turning to Ms. Park's wrongful discharge claim, the Court determined that she had failed to identify a clear mandate of public policy. The Maryland Consumer Protection Act, the Court reasoned, did "not provide the specificity of public policy that [the Court has] required" because the "extent of the public policy mandate contained in the Act . . . undermine[d] its utility in the context of a wrongful discharge claim." Similarly, the Court determined that the Federal Trade Commission Act "[fell] short of providing [an] unmistakably clear mandate of public policy," because "a specific public policy mandate [was] not discernible" from its terms. Lastly, the Court determined that a specific public policy mandate was not discernible from the Food and Drug Administration's black box warning regulation, because the provision left the Court with only its "own discernment to determine whether the behavior Ms. Parks's allege[d] constituted non-compliance by Alpharma," a judgment the Court was required to abjure, "absent a clear, unmistakable signal in the law." Because the Court determined Ms. Parks failed to identify a clear mandate of public policy, the Court affirmed the dismissal of her complaint below.

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Katie McDaniel v. Tom Baranowski, No. 64, Sept. Term 2010. Opinion filed May 4, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/64a10.pdf

REAL PROPERTY - CONSUMER PROTECTION ACT (CPA)

Facts: On March 9, 2009, Katie McDaniel entered into a written lease with Tom Baranowski for the rental of a second-floor apartment in Brooklyn Park, in Anne Arundel County, the tenancy of which commenced a few days later, on March 12, 2009. Although McDaniel was not aware at the time, Baranowski had failed to obtain a license for the "multiple dwelling," defined in Section 15-4-202 of the Anne Arundel County Code (2002, 2009 Supp.), as "a non-owner occupied dwelling containing two or more dwelling units."

In Anne Arundel County, "[a] person may not operate a multiple dwelling . . . without a license issued by the Department [of Inspections and Permits]," and "[a] separate license is required for each multiple dwelling. . . ." A license may not be issued, moreover, "without the approval of a Health Officer," who "shall approve the issuance of a license if an inspection . . . reveals that the multiple dwelling . . . complies with the requirements of [the Anne Arundel County Code]." Those requirements are designed to insure the safety and habitability of the premises, namely that the dwelling is "clean, sanitary, fit for human occupancy, and in compliance with this title and other applicable State and County law."

Although Baranowski had previously secured a license to lease the premises, that license had expired on January 31, 2005. Thereafter, the Anne Arundel County Department of Inspections and Permits Commercial Division contacted Baranowski on multiple occasions, requesting that he renew his license to operate the premises in question. Baranowski finally reapplied for a rental license on May 21, 2009, after he had initiated summary ejectment proceedings against McDaniel.

Before moving into the apartment, McDaniel had paid Baranowski the first month's rent of $650, as well as a security deposit of $650. Upon taking possession, McDaniel discovered various problems involving the fuse box, which was "sizzling and sparking." Although McDaniel did contact Baranowski, who had sent a maintenance person on more than one occasion, the problems with the fuse box persisted, happening "every day, quite a few times" per day, with the power shutting off each time for "one to two minutes." It was not until the weekend of May 22nd when Baranowski hired a professional electrician to repair the problem, that the fuse box was fixed, a week before the trial in the present case commenced. According to McDaniel, other aspects of the apartment also were in disrepair, including two windows that had fallen out of their frames and a faulty kitchen countertop.

The Anne Arundel County Department of Health also conducted an inspection and notified Baranowski of numerous Code violations involving the unit's poor condition. Throughout all of this, McDaniel did not pay any rent, after the $1,300 she had initially paid for the first month's rent and the security deposit. She apparently vacated the apartment on or about June 1, 2009.

On April 16, 2009, Baranowski filed a "Complaint for Repossession of Rented Property under Real Property § 8-401" in the District Court of Maryland, Anne Arundel County, against McDaniel, for failure to pay rent that was due April 12th. McDaniel was present when the case was heard on April 23, 2009, and the District Court judge awarded possession of the premises to Baranowski and entered judgment in the amount of $707.50 in rent and late fees. McDaniel was scheduled to be evicted on May 15, 2009, but was granted an extension to remain on the premises until May 19th. That day, after securing representation from the Legal Aid Bureau, she filed an "Emergency Motion to Stay Eviction and to Revise Judgment, and Request for Rent Escrow," alleging that the District Court had erroneously entered judgment "[b]y consent" when in actuality, McDaniel, who at that time was pro se, had asserted at the hearing that the premises "contained serious and substantial defects" and also had requested "the remedy of rent escrow."

Prior to the filing of the "Emergency Motion to Stay Eviction and to Revise Judgment," Baranowski had filed a second complaint for repossession of the premises against McDaniel on May 13, 2009, for failure to pay rent due May 12th. Through counsel, in response, McDaniel filed a "Notice of Intention to Defend and Counterclaim," in which she alleged that the lease was void or voidable as against public policy, because Baranowski had failed to obtain a license for the premises, as well as that Baranowski had breached the implied warranty of habitability, and violated the Consumer Protection Act; McDaniel also requested a rent escrow. McDaniel sought $1,300 in damages (the amount of her first month's rent and security deposit). She further requested that the District Court abate her rent until Baranowski had made repairs to the premises. McDaniel contemporaneously filed a Motion to Consolidate Baranowski's April and May complaints, which the court granted.

At a hearing on the consolidated cases, the District Court Judge denied McDaniel's Motion to Revise the April judgment, denied her counterclaims, and entered judgment in favor of Baranowski for possession of the property, as well as for May rent with concomitant late fees, determining that Baranowski's failure to obtain a license for the premises did not preclude his summary ejectment action and that McDaniel had failed to prove actual injury under the Consumer Protection Act. The Judge did grant

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McDaniel's motion to stay the eviction until June 1, 2009; McDaniel appealed the various adverse judgments. Thereafter, the Circuit Court affirmed the decision of the District Court regarding back rent and concomitant late fees due Baranowski and also the denial of McDaniel's Consumer Protection Act claim, reasoning that she had failed to present any evidence of "actual injury" as required by the Act.

Held: The Court of Appeals reversed. The Court reasoned that the legal relationship between landlord and tenant is governed by the contract between the parties, as well as any statutory authority. Although Title 8 of the Real Property Article, governing landlord and tenant, does not mention licensure to operate the premises, Section 8-208, governing prohibited lease provisions, expressly states, "No provision of this section shall be deemed to be a bar to the applicability of supplementary rights afforded by any public local law enacted by the General Assembly or any ordinance or local law enacted by any municipality or political subdivision of this State." The Landlord-Tenant Laws Study Commission Meeting Minutes indicate that the Commission envisioned comprehensive habitability codes being enacted by local governments when Section 8-208 was enacted. The licensure requirement in Anne Arundel County, moreover, was already in existence when the Legislature enacted Section 8-208. The Court further noted that in analogous contexts, the failure to obtain a license as required by local ordinance ordinarily renders the contract invalid and unenforceable and concluded that in order to invoke the facile process of summary ejectment, a landlord in those jurisdictions requiring licensure, must affirmatively plead and demonstrate that he is licensed at the time of the filing of the complaint for summary ejectment in order to initiate the summary ejectment process.

Regarding McDaniel's claim for damages under the Consumer Protection Act, the Court determined that McDaniel failed to present any evidence that she sustained any actual damages, such as bills for medical treatment, loss of wages, or the cost of securing suitable substitute housing, for example. As a result, the Court concluded that McDaniel could not recover under the Consumer Protection Act.

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Montgomery County Maryland, et al. v. Edward Shropshire, et al., No. 84, September Term 2010. Opinion filed June 29, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/84a10.pdf

STATE GOVERNMENT - PUBLIC INFORMATION ACT

Facts: In November 2008, Sergeant Edward Shropshire and Captain Willie Parker-Loan responded to an automobile accident involving Montgomery County Assistant Fire Chief Gregory J. DeHaven. A complaint subsequently was filed questioning the officers' conduct during the accident investigation, in which it was alleged that both had violated various administrative rules. At the conclusion of the investigation on May 26, 2009, the Internal Affairs Division (IAD) of the County's police department determined that Sergeant Shropshire and Captain Parker-Loan had committed "no administrative violations."

Before the close of the internal affairs investigation, the Montgomery County Inspector General initiated an investigation into the handling of the accident "to determine whether [the Department's] methods to investigate Gregory J. DeHaven's vehicle accident on November 30, 2008 and any improper actions on the part of those involved in the accident are consistent with generally accepted investigative standards to ensure legal, fiscal, and ethical accountability in Montgomery County government organizations." The Inspector General submitted a request to the Chief Administrative Officer of the County Executive for numerous records involving the investigation.

Before the records were disclosed, Sergeant Shropshire and Captain Parker-Loan filed a complaint in the Circuit Court seeking a declaration prohibiting the custodian of records from releasing the internal investigation records to the Inspector General. The officers alleged that the records were exempt from disclosure, because they were "personnel records" or, alternatively, were "confidential under State law," pursuant to the Maryland Public Information Act. Montgomery County filed a motion for summary judgment, asserting that the internal affairs investigation records were not "personnel records," but rather were "investigatory records," because no evidence of wrongdoing was found by either officer, such that "no documentation ha[d] been placed in [the officers'] personnel files about the investigation." The County further argued that because the Inspector General is charged with preventing and detecting "fraud, waste and abuse in government activities," disclosure of the records was mandated by County law.

Sergeant Shropshire and Captain Parker-Loan responded and also filed a motion for summary judgment, asserting that the internal affairs records in the present case constitute "personnel records" pursuant to Section 10-616(i) of the State Government Article and are, therefore, protected from disclosure. In the alternative, the officers contended that the records were protected from disclosure by Section 10-615(1) of the State Government Article, prohibiting disclosure of those records that are "confidential" by virtue of State law, because "police internal affairs investigative records are confidential under [the Law Enforcement Officers' Bill of Rights]." After a hearing on the parties' cross-motions for summary judgment, the Circuit Court granted the Inspector General access to the disputed internal affairs investigation records, with the exception of "information of a personal nature" unless "directly relevant to the underlying investigation." The Court of Appeals granted certiorari prior to any proceedings in the intermediate appellate court.

Held: The Court of Appeals reversed, reasoning that the phrase "personnel records" in Section 10-616(i) are those records relating to an employee's hiring, discipline, promotion, dismissal, or any matter involving his status as an employee, discussing *Kirwan v. The Diamondback*, 352 Md. 74, 721 A.2d 196 (1998) and *Governor v. Washington Post*, 360 Md. 520, 759 A.2d 249 (2000). The Court determined that the Internal Affairs Division inquiry explored whether Sergeant Shropshire and Captain Parker-Loan had committed administrative violations in connection with the accident investigation involving Assistant Fire Chief Gregory J. DeHaven. Specifically, the internal affairs investigation examined "[a]llegations of administrative misconduct . . . that, if true, would or could result in disciplinary action." As a result, because the internal affairs records involving Sergeant Shropshire and Captain Parker-Loan related to employee discipline, the Court concluded that the records are indeed "personnel records" exempt from disclosure pursuant to Section 10-616(i) of the State Government Article.

Moreover, the Court noted that where, as here, an investigation clears the officers of wrongdoing, there is a significant public interest in maintaining confidentiality, both in fairness to the investigated officers and cooperating witnesses. This policy is embodied in Section 3-104(n) of the Public Safety Article, which states that an investigated officer must "execute a confidentiality agreement" before obtaining a copy of his or her investigatory file at the close of an investigation. As evidenced by the deposition testimony of Internal Affairs Division Chief, Captain David Falcinelli, attached to Sergeant Shropshire and Captain Parker-Loan's motion for summary judgment, "even the best officers could be subject to false or baseless complaints," so that an officer's professional life and reputation are challenged. Finally, records of internal investigations contain significant personal information, such as the investigated officer's name, date of birth, address, social security number, level of education, as well as the complaint, transcripts of witness interviews, and the

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investigator's notes, that if disclosed, could be potentially detrimental to not only the officers, but also the witnesses.

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Milliman, Inc. v. Maryland State Retirement and Pension System, et al., No. 102, September Term 2010. Opinion filed July 20, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/102a10.pdf

STATUTORY - STATE PENSION SYSTEM

Facts: Milliman, Inc. contracted with the State Retirement and Pension System ("the System") beginning in 1982 to provide actuarial valuations for each of the State's retirement and pension systems and continued to serve as actuary by additional contracts effective July 1, 1990, July 1, 1993, and August 5, 1998, to terminate as they did, August 4, 2006. The contracts required Milliman to perform valuations of the various funds, as well as an "annual certification of the employer contribution rate required to fund each retirement system for the coming year." Milliman assured the System that the actuary "subscribe[d] to the concept that the annual actuarial valuations are the cornerstone of all financial planning of a retirement system. As such we take great care in assuring that all technical aspects of the valuation are completed."

In 2004, Milliman discovered a coding error affecting the three retirement systems, in which the actuary failed to include in its calculations benefits payable to surviving spouses of judges and police officers. Thereafter, Milliman reported its discovery of the valuation errors to the System and indicated that liabilities for the three affected systems had been understated by more than $130 million. To provide expert advice concerning the longstanding actuarial error, the System retained the Hay Group, "a global human resource management consulting firm," which examined Milliman's work and determined that "Milliman's errors did result from their failure to apply reasonable standards of care as would have been expected of an actuary at that time."

By formal authorization of its Board of Trustees, the System approved the filing of an administrative claim against Milliman pursuant to Section 15-219.1 of the State Finance and Procurement Article, Maryland Code (2001, 2006 Repl. Vol.). The Retirement System Procurement Officer determined that Milliman had breached its actuarial responsibility, resulting in $73 million in losses to the System, and Milliman appealed to the Board of Contract Appeals. The Board determined that Milliman substantially breached its contracts with the System by failing to exercise reasonable care and diligence in interpreting data in connection with the three affected systems, in contravention of the professional actuarial standard of care. The Board also found that Milliman misinterpreted retirement code "00 " resulting in an understatement of contributions necessary to fund three of the State's ten retirement and pension funds.

Specifically, the Board found that the affected retirement systems were not on track to achieve full funding by the statutory 2020 date, but instead, that "the State Police retirement system was funded at a level of 84% of liability, judges at 74%, and local law enforcement at 60%," so that increased contributions to make up for those deficiencies became necessary. The Board determined that the sum "needed to make [the System] whole from the losses sustained as a result of Milliman's errors," included approximately $34 million in deficient contributions plus $38.8 million in lost interest on those contributions during the twenty-two year period. In so doing, the Board rejected Milliman's argument that the System was not damaged insofar as the taxpayers would fund any deficiency, because that "perspective subvert[ed] the entire function and purpose of actuarial analysis." The Board also concluded that, because the State was not a party to the proceeding, Milliman's contention that any losses sustained by the System as a result of Milliman's calculation errors must be offset by assets that purportedly remained in the State's General Fund, was without merit. Finally, the Board concluded that the System was not contributorily negligent, because it was ultimately Milliman's professional obligation to "understand the data" and seek clarification from the System. After Milliman sought judicial review in the Circuit Court for Baltimore City, the judge affirmed the Board's decision involving Milliman's breach, but determined that the Board erred in calculating damages to include both lost contributions and lost interest on those contributions. The Circuit Court awarded damages to the System for lost interest earnings on the lost contributions only.

Held: The Court of Appeals vacated the judgment of the Circuit Court and remanded the case to that court with directions to affirm the decision of the State Board of Contract Appeals. The Court determined that there was substantial evidence upon which the Board relied to support its finding that the System had suffered losses totaling $73 million and that the affected systems were thereby underfunded as a result of Milliman's coding errors. The Court reasoned that but for Milliman's miscalculations, the three affected systems would have been more robust, despite Milliman's argument that the System had met statutorily set funding goals.

The Court rejected Milliman's argument that the State and the System are the same entity, such that any award of damages "must reflect that the State always retained the use and benefit of contributions not made to the System," reasoning that the State was not a party before the Court of Appeals, nor before the Board of Contract Appeals, which noted the absence of the State as a party. The Court also rejected Milliman's alternative argument, namely that if the State and the System are regarded as distinct bodies, then the System has failed to prove damages because the State is obligated to "pay the accrued unfunded liability relating to the

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coding issue over a period of years." The Court noted that the State's General Fund is not "just a pot in which the System may dip" and that the State and the System are distinct entities for the purpose of calculating damages as both lost contributions and lost interest earnings on those contributions due the System as a result of Milliman's contractual breaches. Finally, the Court reasoned that the System was not contributorily negligent in providing the code to Milliman, given Milliman's professional obligation to review and interpret the data.

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Jerry P. Hansen v. City of Laurel, Maryland, No. 78, September Term 2010, filed 15 July 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/78a10.pdf

TORTS - LOCAL GOVERNMENT TORT CLAIMS ACT - COMPLAINT AND PLEADINGS - CONDITIONS PRECEDENT - AS A CONDITION PRECEDENT TO THE RIGHT TO MAINTAIN AN ACTION AGAINST A LOCAL GOVERNMENT OR ITS EMPLOYEES, FULFILLMENT OF THE NOTICE PROVISION OF THE LOCAL GOVERNMENT TORT CLAIMS ACT, MARYLAND CODE (1874, 2006 REPL. VOL.), COURTS & JUDICIAL PROCEEDINGS ARTICLE, § 5-304, MUST BE PLEAD AFFIRMATIVELY BY A PUTATIVE PLAINTIFF IN HIS/HER COMPLAINT.

Facts: Jerry Hansen ("Hansen"), served as the City of Laurel's ("City") "Chief Building Official" for seventeen years before his employment was terminated by the City in 2007. After exhausting all administrative remedies, Hansen received a Notice of Right to Sue letter from the Baltimore District Office of the Equal Employment Opportunity Commission.

He filed suit against the City in the Circuit Court for Prince George's County on 26 September 2008, advancing theories of recovery based on age and disability discrimination under state and local laws prohibiting the same. Section 5-304 of the Local Government Tort Claims Act ("LGTCA") requires such a plaintiff bringing an action in Prince George's County to provide notice to "the county solicitor or county 'attorney'". Maryland Code (1974, 2006 Repl. Vol.), Courts and Judicial Proceedings Article ("CJ"), § 5-304. On 26 February 2009, the City filed a motion to dismiss for failure to state a claim upon which relief can be granted. The City argued that Hansen "ha[d] not alleged that he satisfied the notice requirements of the [LGTCA], and indeed as far as [the City] [was] aware, he did not." *Hansen v. City of Laurel*, 193 Md. App. 80, 85, 996 A.2d 882, 885 (2010).

Rather than address the alleged deficiencies in his complaint, Hansen appended to his 5 March 2009 opposition to the City's motion to dismiss several documents averring facts not included in his complaint. Those documents "showed that Hansen had notified the City Administrator of his claim within the 180-day window." *Hansen*, 193 Md. App at 86, 996 A.2d at 886. These documents did not discuss, explicitly or implicitly, the LGTCA. The City argued that Hansen did not plead expressly in his complaint satisfaction of the LGTCA notice provision, which it claimed was fatal to his action. The Circuit Court granted the motion to dismiss on 13 April 2009.

The Court of Special Appeals affirmed the dismissal. The intermediate appellate court centered its analysis on the notice provisions in the LGTCA, concluding Hansen did not comply strictly with the LGTCA because he delivered his notice to the City

Administrator, not to the County Attorney of Prince George's County. That court also rejected the argument that Hansen complied substantially with the LGTCA because the City Administrator was a "position that is not charged with investigating tort claims against the city."

Hansen filed timely a Petition for Writ of Certiorari, which we granted, *Hansen v. Laurel*, 415 Md. 607, 4 A.3d 512 (2010), to consider potentially whether "the lower court erred as a matter of law in holding a city administrator is not a proper recipient or 'corporate authority of the defending local government' pursuant to CJ § 5-304(c)(4)."

Held: Affirmed. The Court reasoned that deciding the case on compliance (strict or substantial) with the applicable notice provision would be injudicious on the particular circumstances of this case. Rather, the Court held that Hansen's failure to plead in his complaint satisfaction of the notice provisions in the LGTCA was fatal to his action. The requirement to plead affirmatively satisfaction of the notice requirement constitutes a condition precedent to suit because "[t]he way in which a plaintiff may bring a claim is connected fundamentally to the type of claims that a plaintiff may bring, such that whatever restrictions the General Assembly imposes should be deemed 'conditions precedent.'" The Court reiterated that conditions precedent to a cause of action must be pleaded affirmatively, stating, "Maryland rules and decisions reach somewhat of a compromise - plaintiffs must allege the performance of conditions precedent, but they may do so generally." Hansen's failure to plead satisfaction of the notice requirement of the LGTCA, which constitute a condition precedent, was therefore fatal to his action. Although he had opportunities to amend his complaint in the Circuit Court to plead the condition precedent, he exhibited no initiative to do so. Accordingly, it was dismissed properly.

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COURT OF SPECIAL APPEALS

Adam O'Brien, et al. v. Board of License Commissioners for Washington County, Case No. 2081, Sept. Term 2009, filed July 5, 2011. Opinion by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/2081s09.pdf

ADMINISTRATIVE LAW - APPEAL AND ERROR - MANDAMUS - ALCOHOLIC BEVERAGES

Facts: Sharon and Michael Turner, owners of Chasers Bar and Grill in Hagerstown, sold their business to Adam and Christine O'Brien ("O'Brien"). O'Brien set up a limited liability company to operate an establishment known as DeCourcy's Pub at that location. In order to transfer the liquor license from the Turners to O'Brien, O'Brien had to name Sharon Turner as a "resident agent" with a one percent interest in DeCourcy's Pub, LLC because he did not meet the residency requirement under the rules of the Board of License Commissioners for the County. Thus, Turner's name was also on the liquor license. The landlord for the property agreed to allow the Turners to sublease to O'Brien. The Board approved O'Brien's application for a transfer of the license. Once DeCourcy's Pub opened, neighbors complained about the noise it generated. O'Brien decided to try to move the business to a new location, but plans were stalled, in part because he was under financial stress. He had not paid rent, taxes, or insurance for the property. Before O'Brien was able to move the business to a new location, DeCourcy's Pub closed and the Board took away its liquor license. Turner changed the locks on the property, and asserted that because O'Brien defaulted on the sublease, the business belonged to the Turners. O'Brien wanted to have the license transferred, and the Board told him he could apply for a transfer, but that before it could be approved, Turner would be able to assert her "full legal rights." O'Brien claimed he delivered a transfer application to the Board, but the Board asserted that it did not receive the application. The license was set to expire, and the Board informed O'Brien that before it could consider a transfer application, he would have to renew the license. Turner refused to sign the renewal application for the license because O'Brien owed her money. The license expired before O'Brien submitted a renewal application.

O'Brien and DeCourcy's Pub LLC filed suit against the Board in the Circuit Court for Washington County. The *pro se* action was labeled both a "Petition for Judicial Review" at the top of the page and a "Petition of Writ of Administrative Mandamus" at the bottom. O'Brien moved for summary judgement and the Board orally moved to dismiss at a September 25, 2009 hearing. The circuit court denied the petition for administrative mandamus, concluding that the Board "never issued a final order denying renewal of the license," so the petition for administrative mandamus was "premature in that the issues involved have never been resolved." Subsequently, O'Brien filed a motion to alter or amend, which was denied. This appeal followed. The Board moved to dismiss the appeal.

Held: The Court of Special Appeals affirmed the circuit court's judgment. The Court denied the motion to dismiss the appeal because it was based on reasons that spilled over into the merits or could have been grounds to affirm or were minor procedural objections.

On the merits, O'Brien's argument that the Board refused to approve the transfer of his license fails because his petition for judicial review was untimely. Because a statute authorizes judicial review, Md. Code (1957, 2005 Repl. Vol.), Art. 2B, § 16-101(g) of Art. 2B, administrative mandamus is not available on this issue. If O'Brien had timely filed a petition for judicial review, it would have been available to review the refusal. In this case, the appellants' filing was untimely.

Also rejected is O'Brien's contention that the Board erred in not *considering* his transfer application. O'Brien is not entitled to traditional mandamus relief because Board rules and statutory provisions would not have required the Board to consider and rule on O'Brien's transfer application before his license expired. Even if he did submit his transfer application when he claims he did, O'Brien still would have not met the requirements on time. He did not schedule the required in-person presentation hearing before the Board, and he failed to renew his license before requesting the transfer. Also, the Board was not under a clear legal duty to consider or approve the transfer because O'Brien had not satisfied his debts and obligations with his creditors as required by Board rules. The Court concluded that O'Brien had not shown that he was entitled to a mandamus to require the Board to consider his transfer application prior to its expiration.

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Maryland State Board of Dental Examiners v. Deborah K. Tabb, No. 2463, September Term, 2008, filed June 30, 2011. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2011/2463s08.pdf

ADMINISTRATIVE LAW AND PROCEDURE – COMAR REGULATION GOVERNING DISCOVERY PROCEDURES IN DISCIPLINARY ACTIONS BROUGHT BY THE MARYLAND STATE BOARD OF DENTAL EXAMINERS MUST BE READ IN HARMONY WITH COMAR REGULATION SETTING FORTH THE POWERS AND DUTIES OF ADMINISTRATIVE LAW JUDGES – AGENCY CANNOT DETERMINE VIOLATIONS OF STATUTE, REGULATIONS, OR ETHICAL CODE BASED SIMPLY ON ITS OWN TECHNICAL COMPETENCE AND SPECIALIZED KNOWLEDGE

Facts: Upon receiving allegations against appellee, Deborah K. Tabb, DDS, of incompetent dental treatment, unnecessary dental procedures, and failure to secure informed consent, appellant, the Maryland State Board of Dental Examiners ("the Board"), charged appellee with violating Maryland Code (1981, 2005 Repl. Vol.), §§ 4-315(a)(3), (6), (16), (18), and (22) of the Health Occupations Article ("H.O."), COMAR 10.44.23.02, and § 5B of the American Dental Association's Principles of Ethics and Code of Professional Conduct ("ADA Code of Conduct").

Appellee provided a pre-hearing conference statement to the prosecutor and filed it with the Office of Administrative Hearings. Included in appellee's statement were the names of two expert witnesses whom appellee intended to call at the hearing, as well as a summary of their expected testimony. Thereafter, the prosecutor filed a motion to exclude appellee's expert's testimony, asserting that appellee's expert witness summaries did not comply with COMAR 10.44.07.08.

In a pre-hearing order, the Administrative Law Judge ("ALJ") struck appellee's expert witness summaries and ordered that appellee's experts could not testify at the hearing, because the expert witness summaries were insufficient and appellee failed to meet the discovery deadline set forth in COMAR 10.44.07.08B. The ALJ stated that he was bound by the mandatory language of COMAR 10.44.07.08B and thus did not have discretion to allow appellee to file supplemental expert reports or to modify the deadline for filing expert witness reports.

Following a hearing, the ALJ found that appellee violated H.O. §§ 4-315(a)(6), (16), (18), and ADA Code of Conduct § 5B, but did not violate H.O. §§ 4-315(a)(3), (22), and COMAR 10.44.23.02. The Board, however, upheld all of the charges brought against appellee and ordered, among other things, that appellee be reprimanded and placed on eighteen months' probation.

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The circuit court, on judicial review, reversed the Board's decision and remanded for a new hearing before the ALJ to determine whether appellee had violated H.O. §§ 4-315(a)(6), (16), (18), and the ADA Code of Conduct § 5B. The circuit court held that the ALJ erroneously concluded that appellee's written expert witness reports did not comply with COMAR 10.44.07.08B(1)(b). The court also noted that the ALJ improperly refused to grant appellee additional time to present a supplemental report. The court concluded that the ALJ's exclusion of appellee's expert witness testimony constituted a prejudicial error of law.

Additionally, the circuit court determined that the Board erred in failing to state the facts upon which it relied in making its decision and that the ALJ's factual findings, which the Board expressly adopted, did not support its conclusion that appellee violated H.O. § 4-315(a)(3), (22), and COMAR 10.44.23.02.

Held: Affirmed. First, the Court of Special Appeals upheld the circuit court's determination that the violations of H.O. §§ 4-315(a)(6), (16), (18), and ADA Code of Conduct § 5B, found by both the ALJ and the Board, must be vacated and remanded for a new hearing. The Court explained that COMAR 10.44.07.08B must be read in harmony with COMAR 28.02.01, which provides, *inter alia*, that the ALJ can grant a continuance or postponement (COMAR 28.02.01.11B(7)), modify or waive any time periods established by this chapter (COMAR 28.02.01.11B(8)), or conduct the hearing in a manner suited to ascertain the facts (COMAR 28.02.01.11B(12)). Accordingly, the Court concluded that the ALJ's determination that he did not have discretion to grant appellee's request to modify the deadline in order to allow for the filing of supplemental expert reports was an error of law.

The Court also held that the ALJ's action was arbitrary and capricious, because the ALJ never explained why appellee's expert witness summaries did not satisfy the requirements of the regulations, and the ALJ never addressed an undisputed agreement between the prosecutor and appellee's counsel allowing appellee to file supplemental witness reports after the deadline.

Second, the Court held that there was insufficient evidence to support the Board's decision that appellee violated H.O. §§ 4-315(a)(3), (22), and COMAR 10.44.23.02. The Court observed that the Board, in its final order, expressly adopted the ALJ's findings of fact. It was upon these findings of fact that the ALJ determined that appellee did not violate H.O. §§ 4-315(a)(3), (22), and COMAR 10.44.23.02. In the Court's view, those findings of fact supported the ALJ's determination that appellee did *not* violate the aforesaid regulations. The Board, however, made no additional findings of fact. The Board summarily relied on "its experience, technical competence, and specialized knowledge [] to draw its own

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conclusions from the record" in formulating its final order. Without the finding of additional facts by the Board and the presentation of sufficient rationale to support its decision, the Court concluded that the Board's order was not sustainable on the agency's findings and for the reasons stated by the agency.

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Department of Human Resources, Allegany County Department of Social Services v. Johnette Cosby, No. 256, September Term, 2010, filed July 11, 2011. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2011/256s10.pdf

ADMINISTRATIVE LAW AND PROCEDURE – FINDING OF INDICATED CHILD NEGLECT – PRIOR DETERMINATION OF CINA – APPLICATION OF DOCTRINE OF COLLATERAL ESTOPPEL

Facts: The Allegany Department of Social Services ("the Department") made a finding of indicated child neglect against Johnette Cosby regarding her 17-year-old son, Michael. Cosby challenged the Department's finding by requesting a hearing before the Office of Administrative Hearings ("OAH") under section 5-706.1 of the Family Law Article ("F.L."). However, in a prior CINA proceeding, in which Cosby was a party, the circuit court found that Michael had been neglected by Cosby. Cosby did not appeal that determination.

In the administrative hearing, the Department moved to dismiss Cosby's challenge on the grounds of collateral estoppel. The ALJ agreed and dismissed the case, but the circuit court reversed.

Held: Reversed. On appeal, Cosby conceded that, if the doctrine of collateral estoppel applied, she would be precluded from contesting the Department's finding of indicated child neglect. Nevertheless, Cosby argued that the 1995 amendment to F.L. § 5-706.1 removed collateral estoppel as a defense in Section 5-706.1 hearings. After a review of the legislative history of F.L. § 5-706.1, the Court of Special Appeals determined that the General Assembly did not intend to prohibit the Department from raising the defense of collateral estoppel or to prevent the OAH from dismissing an individual's appeal because the appeal was precluded under the doctrine of collateral estoppel.

The Court also rejected Cosby's argument that the Court of Appeals' decision in *Tamara A. v. Montgomery County Dep't of HHS*, 407 Md. 180 (2009) "leans against collateral estoppel." The Court of Special Appeals stated that the Court of Appeals' determination that F.L. § 5-706.1 "does not necessarily preclude a collateral estoppel defense in a proper case," 407 Md. at 194, corresponded with its conclusion that the application of the doctrine of collateral estoppel to a F.L. § 5-706.1 hearing is neither prohibited by nor inconsistent with the statute's language and legislative history.

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Bagada Dionas v. State of Maryland, No. 1742, September Term, 2009, Opinion filed July 1, 2011 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/1742s09.pdf

CRMINAL LAW - CROSS-EXAMINATION - EXPECTATION OF LENIENCY - HARMLESS ERROR - JUROR COMMUNICATIONS WITH THIRD PARTIES - JUROR MISCONDUCT - PRESERVATION - MERGER - SECOND DEGREE MURDER - CONSPIRACY - JURY INSTRUCTIONS - UNNECESSARY JURY INSTRUCTIONS

Facts: On the evening of July 15, 2007, Maurice White and Wayne White were shot and killed in a field near Wayne's apartment building on Radecke Avenue in Baltimore, Maryland. Witnesses testified that appellant shot Maurice in the head, and he then began shooting at the car that Wayne's girlfriend, Tajah Flemming, was driving with their eight-month-old son in the backseat. Sean White, who had been standing near the driver's side door of his car, which was parked near Ms. Flemming's car, jumped into Ms. Flemming's passenger seat. As appellant continued shooting at Ms. Flemming's car, Wayne began running toward the car, shouting for appellant to stop shooting because Wayne's son was in the car. Appellant shot Wayne in the leg, and another shooter, later identified as Charlie Stevenson, came from the back of a building and shot Wayne several times.

At trial, appellant sought to cross-examine Sean about any expectation of leniency regarding a violation of probation (VOP) charge. The trial judge prohibited this cross-examination because the VOP judge did not tell Sean "directly or indirectly that he had to testify one way or another."

On the sixth day of deliberations, after multiple juror notes, the jury reached a verdict. It convicted appellant of the following charges: (1) two counts of second degree murder; (2) three counts of first degree assault; (3) one count of use of a handgun in a felony or crime of violence; (4) five counts of openly carrying a dangerous weapon; and (5) two counts of conspiracy to commit first degree murder. On September 21, 2009, the circuit court imposed a sentence of life plus 170 years. Appellant appealed.

Held: Affirmed. The trial court erroneously precluded the cross-examination of a State witness regarding whether he had any expectation of leniency in an unrelated violation of probation ("VOP") proceeding based on his testimony in appellant's case. Given that the witness's VOP hearing had been postponed for him to "complete cooperation" in appellant's case, and that the VOP judge had granted bail pending the hearing and stated that the parties would bring to her attention at the sentencing hearing his participation as a witness in appellant's case, there was a sufficient factual foundation to support the requested cross-examination. The trial court erred in finding otherwise and in restricting cross-examination.

The trial court's error, however, was harmless, and it does not require reversal of appellant's convictions. The State's case against appellant was strong, and Sean's identification of appellant, albeit important, was cumulative to the testimony of other witnesses identifying appellant as the shooter. Appellant was given ample opportunity to cross-examine Sean, other than regarding the VOP proceedings, and the impact of that cross-examination would have been minimal under the circumstances of this case.

Although the jury deliberated for a lengthy period of time, it was in the context of a trial that spanned four days and involved 33 different counts, involving different legal theories. During the deliberation period, the jury sent out multiple notes, asking for definitions of the different offenses, clarification regarding the elements of a crime, and information about specific evidence that was introduced. Under these circumstances, the length of deliberations reflects a conscientious attempt to reach a reasonable decision, and it does not weigh against a finding of harmless error.

The trial court did not err in denying appellant's request for a mistrial without conducting a voir dire of the juror who informed the court that he had been approached by a third party who inquired whether the jury had reached a verdict. Questioning of the juror was not mandatory when the juror did not engage in egregious conduct, and the court was clearly advised of the nature of the contact, which was brief and incidental.

Separate sentences for convictions for second degree murder and conspiracy to commit murder were appropriate. Convictions for a completed offense and a conspiracy to commit that offense do not merge under the required evidence test or the rule of lenity, nor do the sentences merge under the doctrine of fundamental fairness.

Appellant's challenge to the trial court's jury instructions, which he alleges erroneously discussed the "kill zone" and transferred intent, were not preserved where the argument was not raised below. This Court declines to exercise plain error review where appellant did not attempt to show how the instruction, even if erroneous, affected the outcome of the proceedings to his detriment. The instructions at issue were given with respect to the charges of attempted first degree murder, attempted second degree murder, and first degree murder, charges on which appellant was found not guilty.

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Eric Espinosa v. State of Maryland, No. 888, September Term, 2010, filed on April 5, 2011. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2011/888s10.pdf

CRIMINAL LAW - DIRECT CRIMINAL CONTEMPT

Facts: Eric Espinosa, appellant, acts as executive director for National Institute of Vehicle Dynamics (‘NIVD’). In an effort to expand its operations into Montgomery County, NIVD entered into a commercial lease with Loflane Joint Venture (‘Loflane’) with the intention of using the leased space as its headquarters and as a training site. In its suit, Loflane alleged that NIVD neglected its obligation to pay rents under the terms of the lease as it had vacated the leased premises and owed back-rent, late charges, and other fees.

NIVD and appellant defended the suit, and counter-claimed, by contending that NIVD had been constructively evicted from the leased premises due to the presence of leaking water and other contaminating substances entering NIVD’s premises.

During a civil jury trial, the Circuit Court for Montgomery County found that appellant’s action during trial interrupted the order of the court and interfered with the dignified conduct of its business. The lower court found appellant in direct criminal contempt, and summarily sanctioned him to 10 days incarceration. The basis for the finding was that appellant lied under oath, providing false testimony during trial. In making that conclusion, the lower court relied, in part, on sworn statements in discovery materials that were used to cross-examine appellant during the trial. Appellant admitted some of his statements were untrue. The lower court denied appellant’s petition to reconsider the finding of criminal contempt.

Held: Reversed. The lower court did not err in considering the sworn statements made by appellant in discovery because the statements were used to cross-examine appellant, and appellant admitted some of his statements were not true. Nevertheless, summary proceedings were not warranted because appellant’s conduct did not prevent the civil trial from proceeding to verdict. Thus, the lower court was required to follow the procedures in either Rule 15-205 or Rule 15-204.

Here, the lower court found that the offending conduct resulting in direct contempt was the making of false statements in affidavits and depositions pre-trial and giving false testimony during trial. Clearly, the false testimony in court, before the trial judge, satisfies the judge’s personal knowledge requirement as to that conduct. The question becomes, however, whether the lower court's consideration of appellant's pre-trial lies violated the personal knowledge requirement. The Court concluded that it does not. Of importance, the pre-trial testimony was used extensively during the trial, on cross-examination, for impeachment purposes or otherwise; thus, providing the lower court with personal knowledge of the relevant facts. Moreover, prior to trial, the lower court also considered the affidavits and deposition when it considered Loflane's renewed motion for summary judgment. Therefore, the Court concluded that the lower court did not rely on extrinsic evidence.

With respect to whether summary proceedings were warranted, the Court concluded that they were not. During a jury trial, appellant admitted he lied during the course of his testimony. The lie was to benefit himself in the outcome of the civil proceeding. Appellant was not disruptive or disrespectful and engaged in no conduct which interfered with the orderly handling of the civil proceeding. The necessity for immediate action was in the handling of the civil proceeding, which was still pending, and the lower court addressed that by imposing sanctions on appellant in that proceeding. The conduct of the civil proceeding to a conclusion was not disrupted. While appellant's conduct was reprehensible, there was no need to proceed in a summary fashion under the direct criminal contempt Rule. Needless to say, the same is true with respect to the denial of the summary judgment motion, which occurred prior to trial. The lower court could have just as effectively proceeded under Maryland Rules 15-204 and 15-205. The extraordinary summary procedure of direct criminal contempt should be used only when necessary to punish someone who, at the time of the finding, is interfering with the orderly conduct of the court's business. Appellant's conduct did not meet the requirement in Rule 15-203 (a)(2), and therefore, the Court reversed.

While the Court agrees that under certain 'special' circumstances perjury may be a basis for contempt, Maryland Rule 15-203, the perjury has to be clear and, for direct criminal contempt, there must be some immediate obstruction to the court in the performance of its duty. The Court concluded that something more than a finding that the contemnor has lied during the course of adversarial proceedings is necessary for criminal contempt because the very 'fact-finding' nature of court proceedings is to resolve differences in testimony, and judge the credibility of the witnesses. As to the <u>direct</u> criminal contempt procedure, there is no need to employ it, absent an immediate obstruction.

In light of the conclusion with respect to the impropriety of imposing summary sanctions in this case, the Court need not address appellant's contentions with respect to violations of due process and right to counsel.

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With respect to appellant's contention that the evidence was not legally sufficient to find the requisite mens rea beyond a reasonable doubt, the Court concluded that the evidence was legally sufficient to permit a finding of contumacious intent, based on appellant's own admissions and sworn documents. The circumstances here were unusual and sufficient in that the nature and extent of the lying, as found by the lower court, was so extensive and pervasive that it could constitute the basis for a contempt finding.

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John Wayne McLaughlin-Cox v. Maryland Parole Commission, No. 1093, Sept. Term 2010, filed July 11, 2011. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/1093s10.pdf

CRIMINAL LAW - DUE PROCESS – LIBERTY INTEREST – PAROLE – CORRECTIONAL SERVICES ARTICLE § 7-305 – CORRECTIONAL SERVICES ARTICLE § 7-307

Facts: On January 12, 1988, appellant pleaded guilty to two counts of second degree murder, and was sentenced to thirty years of confinement for each count, to run consecutively. After appellant's first parole hearing on July 17, 2002, the Maryland Parole Commission ("MPC") provided appellant a copy of its "Parole Recommendation/Decision" form with no explanation of its ruling. Nearly ten months after its decision, the MPC sent appellant a memorandum explaining its decision. Appellant petitioned the Circuit Court for Washington County for a writ of *mandamus* directing the MPC to convene a new parole hearing. The circuit court heard the matter on June 18, 2010, and issued a memorandum opinion and order on July 2, 2010, denying the writ.

Held: The Court of Special Appeals affirmed. Section 7-305 of the Correctional Services Article does not contain specific directives that if certain substantive predicates are present, a particular outcome must follow. Therefore, a Maryland prisoner does not have a liberty interest in parole protected by the due process clause of the Fifth Amendment to the United States Constitution, as applied to Maryland by the Fourteenth Amendment.

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Gregory Williams v. State of Maryland, Case No. 924, September Term 2010, filed July 11, 2011, Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2011/924s10.pdf

CRIMINAL LAW AND PROCEDURE - JURY INSTRUCTIONS - PARTICULAR INSTRUCTIONS - LESSER INCLUDED OFFENSES - FLEEING AND ELUDING - ELEMENTS

Facts: A jury in the Circuit Court for Montgomery County convicted Gregory Williams of possession of cocaine, and fleeing and eluding. See Md. Code § 5-601 of the Criminal Law Article ("C.L.") (possessing or administering controlled dangerous substance); Md. Code § 21-904(c) of the Transportation Article ("T.A.") (fleeing on foot). On May 18, 2010, the circuit court sentenced Williams to four years' incarceration with all but eighteen months suspended and three years' supervised probation as to possession of cocaine, and one year concurrent as to fleeing and eluding.

The acts for which Williams was convicted consisted of his involvement in a drug transaction occurring in his vehicle in a gas station convenience store parking lot. At trial, the State put forth evidence that Williams sold cocaine to another individual, while Williams maintained that he was a potential buyer, rather than a seller of cocaine. After the transaction, a police officer pursued Williams' vehicle and activated the sirens and flashing lights in the officer's unmarked vehicle to signal a stop. Williams' vehicle accelerated before crashing, at which point, Williams exited the vehicle and ran, with the police officer chasing on foot. Williams was detected hiding in a wooded area by a police canine unit and was subsequently arrested.

At trial, at the conclusion of the evidence, the trial judge informed counsel that she intended to instruct the jury on the lesser included charge of possession of cocaine; the prosecutor expressed agreement, and the judge so instructed the jury. During deliberations, the jury submitted notes inquiring as to whether a potential buyer of cocaine who does not consummate the transaction could be convicted of possession of cocaine.

Williams contended, on appeal, that the trial court erred in determining possession of a controlled dangerous substance to be a lesser included offense of distribution of a controlled dangerous substance, and instructing the jury as such, where the defense theory of the case was that Williams was a potential buyer of cocaine. Williams argued that the trial court erred in deciding, on its own initiative, without request by either party, to instruct the jury on the lesser included offense of possession of a controlled dangerous substance. Williams contended, on appeal,

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that the evidence was insufficient to support a conviction for fleeing and eluding in violation of T.A. § 21-904(c) because the police vehicle in question was an unmarked vehicle.

Held: The Court of Special Appeals affirmed Williams' conviction for possession of cocaine, in violation of C.L. § 5-601, and reversed Williams' conviction for fleeing and eluding, in violation of T.A. § 21-904(c).

A defendant charged with a greater offense can be convicted of an uncharged lesser included offense. Possession of a controlled dangerous substance is a lesser included offense of distribution of a controlled dangerous substance because every element of the crime of possession is also an element of the offense of distribution.

Notes from a jury indicating that the jury considered the defense theory of the case, that Williams was merely a potential buyer of cocaine, do not constitute a basis for concluding that the trial court erred in instructing the jury on the lesser included offense of possession of a controlled dangerous substance where the evidence adduced by the State at trial was sufficient to generate the instruction on possession of a controlled dangerous substance.

Where the trial court *sua sponte* proposes to instruct the jury on an uncharged lesser included offense, and one party affirmatively agrees that the instruction should be given, the trial court does not err in giving the instruction.

Statutory construction is a question of law which a court resolves *de novo*. Statutes are construed so as to avoid rendering any word superfluous or meaningless. T.A. § 21-904(c) provides as follows:

> (c) Fleeing on foot.-- If a police officer gives a visual or audible signal to stop and the police officer, whether or not in uniform, is in a vehicle appropriately marked as an official police vehicle, a driver of a vehicle may not attempt to elude the police officer by:
>
> (1) Willfully failing to stop the driver's vehicle;
> (2) Fleeing on foot; or
> (3) Any other means.

T.A. § 21-904(c) requires that the visual or audible signal to stop come from a police officer in a vehicle "appropriately marked as an official police vehicle." T.A. § 21-904(c) does not define the phrase "appropriately marked as an official police vehicle."

To be appropriately marked for purposes of T.A. § 21-904(c), a vehicle must bear a marking, symbol or insignia that identifies the vehicle as an official police vehicle. The activation of lights and sirens affixed to an unmarked police vehicle does not

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satisfy the statutory requirement that the vehicle be appropriately marked as an official police vehicle.

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In re: Matthew S., No. 1184, September Term, 2009. Opinion filed on July 1, 2011 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/1184s09.pdf

CRIMINAL LAW - JUVENILE - EXTRAJUDICIAL YEARBOOK IDENTIFICATION - DISCLOSURE OF IMMUNITY - *BRADY* VIOLATION - NONHEARSAY - HARMLESS ERROR - CUMULATIVE EVIDENCE

Facts: On September 30, 2008, Officer Scott Feldman observed appellant engage in what appeared to be a drug transaction. Officer Feldman subsequently received from Kaan D., the individual who purchased marijuana from appellant, information that appellant's name was "Matt S." and he attended Quince Orchard High School. Officer Feldman identified appellant by looking up a photograph of "Matt S." in a Quince Orchard High School yearbook.

On April 16, 2009, the Circuit Court for Montgomery County, sitting as a juvenile court, held an adjudicatory hearing. That morning, the State advised the court that it had reached an agreement with Kaan the previous day, whereby Kaan was granted immunity in exchange for his testimony. Appellant moved to exclude Kaan's testimony, or alternatively, he requested a continuance, on the ground that the State provided him insufficient notice regarding its agreement with Kaan. The court denied appellant's requests.

During the trial, Officer Feldman testified regarding his out-of-court identification of appellant using the yearbook. Appellant moved to suppress Office Feldman's identification on the ground that it was impermissibly suggestive. The court denied appellant's motion.

Throughout the trial, several officers testified regarding what individuals told them during their investigation of appellant. In the two instances that appellant objected, the court overruled the objection on the ground that the testimony was nonhearsay.

Held: Judgments affirmed. Principles of due process protect those accused of criminal acts against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. Courts engage in a two-step inquiry in evaluating due process challenges to identification procedures alleged to be unduly suggestive. In the first step, the accused bears the initial burden of showing that the procedure employed to obtain the identification was unduly suggestive. If the accused meets this burden, we proceed to the second step, where we determine whether, based on the totality of the circumstances, the identification was reliable despite the suggestiveness of the confrontation procedure.

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There is support for the argument that a pre-trial identification procedure, which involves showing a witness a yearbook photograph including the defendant's name as a caption, is impermissibly suggestive if the witness previously has been advised of the suspect's name. In this case, however, the identification was made, not by a lay witness, but by a trained police officer who was conducting his own investigation in the case. Officer Feldman's extrajudicial identification from the yearbook merely sought to confirm the information he had gathered through his investigation. Accordingly, there was no impermissible suggestiveness in the identification, and the juvenile court did not err in denying appellant's motion to suppress. In any event, even if the procedure used to make the yearbook identification was unduly suggestive, the identification was admissible because, under the totality of the circumstances, it was reliable.

Where the prosecutor disclosed an immunity agreement with a witness the morning of the adjudicatory hearing, there was no violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence known to the defendant or his counsel that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*.

The juvenile court properly admitted police testimony regarding what individuals told them during their investigation. To the extent preserved, the testimony was nonhearsay evidence that explained the course of the investigation that led to appellant. In any event, even if error, the admission of the testimony was harmless because it was cumulative to evidence already admitted without objection.

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Robert E. Gertz v. Maryland Department of the Environment, No. 1090, September Term, 2009. Opinion filed on July 1, 2011 by Kenney, J. (retired, specially assigned).

http://mdcourts.gov/opinions/cosa/2011/1090s09.pdf

ENVIRONMENT - CIVIL CONTEMPT - MONETARY SANCTION AUTHORIZED BY PRIOR CONSENT CONTEMPT ORDER.

Facts: Appellant operated on his property a landfill without a permit. After litigation in the Circuit Court for Anne Arundel County between appellant Gertz and appellee, the Maryland Department of the Environment ("MDOE"), the court issued an injunction requiring appellant to close the facility or procure a permit within three months. When appellant did not comply with these requirements, MDOE returned to court in 2004 to obtain an order (the "2004 Contempt Order") that imposed new deadlines for closing the facility and, as agreed to by appellant, provided a penalty of at least $10,000 for the future violation of the order. Appellant did not satisfy the closure deadlines of the 2004 Contempt Order, and in 2008, MDOE filed a petition seeking to hold appellant in constructive civil contempt for violation of that order. The court entered a new order ("the 2008 Contempt Order") requiring appellant to submit a closure plan and imposing future inspection and monitoring requirements, and also levied a penalty of $72,000 for appellant's violation of the 2004 Contempt Order, $22,000 of which would be suspended contingent on appellant's future compliance.

Held: Whereas criminal contempt orders sanction past misconduct, a civil contempt order is remedial in the sense that its purpose to coerce future compliance with the court order and provides for purging. Md. Rule 15-207(d)(2). The circuit court did not err in imposing a civil contempt sanction of $72,000 for failure to comply with landfill closure requirements, with $22,000 of that amount suspended as an incentive for appellant to comply with future inspection and monitoring requirements. The suspended $22,000 portion of the sanction constituted a properly purgeable civil contempt sanction because appellant could avoid it by complying with the future requirements of the 2008 Contempt Order. The non-suspended $50,000 portion of the sanction did not constitute compensatory damages; nor did it improperly punish "past misconduct." In the prior contempt order, appellant had agreed to pay a stipulated penalty of at least $10,000 as a remedial incentive to meet scheduled deadlines. The sanction could have been avoided by meeting the scheduled deadlines. Having consented to a penalty, the certain amount of which would be determined later if he failed to comply, appellant could not complain that the penalty was actually imposed as part of a subsequent civil contempt proceeding.

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In re Adoption/Guardianship of Cross H., No. 1897, September Term, 2010, filed July 1, 2011. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/1987s10.pdf

FAMILY LAW – CHILD IN NEED OF ASSISTANCE – TERMINATION OF PARENTAL RIGHTS – FAMILY LAW ARTICLE §5-323 – FAMILY LAW ARTICLE §5-324 – FAMILY LAW ARTICLE §5-325

Facts: Cross H., a minor child, was born to appellants Virginia H. and Aaron R. on August 28, 2007. On October 3, 2007, Cross H. was adjudicated a Child In Need of Assistance ("CINA"). He was committed to the Department of Social Services ("the Department"), and was placed in foster care with Mr. and Mrs. B. Cross H. remained in foster care with Mr. and Mrs. B's family for approximately seven months, until the spring of 2008, when he was placed with Christopher D. and David A.. Appellant Aaron R. was determined to be Cross's biological father in January of 2009. Once paternity was confirmed, Cross H.'s permanency plan was changed to reflect the goal of reunification with his father. However, Aaron R. was unable to complete the necessary drug treatment and psychological examinations, and therefore, on April 29, 2009, based on Virginia H. and Aaron R.'s requests, the circuit court ordered that Cross's permanency plan be explored for placement with the paternal grandmother, and ordered the Department to conduct a home study and a bonding study. These studies resulted in negative findings regarding placement with Barbara J.

Based on these findings, on October 28, 2009, the juvenile master recommended that Cross's permanency plan revert to non-relative adoption. Appellant Virginia H. filed a motion to intervene, with exceptions to the permanency plan, and the circuit court granted the motion. The court conducted an exceptions hearing on December 7 and 16, 2009 and on February 17 and 18, 2010. At the conclusion of the hearing, the circuit court delivered an extensive oral opinion, explaining the court's conclusion that neither Ms. H., nor Mr. R. were available as current placements for Cross H. Accordingly, the juvenile court entered an order on March 26, 2010, in which it dismissed the mother's exceptions, and ordered a permanency plan of non-relative adoption, affirming the master's recommendations. The mother filed an appeal to the CINA case in the Court of Special Appeals. While the CINA appeal was pending, in compliance with the circuit court's March 26th order, the Department filed a petition to terminate parental rights ("TPR petition"). Aaron R. filed a motion to stay the TPR proceedings in the juvenile court until the appeal of the CINA order had been resolved. The juvenile court denied the motion to stay and proceeded with the TPR hearing, which spanned a period of five days from September 28, 2010 until October 4, 2010. At the conclusion of the hearing, the court granted guardianship of Cross H. to the Department, and terminated the parental rights of Virginia H. and

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Aaron R.

Along with its appellate brief in the CINA appeal, the Department also filed a motion to dismiss the CINA appeal as moot, arguing that the court's October 4, 2010 order terminating appellants' parental rights effectively ended the circuit court's jurisdiction in the CINA case. On January 11, 2011, the Court of Special Appeals denied the motion to dismiss, and affirmed the juvenile court's CINA decision, including the change in permanency plan. On February 9, 2011, appellant filed a petition for writ of certioari to the Court of Appeals in the CINA case. The petition was denied on April 25, 2011. On October 22, 2010, Virginia H. noted her appeal of the TPR case, and on November 2, 2010, Aaron R. did the same. The parents argued that the circuit court erred in proceeding with the termination of parental rights hearing when the appeal of the CINA order was pending, that the circuit court erred in refusing to consider placement with the paternal grandmother, and that the circuit court erred in terminating their parental rights.

<u>Held</u>: The Court of Special Appeals held that the circuit court did not err in proceeding with the termination of parental rights hearing when the appeal of the CINA order was pending. The Court explained that, although a CINA adjudication is a relevant factor that a juvenile court may consider in deciding whether to terminate parental rights, they are independent legal actions, and the changing of the permanency plan from reunification, or adoption by a relative, to adoption by a non-relative, is not required before the Department can file a TPR petition. Thus, while related, the actions are independent of one another, and there is no prohibition against the initiation of TPR proceedings during the pendency of a CINA appeal. The Court also distinguished *Cross H.* from *In re: Emileigh F.*, 355 Md. 198 (1999), in which the Court of Appeals held that the circuit court erred in closing a CINA case while an appeal was pending.

The Court held that the juvenile court did consider placement of Cross H. with his paternal grandmother, and that it properly ruled against such placement, based on the results of a home study and a bonding study conducted by the Department, and on the testimony of the Department's social worker about the relationship between Cross H. and his grandmother.

Finally, the Court held that the juvenile circuit court properly considered the applicable statutory criteria for termination of parental rights, as set out in §5-323 of the Family Law Article, that ample evidence supported the court's factual findings, and that these findings provided clear and convincing evidence of parental unfitness with regard to Aaron R., and of the existence of exceptional circumstances with regard to Virginia H.. This evidence was sufficient to overcome the presumption in favor of maintaining the natural parental relationships. Therefore, the Court concluded, the circuit court did not abuse its discretion in terminating the parental rights of Aaron R. and Virginia H.

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James L. Mills v. Ronald Godlove, No. 2761, September Term 2009, Opinion filed on July 7, 2011, by J. Hotten

http://mdcourts.gov/opinions/cosa/2011/2761s09.pdf

REAL PROPERTY LAW - LAND USE AND ZONING - SPECIAL EXCEPTION

REAL PROPERTY LAW - LAND USE AND ZONING - VARIANCE

Facts: James and Korina Mills, appellants, owned property in Washington County that was divided by Licking Creek Road. Appellants resided on the east side of the road and maintained a garage and paving equipment on the west side. After parking the paving equipment on the west side of the property without issue for seven years, a complaint was filed. As a result, appellants sought a special exception and variance to continue parking the paving equipment on their property.

On March 14, 2007, appellants appeared before the Washington County Board of Zoning Appeals ("Zoning Board") to request a special exception and variance, which was granted. Ronald Godlove and Gail McDowell, collectively appellees, submitted a petition for judicial review. The Circuit Court for Washington County reversed and remanded the decision based on the sufficiency of the findings. A second public hearing was subsequently held. On April 16, 2009, the Zoning Board issued an opinion, again, granting appellants' request for a special exception and variance. Appellees thereafter filed a second petition for judicial review. The Circuit Court for Washington County reversed the Zoning Board, holding that the analysis of the inherent adverse effects was insufficient, and that appellants failed to establish practical difficulty.

Held: Judgment affirmed. "In reviewing a decision of a zoning board approving or denying an application for a special exception, the emphasis must be first and foremost on identifying the relevant and prevailing zoning ordinance. Only then, after determining whether the zoning ordinance is silent on the matters to which [*Schultz v. Pritts*, 291 Md. 1 (1981)] and its progeny speak, may the *Schultz* line of cases become pertinent and controlling." *Montgomery County v. Butler*, 417 Md. 271, 306 (2010). The Court concluded that *Schultz* and its progeny controlled because the Washington County Zoning Ordinance was silent on matters the cases address.

A special exception shall be denied if the facts and circumstances demonstrate that the proposed use would have adverse effects above and beyond those inherently associated with the special exception. *Schultz*, 291 Md. at 15. The circuit court reversed the Zoning Board's grant of a special exception, because, among other reasons, the board failed to discuss "the inherent adverse effects associated with an equipment storage yard," and “whether the inherent adverse effects resulting from granting a special exception would be unique or different at this particular locality.”

When a zoning authority makes conclusions without supporting evidence, the findings are not amendable to meaningful judicial review. *See Critical Area Comm’n for the Chesapeake & Atlantic Coastal Bays v. Moreland, LLC*, 418 Md. 111, 134 (2011). The Court concluded that the Zoning Board should have developed supporting evidence regarding the adverse effects appellants’ use would have had on the neighborhood, and determined whether those effects were above and beyond those inherently associated with storing paving equipment. The Court also noted that the Zoning Board did not discuss the neighborhood or provide an in depth analysis of the effect storing paving equipment would have when it concluded that the proposed use was of low intensity and compatible with the neighborhood.

A variance shall be granted if the property is unique and unusual from the surrounding properties, such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon the property. *Cromwell v. Ward*, 102 Md. App. 691, 694 (1995). If the property is unique or unusual, then a court must determine whether the uniqueness causes a practical difficulty or undue hardship by applying the relevant zoning ordinance. *Id*. at 694-95. However, a variance shall not be granted if it is merely one of convenience. *Carney v. City of Baltimore*, 201 Md. 130, 137 (1952). The Court affirmed the circuit court’s decision because the Zoning Board recognized that the variance was primarily one of convenience.

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Columbia Association, Inc. v. Joseph L. Poteet, et ux., No. 2056, September Term, 2009, filed July 1, 2011. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2011/2056s09.pdf

REAL PROPERTY - STATUTE OF LIMITATIONS – INSTRUMENT UNDER SEAL – DOCTRINE OF ACKNOWLEDGMENT

Facts: Appellees, Joseph Poteet and Shirley Clarke-Poteet (the "Poteets"), acquired title to real property that, pursuant to a Declaration executed by the Poteets' predecessor in title, was subject to certain covenants, easements, charges, and liens. The Declaration provided, among other things, for a charge to be levied in each year against the Poteets' property. At the end of the Declaration, the word "seal" was included next to the signature of the Poteets' predecessor in title, as well as the clause, "IN WITNESS WHEREOF the parties hereto have set their hands and respective seals as of the day and year first above written."

The Poteets failed to pay the annual charges for which they were billed between 1973 and 2006. On December 19, 2008, appellant, Columbia Association, Inc. ("Columbia"), a homeowners' association, filed suit against the Poteets to recover the annual charges assessed against the Poteets' property for said period. The circuit court granted summary judgment in favor of the Poteets on the ground that the three-year statute of limitations applicable to simple contracts under Maryland Code (1974, 2006 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article ("C.J."), barred recovery of any of the annual charges.

Held: Affirmed in part and reversed in part and remanded to the circuit court for further proceedings. The Court of Special Appeals held that the Declaration establishing the annual charges was an instrument under seal so as to create a specialty instrument. The Court reasoned that the inclusion of the word "seal" next to the signature of the Poteets' predecessor in title, as well as the clause, "IN WITNESS WHEREOF the parties hereto have set their hands and respective seals as of the day and year first above written," was conclusive evidence of an intent to create a sealed instrument. Accordingly, the Court held that the twelve-year statute of limitations for specialties under C.J. 5-102(a) applied to the Poteets.

The Court, however, rejected Columbia's argument that the twelve-year statute of limitations had been removed under the doctrine of acknowledgment. The Court observed that, under that doctrine, an acknowledgment or admission of a debt barred by the statute of limitations removes the bar and revives the remedy. Columbia contended that an acknowledgment that the creditor claims a debt is still owed is sufficient to remove the bar of the statute. The Court disagreed and held that an acknowledgment

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sufficient to remove the bar of the statute of limitations requires an admission by the debtor, in word and/or deed, that the debt is still owed by the debtor. In the instant case, the Poteets acknowledged receiving Columbia's billing statements for the annual charges from 1973 to 2006, but never admitted that they owed any of the annual charges; indeed, they expressly denied any such obligation. Thus the Court ruled that there was no acknowledgment by the Poteets that removed the bar of the statute of limitations for the annual charges from 1973 to 2006.

The Court thus held that Columbia was entitled to recover only those annual charges where the right to sue had accrued within the twelve years prior to the filing of the lawsuit against the Poteets.

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Anderson v. Joseph, No 554 September Term, 2010, Opinion filed July 11, 2011 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/554s10.pdf

REAL PROPERTY - TENANCY IN COMMON - UNAUTHORIZED ACTS - RATIFICATION - CONTRIBUTION FOR REPAIRS/IMPROVEMENTS

Facts: Alda Anderson and Nero Joseph owned the Property located at 2309 Sheridan Street, in Hyattsville, Maryland as tenants in common. On May 27, 2008, Ms. Anderson filed a Motion for Sale and Appointment of Trustee, requesting, *inter alia*, that the court order a sale of the Property in lieu of partition. On July 15, 2008, the court appointed Erwin R.E. Jansen, Esquire, as trustee to sell the Property and distribute the proceeds.

On January 8, 2009, the Property was sold, and on March 25, 2009, Mr. Jansen filed a Trustee's Report of Sale, which included payment of a $49,552.79 loan from the proceeds of the sale. On July 24, 2009, Ms. Anderson filed an Exception to the Trustee's Report of Sale, asserting that Mr. Joseph took out the loan without her consent and requesting that it be paid solely out of his share of the proceeds.

On February 2, 2010, the court held a hearing. Ms. Anderson testified that she was not aware of the loan. She asserted that, although Mr. Joseph was entitled to encumber his half interest in the Property, he had no right to encumber her half interest in the Property. Mr. Joseph testified that he obtained the loan to repair a flood in the basement of the Property, as well as to do some work on the kitchen. He acknowledged that he did not discuss the flood or the loan with Ms. Anderson.

On April 5, 2010, the court issued its order. Without any explanation of its reasons, the court denied Ms. Anderson's Exception to the Trustee's Report of Sale.

Held: Judgment reversed. Tenants in common each have an equal right to possess, use, and enjoy the property. They each possess the authority to sell or encumber their own individual interests. One cotenant, however, may not encumber another cotenant's interest without consent. There are limited circumstances, however, where an otherwise unauthorized act by one cotenant is binding on another cotenant. This occurs if the nonconsenting cotenant subsequently affirms or ratifies the action.

Here, the evidence was clear that Ms. Anderson did not initially consent to, or subsequently ratify, Mr. Joseph's action in obtaining the loan encumbering the Property. Ms. Anderson consistently asserted that she had no knowledge of the Bank of America loan. Mr. Joseph confirmed the lack of consent to encumber the Property with the loan, testifying at the hearing that he did not discuss the loan with Ms. Anderson. Under these circumstances, the loan encumbered only Mr. Joseph’s half interest in the Property, and it should have been deducted solely from Mr. Joseph’s share of the proceeds of the sale.

The evidence was insufficient to support a credit for repairs. The general rule is that one cotenant is entitled to contribution from another for necessary repairs and improvements when they were made with the assent of the other, or the repairs were necessary for the preservation of the building or other erection on the land, and were done by one cotenant after request of and refusal by the other cotenant. Here, as indicated, the evidence shows that Mr. Joseph did not give Ms. Anderson the opportunity to determine the expediency or necessity of making the repairs prior to the money being expended. Accordingly, even if there had been sufficient evidence of the repairs made, a credit was not warranted by the evidence.

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HNS Development, LLC v. People's Counsel for Baltimore County, et al., Case No. 639, September Term, 2010, filed July 8, 2011, Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2011/639s10.pdf

REAL PROPERTY LAW - ZONING AND LAND USE - SUBDIVISIONS - COMPREHENSIVE PLANS

Facts: This case involves the denial of a proposed amendment to the development plan for a multi-lot subdivision in Baltimore County, known as Longfield Estates. Appellant, HNS Development, LLC, filed with the Baltimore County Review Group (the "CRG") a proposal to amend (the "amended plan") the original development plan for Longfield Estates, seeking to further subdivide and develop the property. Appellees, People's Counsel for Baltimore County and Greater Kingsville Civic Association, objected to the amended plan, and the CRG denied approval of the amended plan. Both HNS and appellees appealed the CRG's denial to the Baltimore County Board of Appeals (the "Board"). The Board found, pursuant to Baltimore County Code § 22-47 (1978, 1988/89 Supp.), that the amended plan had been deemed approved through untimely action by the CRG, and remanded the matter to the Planning Board for a determination as to whether the amended plan conflicted with the Baltimore County Master Plan (the "Master Plan"). The Planning Board ultimately determined that the amended plan conflicted with the Master Plan, and the Board affirmed the Planning Board's decision. HNS petitioned the Circuit Court for Baltimore County for judicial review. This appeal followed the circuit court's affirmance of the Board's decision. HNS contended, on appeal, that the Board erred in finding that the amended plan, having been "deemed approved" pursuant to Baltimore County Code § 22-47, was subject to review under Baltimore County Code § 22-61(c) (1978, 1988/89 Supp.), and in finding that the amended plan conflicts with the Baltimore County Master Plan.

Held: The Court of Special Appeals affirmed. Baltimore County Code 1978 applied as Baltimore County Code § 22-63 (1978, 1988/89 Supp.) provides that "[a]ny material amendment to an approved plan shall be reviewed and approved in the same manner as the original plan." The CRG process was adopted in Baltimore County by Council Bill 56, 1982, and codified in the Baltimore County Code, 1978, in §§ 22-37, *et. seq*. The CRG process was superseded in 1992 by the development plan process in use today in Baltimore County Code §§ 32-4-101, *et seq*. Any amendments, however, to plans adopted using the CRG process were to be reviewed and approved in the same manner as the original plan. (Baltimore County Code § 32-4-262). This requirement was changed by the passage of Bill No. 24-06 on March 17, 2006. Baltimore County Code § 32-4-262(2) provides: "Any material amendment to an approved residential Development Plan or plat shall be reviewed in accordance with this title, and with

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respect to that portion of the original plan or plat to which the amendment pertains, the amendment shall be reviewed for compliance with all current law . . . ." This case began prior to the passage of Bill No. 24-06; accordingly, Baltimore County Code 1978 is applicable in this case.

Failure of the CRG to act within the prescribed time limits of Baltimore County Code § 22-56(b) (1978, 1988/89 Supp.) and § 22-47 (1978, 1988/89 Supp.) does not immunize the proposed development or subdivision plan from review under Baltimore County Code § 22-61(c) (1978, 1988/89 Supp.).

Baltimore County Code § 26-166(a) (1978, 1988/89 Supp.) and Baltimore County Code § 32-4-103(a)(1) (2011) require subdivision plats to conform to the Baltimore County Master Plan.

Baltimore County Code § 22-37 (1978, 1988/89 Supp.) and § 22-38 (1978, 1988/89 Supp.) do not create a system of deemed compliance with the Master Plan. Baltimore County Code § 22-38 is an introductory section of the Baltimore County Code addressing the purposes of the regulations. Article Four of the 1978 Baltimore County Code (1988/89 Supp.), if applicable, sets forth a process under which a proposed development plan is to be reviewed and approved in Baltimore County. One of the determinations required to be made during this process is whether a proposed plan conflicts with the Master Plan. As such, compliance with the Master Plan is determined pursuant to evaluation of the proposed plan under the statutory approval process described in Baltimore County Code §§ 22-53 through 22-68 (1978, 1988/89 Supp.). To determine otherwise would render the extensive process set forth in Baltimore County Code §§ 22-53 through 22-68 "surplusage, superfluous, meaningless, or nugatory."

Baltimore County Code § 22-18(a) provides, in pertinent part: "When any application for a building permit or for approval of the preliminary plan of any subdivision shall be forwarded to the director of planning for his consideration and approval . . . ." By plain reading, Baltimore County Code § 22-18 does not apply to proposed amendments to an existing subdivision plan or property which has been substantially developed and whose development has already been approved subject to conditions to keep the development in compliance with the Master Plan.

"In zoning cases, in determining whether the challenged zoning regulation amounts to a taking of private property, . . . no compensable taking occurs so long as the zoning regulation does not deprive the owner of 'all beneficial use of the property.'" Md.-Nat'l Cap. P. & P. Comm'n v. Chadwick, 286 Md. 1, 10 (1979) (citations omitted); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (to constitute a taking the county by denying the proposed plan would have to deny appellant all reasonable use of its property). Sale of the property for profit during the approval process, while retaining the right to subdivide, negates a finding of deprivation of all beneficial use of the property.

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ATTORNEY DISCIPLINE

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

JEFFREY EDWARD MICHELSON

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By an Order of the Court of Appeals of Maryland dated July 11, 2011, the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

STEPHEN ROBERT GREINER

*