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COURT OF APPEALS

APPEALS - REVIEW OF ADMINISTRATIVE DECISIONS

Facts: A class action lawsuit was filed in the Circuit Court for Anne Arundel County alleging that, between 1988 and 1996, Anne Arundel County mishandled and unlawfully used developmental impact fees it collected. The appellants, both former employees of Anne Arundel County, participated in the class action lawsuit on the side of the plaintiffs, against the County.

Based on their participation in the case, the County Executive of Anne Arundel County filed with the Anne Arundel County Ethics Commission, the appellee, a complaint against the appellants, alleging that they, by virtue of that participation, had violated Article 9, § 5-105 of the Anne Arundel Code, a provision of the Public Ethics Law prohibiting "former County employees from representing or assisting a party in a matter, if the former employee had information not generally available to the public." After protracted and contentious preliminary proceedings, the Commission held a hearing on the complaint and ultimately determined that the allegations were well-founded. The appellants sought judicial review in the Circuit Court for Anne Arundel County, arguing that the Commission lacked jurisdiction over them. After a hearing, the Circuit Court issued its Opinion and Order, affirming the decision of the Commission.

The appellants noted an appeal to the Court of Special Appeals. Subsequently, the Commission filed in that court, pursuant to Maryland Rule 8-602 (a) (1), a motion to dismiss the appeal on the grounds that it "is not allowed by these rules or other law." The intermediate appellate court ordered that the "jurisdictional issue raised in the motion . . . be fully briefed and argued in due course," after which the Commission filed, in the Court of Appeals, a Petition for Writ of Certiorari, which was granted. Dvorak v. Ethics Comm'n, 397 Md. 396, 918 A.2d 468 (2007).

Held: *Appeal Dismissed, With Costs.* A Circuit Court's review of an administrative agency decision is non-appealable under § 12-302 of the Courts and Judicial Proceedings Article.

Robert J. Dvorak, et al., v. Anne Arundel Ethics Commission, Case No. 143, September Term, 2006. Filed July 31, 2007. Opinion by Bell, C.J.

ATTORNEYS - ATTORNEY DISCIPLINE - IN GENERAL-AN ATTORNEY IS PROHIBITED FROM INTENTIONALLY ACTING IN A DISHONEST, FRAUDULENT, OR DECEITFUL MANNER.

ATTORNEY AND CLIENT - THE OFFICE OF ATTORNEY-DISCIPLINE - PROCEEDINGS - PARTIES ENTITLED TO PROSECUTE-THE PEER REVIEW PANEL IS PERMITTED TO MAKE RECOMMENDATIONS, HOWEVER, IT IS THE ATTORNEY GRIEVANCE COMMISSION THAT DETERMINES WHETHER AND WHEN CHARGES ARE FILED.

ATTORNEY AND CLIENT - THE OFFICE OF ATTORNEY - DISCIPLINE-PROCEEDINGS - EVIDENCE - IN GENERAL - THE PEER REVIEW PANEL'S REPORT IS NOT ADMISSIBLE IN AN ATTORNEY GRIEVANCE HEARING.

ATTORNEY AND CLIENT - THE OFFICE OF ATTORNEY - DISCIPLINE - PUNISHMENT - DISBARMENT.

Facts: This disciplinary action against Hekyong Pak, respondent, arose out of her actions subsequent to a default on a loan secured by her parents. The Attorney Grievance Commission of Maryland (the Commission) charged respondent with violating Rules 3.3 (Candor Toward the Tribunal), 4.1 (Truthfulness in Statements to Others), 5.5 (Unauthorized Practice of Law), 8.4(c) and 8.4(d) (Misconduct) of the Maryland Rules of Professional Conduct (the MRPC).

Respondent's parents defaulted on a loan for commercial real estate in Pennsylvania and the loan company filed suit in the United States District Court for the District of Maryland. During the course of that litigation, Pak aided her parents in divesting their personal real estate holdings in order to avoid a judgment being attached to those holdings. In so doing, respondent violated several sections of the MRPC. She made false statements in her testimony before the U.S. District Court concerning a transfer of funds that her parents made to relatives in Korea in order to move assets out of the United States. She failed to correct the record during the loan default proceedings that these funds were wired to Korea from the family's second property sale, not the first sale as she had asserted. She filed pleadings and assisted her parents in filing proceedings *pro se* in U.S. District Court while not a member of that court's bar. Finally, she fraudulently created shell business entities (an LLC and an LP) for the purpose of divesting her parents of their real estate holdings, failed to file a property deed, and misrepresented the nature of the wire transfer to Korea.

The Commission sought disbarment and the respondent requested that the action be dismissed arguing that the Court of Appeals did not have jurisdiction over the present matter because the Peer Review Panel found that no misconduct had occurred. The hearing judge rejected respondent's jurisdictional argument and found that

she had violated all of the charges filed by the Commission. Respondent took exception to the hearing judge's findings of fact and conclusions of law.

Held: Disbarment. The Court of Appeals found that it does have original and complete jurisdiction over all attorney disciplinary matters in the State of Maryland and that the Commission has the ultimate authority over whether to bring a disciplinary action against an attorney. The Court found that disbarment was warranted where respondent had violated MRP 3.3, 4.1, 5.5, 8.4(c) and (d). In particular, the Court found that the respondent's conduct constituted a carefully planned web of lies and fraudulent conduct in order to protect her parents' assets. Furthermore, her actions were prejudicial to the administration of justice.

Attorney Grievance Commission of Maryland v. Hekyong Pak, Misc. Docket AG No. 83, September Term, 2005, filed August 2, 2007. Opinion by Cathell, J.

ATTORNEYS - ATTORNEY DISCIPLINE - FAILING TO TIMELY REMOVE EARNED FEES

Facts: The Attorney Grievance Commission of Maryland filed a Petition for Disciplinary or Remedial Action against Robert Sapero in the Court of Appeals, alleging that he had violated Rules 1.5, 1.15, 8.1, 8.4 of the Maryland Rules of Professional Conduct. The conduct at issue related to Sapero's representing a husband a wife in connection with the husband's auto accident. In October 2002, the claims arising out of the accident were settled, and the defendant issued checks to the plaintiffs. Sapero did not provide his clients with a written statement regarding how these funds would be remitted until more than three years later. During those three years, however, the clients had not yet resolved certain medical bills relating to the accident. Additionally, Sapero failed to timely remove earned fees from the client's escrow account, which occurred because of his poor recordkeeping. Because of this, Sapero filed inaccurate state and federal personal income tax returns for several years.

In May 2005, Bar Counsel requested information from Sapero relating to this matter. On August 5, 2005, a subpoena was issued requiring Sapero to produce the information by August 30, 2005. In the beginning of September 2005, Sapero phoned the Bar Counsel, and subsequently produced a disorganized box of documents. However, Bar Counsel could not extract the required information from the box of documents within a reasonable amount of time.

In September 2006, Sapero filed amended tax returns in which he paid his remaining tax liability. With the help of an accounting firm, Sapero produced the information sought by Bar Counsel. Additionally, Sapero implemented a new computerized accounting system to prevent similar errors in the future.

Held: Rule 8.4(d) prohibits an attorney from engaging in conduct which is prejudicial to the administration of justice. Although Sapero's failure to report his earned income imposed a tax liability on him, there was no clear and convincing evidence that his failure was intentional. Thus, the Court found that Sapero did not violate Rule 8.4(d).

Rule 1.5(c) requires that at the conclusion of the underlying contingency matter, an attorney will provide the client with a written statement describing the outcome of the matter and the remittance due to the client. The Court reasoned that the written statement must be provided at the time of the actual settlement or recovery on the claim, not when the remittance to the client less all expenses is an absolute certainty. Therefore, although the clients still had outstanding medical bills, Rule 1.5(c) obligated Sapero to furnish his clients with a written statement contemporaneously with the settlement of the case. This statement, the Court noted, could have been an interim statement, indicating the status of the remaining bills, provided it was timely issued.

Rule 8.1(b) prohibits an attorney from knowingly failing to respond to a lawful demand from a disciplinary authority. In this case, the Court held that Sapero violated the rule by failing to comply with Bar Counsel's two requests and a subpoena for his records. The Court reasoned that Sapero's lack of organization, which caused his violation, did not excuse his violation of the rule.

The Court held that Sapero could not be held responsible for violating Rule 1.15(c) because Bar Counsel had not charged him with a violation of that rule. The Court reasoned that to hold him responsible would violate the fair notice to which he was entitled.

The Court noted that the purpose of sanctioning a lawyer for violating these rules is to protect the public. In this case, Sapero's misconduct was neither detrimental to his clients, nor intentional or fraudulent. Additionally, the Court noted that the

Sapero's conduct was not beneficial to him, and by taking extensive remedial action, he demonstrated remorse. Sapero also had no record of prior disciplinary action. Thus, the Court held that the proper sanction was a reprimand.

Attorney Grievance Comm'n v. Sapero, Misc Docket AG No. 34, September Term, 2006, filed August 1, 2007. Opinion by Greene, J.

ATTORNEYS - MARYLAND RULES OF PROFESSIONAL CONDUCT - MRPC 8.4 (c)
(MISCONDUCT)

Facts: The Attorney Grievance Commission of Maryland ("Bar Counsel"), filed a petition for disciplinary or remedial action against Angela Therese Floyd, Esquire, in which it was alleged that Floyd violated Maryland Rule of Professional Conduct 8.4 (c) (Misconduct) when, during an employment application process for a legal position, she acted intentionally to deceive the Federal Trade Commission ("Commission") into believing that she and her husband had a "purely" employer-employee relationship in order to secure a higher salary.

The Circuit Court for Prince George's County held an evidentiary hearing and issued an opinion, which presented his findings of fact and conclusions of law. The court found that Floyd applied for an entry level job at the Commission as an attorney, and that with her application, she submitted a résumé that listed her current employment as a position with the "Law Office of Frederick Iverson, Washington, DC," without disclosing that Mr. Iverson was her husband; the résumé also did not disclose that Floyd had worked for Mr. Iverson in Columbus, Ohio before they moved to Washington, DC. The Commission subsequently decided to offer Floyd a position with a starting salary of \$42,724 per year. Floyd was told that in order for consideration of hiring her at a salary higher, she would have to have a competing job offer. Floyd then requested of Mr. Iverson that he put in writing his offer of employment with him. Mr. Iverson composed a letter on stationary displaying his office address which offered Floyd a job at \$54,000 per year. The letter concluded, "Regardless of where your future employment decisions take you, I wish you the best of luck in your

career." Floyd, aware of the contents of the letter, delivered it to the Commission, and the Commission offered Floyd a job at a higher starting salary than originally offered; neither Floyd nor Mr. Iverson disclosed their marital relationship. The court found that Floyd violated Rule 8.4 (c) by engaging in conduct involving "deceit or misrepresentation" by failing to disclose to the Commission the fact that Mr. Iverson was her husband.

Floyd did not take exception to the hearing judge's findings of fact, but took exception to the hearing judge's conclusion that she violated Rule 8.4 (c).

Held: Ninety day suspension. The question before the Court of Appeals was whether Floyd, in proffering a letter from her husband, who did not share the same surname, in support of an increase in salary from that which she had been offered by the Commission, "engaged in conduct involving dishonesty, fraud, deceit or misrepresentation," Rule 8.4 (c), when in so doing led the Commission to believe that she had "purely an employer-employee" relationship with Mr. Iverson. The Court agreed that Floyd violated Rule 8.4 (c) when she "deprived the Commission of information material to its ability to make an appropriate assessment of Mr. Iverson's recommendation and job offer." The Court noted that although Floyd did not explicitly misstate any fact, she concealed a material fact, which constituted deceit. The Court rejected Floyd's argument that because the Commission could not discriminate on account of her marital status, her marital status was irrelevant. Floyd violated Rule 8.4 (c) because her concealment of a close personal relationship with Mr. Iverson, in addition to that of employee and employer, impeded the ability of the Federal Trade Commission to question and evaluate the bona fides of what was proffered as a competing offer. The Court also found it troubling that Respondent omitted any reference to her employment with Mr. Iverson before she and he relocated to the District of Columbia, although non-legal employment prior to this time was included. Addressing the appropriate sanction, the Court stated that Respondent's misconduct reflected dishonesty. Considering the mitigating factors, the Court noted that Respondent had no prior disciplinary record, the instant violation was not part of a pattern of misconduct, and that she had acknowledged her error. For violating Rule 8.4 (c), the Court suspended Floyd from the practice of law for ninety days.

Attorney Grievance Commission v. Angela Therese Floyd, Misc. AG No. 31, Sept. Term 2006, filed July 30, 2007. Opinion by Battaglia, J.

CRIMINAL LAW - CONTEMPT - MARYLAND RULES - DIRECT CONTEMPT -
PROCEDURE

Facts: On June 7, 2006, Marnitta King entered her appearance on behalf of Shawn Marcus Wooden in a criminal case in the Circuit Court for Charles County. The trial was scheduled for June 27, 2006. Ms. King was not present for trial. At the conclusion of Mr. Wooden's case, the trial court issued a Show Cause Order directing Ms. King "to show cause why she should not be sanctioned for direct criminal contempt" for her failure to appear. The Show Cause Order referenced Maryland Rules 15-204 and 15-205, but not Maryland Rule 15-203. On August 22, 2006, during a hearing on the Show Cause Order, the court proceeded summarily. The court heard evidence from Ms. King and sanctioned her. Ms. King appealed to the Court of Special Appeals. On February 2, 2007, this Court issued a writ of certiorari on its own initiative.

Held: Reversed. Maryland Rule 15-203 allows a judge to proceed summarily against a person who has committed a direct criminal contempt. This allows a judge to initiate contempt proceedings immediately after such conduct occurs and to defer the imposition of sanctions. However, before deferring the imposition of sanctions, a judge must find and announce on the record that direct contempt has been committed. Furthermore, although the judge may defer the imposition of sanctions, the judge must impose sanctions contemporaneously with the proceedings in which the direct contempt occurred. The judge may not wait several weeks between finding contempt and imposing sanctions.

In this case, the trial judge did not announce on the record that a direct contempt had been committed. The Show Cause Order referenced Maryland Rules 15-204 and 15-205, and not Maryland Rule 15-203. Thus, the trial court did not elect to proceed summarily. The Court of Appeals reasoned that proceeding summarily at a later date and as part of a new proceeding, after having elected not to proceed summarily, is inconsistent with Maryland Rules 15-204 and 15-205.

Marnitta King v. State of Maryland, Case No. 134, September Term, 2006, filed July 31, 2007. Opinion by Greene, J.

CRIMINAL LAW - EVIDENCE - PRIOR CRIMES OR BAD ACTS EVIDENCE

EVIDENCE - MARYLAND RULES OF EVIDENCE - MODIFICATION

Facts: On the evening of May 16, 2002, petitioner, Richard David Hurst, encountered Gertrude P. walking along a road outside of Hagerstown, Maryland. Petitioner pulled his vehicle alongside of her and asked for directions to Frederick, Maryland. Petitioner convinced Ms. P. to enter his vehicle and petitioner drove her to a Frederick County field. Ms. P. testified at trial that after stopping in the field, petitioner threatened her with a knife, and then forced her to perform fellatio and to engage in vaginal intercourse. Petitioner testified that he and Ms. P. engaged in consensual sexual activities.

At petitioner's trial before the Circuit Court for Frederick County, the State offered the testimony of Jacqueline E., a woman petitioner had raped twenty-one years earlier. Petitioner objected to admission of that evidence, arguing that Ms. E.'s testimony was inadmissible under Maryland Rule 5-404's general prohibition on the use of prior bad acts or crimes evidence. The Circuit Court allowed Ms. E.'s testimony as a similar prior crime and to offset petitioner's consent defense. The jury convicted petitioner of first and second degree rape, first and second degree sexual offense, kidnaping, and false imprisonment.

Petitioner noted a timely appeal to the Court of Special Appeals, which affirmed. The intermediate appellate court held that Ms. E.'s testimony involved sufficiently similar events to those in the present case to be admissible as an exception to Rule 5-404's prohibition on the admission of prior bad acts or crimes evidence. *Hurst v. State*, 171 Md. App. 223, 247-48, 909 A.2d 1069, 1083 (2006). The Court of Appeals granted Hurst's petition for a writ of certiorari to determine whether Ms. E.'s testimony was admitted properly at trial. *Hurst v. State*, 396 Md. 524, 914 A.2d 768 (2007).

Held: Reversed. The Court of Appeals held that Ms. E.'s testimony was admitted improperly into evidence by the trial court. The Court noted that prior crimes or bad acts evidence is admissible under Maryland Rule 5-404 only when it is substantially relevant to some contested issue in the case and is not offered to prove guilt based on propensity to commit crimes. The Court determined that evidence that a third party did not consent to sexual intercourse with petitioner in the past had no bearing on whether a subsequent complainant consented to sexual intercourse with petitioner. Such evidence was in essence evidence that petitioner possessed a criminal propensity to engage in sex crimes and, as such, was inadmissible. The Court of Appeals noted further that Ms. E.'s testimony was not admissible under the identity exception to Maryland Rule 5-404 because identification was not a

contested issue in this case. The sole defense was consent, not criminal agency, and as such, *modus operandi* did not support the admission of Ms. E.'s testimony.

The Court noted also that under its holding in *Vogel v. State*, 315 Md. 458, 554 A.2d 1231 (1989), sex crimes evidence is admissible to demonstrate criminal propensity only when (1) the current prosecution is for sexual crimes, (2) the prior illicit sexual acts are similar to those for which the accused is on trial, and (3) the same accused and victim are involved. The Court declined to extend that holding to allow sex crimes evidence to demonstrate criminal propensity in other circumstances, stating that the proper means to change the Maryland Rules of Evidence is through action by either the General Assembly or the Court of Appeals acting in its legislative capacity. The Court found that any change to the existing sexual propensity exception should be made in that manner, and not by judicial fiat.

Richard David Hurst v. State of Maryland, No. 124, September Term, 2006, filed July 31, 2007. Opinion by Raker, J.

CRIMINAL LAW - PROCEDURE - POSTCONVICTION DNA TESTING

Facts: Appellant, Douglas Scott Arey, was convicted of first degree murder and use of a handgun in the commission of a crime of violence in April 1974. In May 2002, Arey filed a petition pursuant to § 8-201 of the Criminal Procedure Article requesting DNA testing of evidence used by the State in his trial. On July 17, 2006, the Circuit Court denied appellant's petition. The court based its ruling on an affidavit submitted by the State, in which the head of the Baltimore City Evidence Control Unit averred that the evidence requested by appellant no longer existed. The officer based his affidavit on a search of the Evidence Control Unit's database and forms on file. Subsequent to the denial of his petition, appellant filed motions to strike the affidavit and the order of the court. In each motion, he asked the court to hold an evidentiary hearing to enable him to respond to the affidavit and for appointment of counsel. The court denied both motions.

Pursuant to § 8-201(j)(6) of the Criminal Procedure Article, appellant filed an appeal directly to the Court of Appeals.

Held: Reversed. On appeal, appellant argued that the Circuit Court erred in dismissing his petition. Additionally, appellant asserted that he was entitled to an evidentiary hearing on the petition and to assistance of counsel.

The Court of Appeals held that the Circuit Court erred in dismissing appellant's petition. The Court concluded that the search described in the affidavit was insufficient for the Circuit Court to reasonably conclude that the evidence no longer existed. Further, the Court cautioned that the State should have ascertained, if possible, the protocol the police or custodian of evidence utilized at the time the evidence was purportedly destroyed. The Court reiterated the admonition in *Blake v. State*, 395 Md. 213, 909 A.2d 1020 (2006), that a search for evidence should include most likely places, including, *inter alia*, the prosecutor's office, state and local crime laboratories, hospitals, clinics, doctors' offices, courthouse property rooms, offices of defense counsel, independent crime laboratories, and offices of clerks of the court.

The Court concluded that if a court determines that there is a genuine factual dispute as to whether the evidence exists, the court has the inherent power to hold a hearing, and should ordinarily do so. The Court held that appellant was not entitled to assistance of counsel under § 8-201 of the Criminal Procedure Article or Article 24 of the Maryland Declaration of Rights, but that courts have the inherent power to appoint counsel at any stage of proceedings pursuant to § 8-201, in order to further the interest of justice, subject to review for abuse of discretion.

Douglas Scott Arey v. State of Maryland, No. 82, September Term, 2006, filed August 1, 2007. Opinion by Raker, J.

EDUCATION - SPECIAL EDUCATION LAW - RELATED SERVICES - THE ABSENCE OF AN ENUMERATED "RELATED SERVICE" FROM A DISABLED CHILD'S

INDIVIDUALIZED EDUCATION PLAN DOES NOT BAR A DUE PROCESS COMPLAINT BROUGHT UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND EDUCATION LAW § 8-413 BASED ON THE PROVISION OF THAT "RELATED SERVICE" WHERE THE SERVICE MAY BE PROVIDED BY A SCHOOL NURSE AND IS REASONABLY NECESSARY FOR THE CHILD TO RECEIVE A FREE APPROPRIATE PUBLIC EDUCATION.

ADMINISTRATIVE LAW - MARYLAND OFFICE OF ADMINISTRATIVE HEARINGS - SUBJECT MATTER JURISDICTION - AN ADMINISTRATIVE LAW JUDGE HEARING DISPUTES BROUGHT UNDER THE IDEA HAS NO JURISDICTION TO ADJUDICATE A DUE PROCESS COMPLAINT THAT CONCERNS A SCHOOL NURSE'S ABILITY TO COMMUNICATE DIRECTLY WITH A PRESCRIBING PHYSICIAN REGARDING THE ADMINISTRATION OR WITHHOLDING OF MEDICATIONS, RATHER THAN A SPECIAL EDUCATION ISSUE.

Facts: This dispute arose during the 2002-03 and 2003-04 school years, while John A.'s daughter, A.A., was attending Rockburn Elementary, a school in the Howard County Public Schools ("HCPS") System, Appellee. Throughout the school years, A.A. qualified as a "child with a disability," pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 to 1419 (2000 & Supp. IV 2004), because she suffered from Bi-Polar Disorder, Attention Deficit Hyperactivity Disorder ("ADHD"), and Sensory Integration Disorder, afflictions which impair her ability to learn in a normal educational environment. As a result, beginning in October 2002, A.A. received special education and certain "related services" from HCPS in accordance with an Individualized Education Plan ("IEP") developed and implemented by her IEP Team. The IEP applicable to A.A. contained "Instruction," "Psychological Services," and "Occupational Therapy" as the services to be provided A.A. by the HCPS. In addition to the IEP documents, the parents signed a "Request for Records" form consenting to the release of A.A.'s confidential psychiatric records to the HCPS, expressly conditioned on the parents being informed before the HCPS or its agents and employees contacted A.A.'s psychiatrist.

In accordance with an agreement with the HCPS signed by A.A.'s treating psychiatrist, Dr. Harold Eist, the school nurse at Rockburn administered to A.A. two medications, Geodon and Neurontin, during the 2002-03 school year. Throughout the school year, teachers and health room personnel at Rockburn observed A.A. as being lethargic and drowsy, sometimes falling asleep in class and in the health room.

In August 2003, Dr. Eist added another medication, Inderal, to A.A.'s drug regimen. Shortly thereafter, in early October 2003, a school nurse wrote to Dr. Eist to inform him that, at the time A.A. was administered her medications, Rockburn staff observed that, prior to the administration of her medications, A.A. was lethargic and had fallen asleep in class, and that her apical pulse rate was

between 110 and 142. As a result, the school nurse requested clarification from Dr. Eist concerning the administration of A.A.'s medications when possible symptoms contraindicating further drug administration were noted. The nurse also sought from Dr. Eist advisement pertaining to boundary standards as to when the medication should be withheld.

On October 15, 2003, A.A.'s parents informed Dr. Eist that it was their understanding from the HCPS letter that the HCPS sought discretion to refrain from administering the child's medications based upon its physical observations. The parents expressed their disapproval of such a request and asked Dr. Eist to respect A.A.'s right to privacy and provide no further information to the HCPS regarding A.A.'s medical condition and treatment, absent their prior consent or in the case of a bona fide medical emergency.

In response to the school nurse's letter, Dr. Eist's attorney advised the HCPS that Dr. Eist would not release A.A.'s confidential medical information unless there was parental consent or he otherwise was compelled by law to do so. The attorney explained that Dr. Eist would not change the medications prescribed for A.A., the HCPS was expected to continue to administer the medications according to Dr. Eist's orders, and A.A. should not be removed from class for pulse readings.

On November 25, 2003, Donna Heller, the HCPS's health services manager, wrote to Dr. Eist (with a copy to the parents) to make clear that the HCPS was not asking the psychiatrist to change the prescribed medications and emphasizing that the HCPS, in order to ensure the child's safety, simply requested clarification and standards for when the medications should be withheld based on symptoms noted at the time of administration. She informed Dr. Eist that she consulted with the Maryland Board of Nursing and that counsel for that Board advised that rote administration of the medications without the ability to communicate directly with the prescribing psychiatrist would be inappropriate. The health services manager concluded that, based on the symptoms observed by the nursing staff, combined with a lack of guidance from Dr. Eist and in the absence of the ability to communicate with him directly, the HCPS no longer would administer the medication to A.A., beginning on December 2, 2003. Ms. Heller suggested that either of A.A.'s parents would be free to come to Rockburn and administer the medications to their daughter during the school day.

On June 9, 2004, A.A.'s parents filed a request with the Maryland Office of Administrative Hearings ("OAH") for a due process hearing under the provisions of the IDEA and its Maryland counterpart, asserting that the HCPS's refusal to administer the three medications in accordance with Dr. Eist's instructions constituted a denial of A.A.'s right to a free appropriate public education ("FAPE"). They sought an administrative order requiring

the HCPS to abide by Dr. Eist's medical directives and administer the medication to A.A. during the school day.

At the outset of the due process hearing, the HCPS's attorney challenged the subject matter jurisdiction of the Administrative Law Judge ("ALJ") under the IDEA to consider the issues presented in the parents' hearing request. The HCPS argued that, under the IDEA and Maryland's counterpart law, a due process hearing may be conducted only when the dispute pertains to the "identification, evaluation, or placement of the child, or the provision of a free appropriate public education to such child," and that the dispute here did not fall into any of those four jurisdictional categories. While the parents claimed the dispute implicated A.A.'s special education rights under the IDEA, the HCPS maintained that the controversy raised only ethical and medical questions of the ability of school nurses to demand permission for direct communication with psychiatrists that prescribe medications to be administered at school.

The ALJ granted the HCPS's motion to dismiss, determining that the issue raised by the parents was a medical treatment, or ethical, question, rather than a special education one. Therefore, the dispute raised in the parents' complaint fell outside of the scope of the IDEA, depriving the ALJ of subject matter jurisdiction and requiring dismissal of the parents' due process request.

Upon the parents' petition for judicial review, the Circuit Court for Howard County affirmed the ALJ's order dismissing the parents' IDEA claim. The Circuit Court found that the issue presented was not whether A.A. required medication to benefit from her special education program, but rather whether the school nurse had a need to request additional direction from the child's treating/prescribing physician. The court determined that this issue was not covered by the provisions of the IDEA. Thus, it dismissed the parents' complaint for lack of subject matter jurisdiction. The Circuit Court also dismissed without prejudice the parents' other claims against the HCPS, brought under Section 504 of the Rehabilitation Act of 1974, 42 U.S.C. § 1983, and Article 24 of the Maryland Declaration of Rights, because they were original claims joined wrongly with the petition for review.

A.A.'s parents appealed the Circuit Court's order to the Court of Special Appeals. The Court of Appeals, on its motion, issued a writ of certiorari to the Court of Special Appeals before it decided the case. 397 Md. 107, 916 A.2d 256 (2007).

HELD: Affirmed. As a threshold matter, the Court of Appeals held that the absence of an "administration of medication" provision from A.A.'s IEP does not preclude necessarily the parents' due process complaint based on provision of the service because the administration of medication was reasonably necessary for A.A. to access her FAPE and the service could be provided without requiring

a trained physician. The Court emphasized that each state is required by the IDEA, in order to receive funding, to provide all "related services" "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982).

Relying on *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984), and *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 119 S. Ct. 992, 143 L. Ed. 2d 154 (1999), the Court found that, because the administration of medication was a service reasonably necessary for A.A. to benefit from her special education program, and because the service could be provided by a minimally trained layperson and did not require a physician's expertise, the administration of A.A.'s medications was implicitly part of her IEP and could form the basis for a due process complaint. Thus, based on the purpose of the IDEA and Supreme Court precedent interpreting its language, the Court of Appeals held that the absence of an administration of medication provision did not bar the parents' due process complaint.

As to the ALJ's jurisdiction under the IDEA to adjudicate the dispute, the Court of Appeals held that the IDEA and its Maryland counterpart were not intended to serve as the vehicle for the resolution of claims pertaining to whether school nurses may communicate directly with treating/prescribing psychiatrists when symptoms contraindicating the administration of medication are observed. Because the issue at bar did not implicate the identification, evaluation, or placement of A.A. or the provision of a free appropriate public education to her, but instead concerned medical and ethical issues outside the statutory jurisdiction of an ALJ assigned to adjudicate complaints brought under the IDEA, the Court affirmed the ALJ's dismissal of the due process complaint.

The Court expressed concern that allowing cases such as A.A.'s to be brought under the IDEA might turn administrative hearings into forums for tort-sounding actions that have only some tangential relationship to a "related service." Finally, the Court suggested that the parents, who argued that the HCPS's action also violated their fundamental liberty interest in the care, custody, and control of their child, might more appropriately bring their causes of action under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and 20 U.S.C. § 1983, rather than the IDEA.

John A., et ux., Next Friends of A.A. v. Board of Education for Howard County, No. 132, September Term 2006, filed July 30, 2007. Opinion by Harrell, J.

INSURANCE - AUTO INSURANCE COVERAGE - CHOICE OF LAW

Facts: The Heffernans filed a breach of contract action against their insurer, Erie Insurance Exchange, on the basis of an uninsured/underinsured motorist claim in the Circuit Court for Baltimore City. The insurance contract was formed in Maryland, but the accident involving the underinsured motorist took place in Delaware. Erie removed the case to the United States District Court for the District of Maryland. The District Court certified two questions to the Court of Appeals.

Held: Substantive law of Delaware applies to determine what the claimants would be "entitled to recover." Maryland's public policy exception to *lex loci delecti* requires neither the application of Maryland's statutory cap on non-economic damages, nor the application of Maryland's contributory negligence principles.

The Court of Appeals reasoned that although an insured sues in contract against the insurer, the determination of contractual liability in an insured/underinsured motorist claim depends on substantive tort law. In a tort conflict of law situation, Maryland adheres to *lex loci delecti*, which employs the substantive tort law of the *situs* of the accident, the place where the injury took place. Since the accident took place in Delaware, Delaware tort law determines liability and damages. Although this would cause contractual and tort issues to be determined by the law of different states, the Court reasoned that this holding creates a predictable framework for resolving choice of law issues. Furthermore, the Court held that *lex loci delecti* is the proper test for determining a tort conflict of law because the doctrine recognizes the foreign state's interests in paying for and preventing automobile collisions. The Court declined to apply the doctrine of *renvoi*, which allows a forum court to apply the entire body of a foreign jurisdiction's substantive law. This is because application of *lex loci delecti* to this case would not cause forum shopping or an anomalous result.

The Court held that Maryland's public policy exception to *lex loci delecti* did not compel the application of Maryland's statutory cap on non-economic damages. This is because the cap is part of Maryland substantive law and because Maryland's interest in the cap is not sufficiently strong to override application of *lex loci delecti*. Furthermore, the Court held that Maryland's public policy exception to the doctrine of *lex loci delecti* did not compel the application of contributory negligence because Maryland has a strong interest in applying the law of the *situs* of the accident in tort conflict of law cases.

Erie Insurance Exchange v. Edmund D. Heffernan, II, et al., Misc. No. 2, September Term, 2006, filed June 13, 2007. Opinion by Greene, J.

LABOR AND EMPLOYMENT LAW - COLLECTIVE BARGAINING AGREEMENTS - ENFORCEMENT - EXHAUSTION OF REMEDIES - DISMISSAL - EMPLOYEES SUBJECT TO COLLECTIVE BARGAINING AGREEMENTS MUST EXHAUST THE REMEDIES PROVIDED FOR BY THE AGREEMENT BEFORE THEIR CLAIMS MAY BE ADJUDICATED IN COURT.

Facts: At the time that the controversy in question arose, Amelia Foster was working as a User Support Specialist I at a public high school in Montgomery County, where she was responsible for all of the computers. Carol Gazunis was working as a supervisor in the Office of Global Access Technology, which supervised all of the computers and networks in the school. In June 2002, a new server arrived at the school. The school experienced recurrent problems with the server. Foster approached the principal to explain that she believed Gazunis's son, who also worked with the computers, was responsible. Gazunis, thereafter, allegedly threatened Foster and allegedly told the principal that Foster had purposefully sabotaged the computer network. Foster was subsequently relieved of her computer responsibilities and officially demoted. Foster took an extended sick leave and was released from duty in June 2003.

Foster timely filed two grievances relating to her demotion. She also initiated the four-step administrative review process in accordance with her collective bargaining agreement. She proceeded through steps one, two and three and initiated step four, arbitration, and then subsequently withdrew from the grievance process. She and her husband filed a civil action in the Circuit Court for Montgomery County against Gazunis and the Montgomery County Board of Education. Foster alleged defamation, wrongful demotion and termination, and breach of contract. In addition, she and her husband filed a claim for loss of consortium. Gazunis and the Board filed a motion for summary judgment on all counts. The Circuit Court denied the motion as to the defamation count and stayed the remaining counts, pending completion of arbitration as

required by the collective bargaining agreement. Foster thereafter asked the Board to revive the arbitration proceedings. The Board explained that it canceled the arbitration and closed the grievance when Foster withdrew her request for arbitration.

The Circuit Court consolidated all four counts for trial and sent the claims to the jury. The jury returned a verdict in favor of Foster on the defamation and wrongful demotion claims and in favor of Mr. and Mrs. Foster on their loss of consortium claim. The jury awarded Foster \$35,000 for past loss of earnings, \$200,000 in non-economic damages for emotional distress, and awarded the Fosters \$50,000 on their loss of consortium claim, a total of \$285,000. Gazunis and the Board moved to alter or amend the judgment to set aside the verdict to the extent that it exceeded the \$100,000 statutory cap on damage claims, pursuant to Md. Code (1974, 2006 Repl. Vol.), § 5-518(b) of the Courts and Judicial Proceedings Article. They also argued, in that motion, that Gazunis was not personally liable for damages resulting from her tortious acts, because § 5-518(e) of the Courts and Judicial Proceedings Article negated her liability. On April 7, the court reduced the damage award to \$100,000 against the Board alone, in response to the motion. The Fosters appealed to the Court of Special Appeals, arguing that the trial court had erroneously granted a JNOV in favor of Carol Gazunis and that the court erred in finding that the Board was entitled to the immunity set forth in § 5-518 (b). Gazunis and the Board cross-appealed, arguing that the trial court erred in permitting hearsay testimony to provide an essential element of the defamation claim and that the court erred in permitting the jury to consider the wrongful demotion claim when Foster had failed to exhaust the remedies provided in the collective bargaining agreement. The intermediate appellate court addressed only the issue of whether Foster had exhausted her remedies under the agreement. It concluded that even if she waived her right to arbitrate, the wrongful demotion and breach of contract claims could still be arbitrable if the Board did not waive its right to arbitrate. It therefore vacated the judgment and remanded the case to the Circuit Court for a determination of whether the Board waived its right to arbitrate. On November 21, 2006, Gazunis and the Board filed a petition for writ of certiorari, asking this Court to address only the collective bargaining agreement issue. On December 4, the Fosters filed a petition for writ of certiorari asking this Court to determine whether the lower court erred in (1) granting JNOV in favor of Gazunis, (2) determining that the Board was entitled to immunity under § 5-518 (b), and (3) entering judgment for \$100,000 when the verdict was for \$285,000. Gazunis and the Board filed an answer on December 18, asking this Court to address the hearsay defamation issue if we grant the Foster's petition for writ of certiorari. We granted only the two petitions.

Held: Reversed. Case remanded for further proceedings.

This Court first concluded that the issue of whether the trial court erred in permitting hearsay testimony to establish the publication element of defamation was not properly before the Court because the parties failed to raise the issue in their petitions for writ of certiorari. The Court noted that the parties did preserve the issue before the intermediate appellate court. The Court of Appeals remanded the case to the Court of Special Appeals for consideration of the hearsay issue and other related issues not addressed in the intermediate appellate court's opinion. The Court explained that if the Court of Special Appeals determined that any of the issues had merit and would warrant a new trial as to defamation and the derivative claim of loss of consortium, then it will have to reverse the judgment entered against Gazunis and remand for a new trial on those counts. In addition, if the Court of Special Appeals were to conclude that none of the issues have merit or would not warrant an entirely new trial, it will have to reverse the judgment against Gazunis and remand for a new trial only on damages.

The Court next examined the collective bargaining agreement and determined that the collective bargaining agreement directly governed Foster's grievances pertaining to wrongful demotion, termination, and breach of contract. The Court determined that Foster was required to exhaust all of her contractual remedies as a condition precedent to seeking judicial relief in the courts on those claims. The Court explained that when Foster waived arbitration, the fourth step in the grievance process under the collective bargaining agreement, the Board was entitled to close the grievance, as it did. The Court held that the Court of Special Appeals therefore erred in remanding the case to the Circuit Court to determine whether the Board waived its right to adjudicate the claim. The Court concluded that when Foster waived arbitration, she also waived her right to adjudicate her grievance, as to the claims for wrongful demotion, termination, breach of contract, and loss of consortium stemming from those claims, and that, accordingly, any money judgments entered on those claims are invalid.

Gazunis v. Foster, No. 120, September Term 2006, filed August 1, 2007. Opinion by Greene, J.

REAL PROPERTY - ZONING - HISTORIC DISTRICT ZONING - MAYOR AND CITY COUNCIL OF ROCKVILLE ARE NOT REQUIRED, WHEN DECIDING WHETHER TO DESIGN AS HISTORICALLY/ARCHITECTURALLY SIGNIFICANT A PARTICULAR PARCEL OF PROPERTY, TO CONSIDER THE ECONOMIC FEASIBILITY OF PRESERVING THAT PROPERTY, EVEN WHEN THE DESIGNATION PROCEEDINGS AROSE AS A MUNICIPAL RESPONSE TO A DEMOLITION PERMIT APPLICATION FILED BY THE PROPERTY OWNER - CONSIDERATION OF ECONOMIC FEASIBILITY IS RESERVED FOR THE CITY'S HISTORIC DISTRICT COMMISSION, IF THE PROPERTY IS DESIGNATED FORMALLY AS WITHIN THE HISTORIC DISTRICT ZONE, IN ACTING ON THE DEMOLITION PERMIT APPLICATION.

CONSTITUTIONAL LAW - THE TAKINGS CLAUSE - THE MAYOR AND COUNCIL'S REFUSAL TO CONSIDER, DURING THE HISTORIC DESIGNATION PROCEEDINGS, THE ECONOMIC FEASIBILITY OF RENOVATION DID NOT WORK A REGULATORY TAKING OF THE PROPERTY.

Facts: Petitioner, the owner of the property in question, challenges a decision of the Mayor and Council of Rockville, Maryland, to designate as historically/architecturally significant and, as a result, place within Rockville's historical district, a 11,300 square foot parcel of land located at 115 Park Avenue, at the intersection of Fleet Street and Park Avenue, and improved with a 1 ½ story bungalow (collectively the "Property"). The bungalow, now owned by the Betty Brown Casey Trust, Petitioner is commonly referred to in Rockville as the "Spates Bungalow."

Constructed approximately in 1923, the bungalow is one of the last two original structures remaining in what had been "The Park" subdivision, a residential neighborhood established in 1888 by Judge William Veirs Bouic, Sr., a prominent political leader during a period of rapid growth in Rockville in the mid- to late-19th century. The bungalow is considered by some to be "an excellent and little-altered example of the Craftsman style of architecture" popular in the 1890's to 1920's.

From 1980 until 1999, the Property was leased to a Montgomery County surveyor who used the bungalow primarily for the purposes of storage and some office space. When the surveyor, due to the bungalow's deteriorating condition, declined to renew his lease in 1999, a structural engineer was engaged by Petitioner to evaluate the Property. The engineer determined that rehabilitation of the bungalow, due to its extensive disrepair, would not be cost effective, and concluded that demolition of the building was appropriate.

In light of this financial picture, the Trust filed a formal demolition permit application with the Rockville Planning Department on September 7, 2001. Petitioner contends a representative of the City staff, in September 2001, informed it that all requirements for issuance of a demolition permit had been satisfied and that a permit would be issued shortly. On October 2,

2001, however, Petitioner was informed by letter that the permit application remained pending, subject to review and recommendation of the Property by the Rockville Historic District Commission ("HDC") regarding the historical/architectural significance of the bungalow. According to that letter, Peerless Rockville Historic Preservation, Ltd., a third-party, non-profit historic preservation group, nominated the Property for historic designation.

After numerous hearings before the HDC, Rockville Planning Commission, and the Mayor and Council, the Mayor and Council on July 14, 2003 adopted unanimously an ordinance re-zoning the Property from O-1 to O-1 HD (Historic District). The historic designation acts as an overlay, and is placed on top of the underlying zone or zones, in the present case a Euclidian zone, O-1 (office). The O-1 zone remains on the official Zoning Map for the City of Rockville, subject to the additional regulations consequential to historic designation. Absent from the ordinance establishing the historic district was any apparent consideration of the financial feasibility of preserving the bungalow, for which much evidence was adduced by the Trust during the course of the historic designation deliberations before the local government bodies.

Because the statutes applicable to the Property as a result of its historic designation restrict Petitioner's ability to alter, develop, or, as in the present case, demolish the bungalow, the Trust filed a petition in the Circuit Court for Montgomery County seeking judicial review of the historic designation action, no final action on demolition permit having yet been taken. The Circuit Court opined that the decision to place the Property in the historic district was not arbitrary on the record before it, but nevertheless remanded the matter to the Mayor and Council in order to consider the economic feasibility of preserving the bungalow. According to the Circuit Court, the Mayor and Council erred in neglecting to consider this factor in the course of its deliberations on whether to designate the Property as historic.

Upon appeal by the Mayor and Council, the Court of Special Appeals, although agreeing with the Circuit Court's conclusion as to the sufficiency of evidence supporting the Mayor and Council's decision concerning historical significance, reversed the Circuit Court's judgment remanding the matter. The intermediate appellate court reasoned that the Mayor and Council was not required to consider economic infeasibility of preservation when deciding whether to include the Property within the historic district. The Trust petitioned for a writ of certiorari to review the judgment of the Court of Special Appeals. The writ was issued.

Held: Affirmed. The only legislatively-declared criteria for designation of a property as historic is set forth in Maryland Code (1957, 2003 Repl. Vol.), Article 66B, § 8.02, which states that

"[f]or the purposes of this subtitle, each local jurisdiction may designate boundaries for sites, structures, or districts which are deemed to be of *historic, archaeological, or architectural significance*" The economic feasibility of renovation is nowhere indicated as a required consideration for the threshold determination whether a site is worthy of historic designation. Once historically/architecturally designated, the property becomes subject to Article 66B, §§ 8.05 - 8.10. Pursuant to that regulatory scheme, "[b]efore a person may construct, alter, reconstruct, move, or demolish a site or structure located within [the] designated district of [the] local jurisdiction, . . . the person shall file an application with the historic district commission or historic preservation commission." Article 66B, § 8.05(a). In the case of a historic demolition permit application, the HDC, is obligated expressly to attempt to formulate an economically feasible plan for preservation of the property. Article 66B, § 8.09(a)(1). If no economically feasible plan initially is agreed upon, the HDC has 90 days from that date to "negotiate with the owner and other parties to find a means of preserving the site or structure." Article 66B, § 8.09(b). In the event that no alternative can be negotiated by the parties, the HDC "may approve proposed . . . demolition, despite the fact that the changes [apply to a historically designated property], if: . . . retention of the site or structure would: (i) *Cause undue financial hardship to the owner*" Article 66B, § 8.10 (emphasis added). Taking into consideration that economic feasibility is contemplated specifically as a consideration at a certain point in the statutory scheme, if the Legislature intended that the Mayor and Council consider, in deciding whether an historic designation was appropriate, the economic feasibility of preserving a property in a situation such as the one presented in this case, it is not unreasonable to assume that the Legislature would have provided explicitly for such a consideration.

That the Mayor and Council was not required to consider the economic feasibility of preservation is all the more reasonable when one considers the purposes underlying historic area zoning. In addition to "enhanc[ing] the quality of life by preserving the character and desirable aesthetic features of a city . . . ," *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129, 98 S. Ct. 2646, 2661-62, 57 L. Ed. 2d 631 (1978), historic area zoning serves also the purpose of preventing the premature destruction of historically important structures, landmarks, and geographic areas without first considering adequately their significance. *Penn Cent. Transp. Co.*, 438 U.S. at 108, 98 S. Ct. at 2651, 57 L. Ed. 2d 631 ("[The public purpose [behind historic and landmark preservation] is to prevent the destruction of historic buildings without adequate consideration of their value or significance in enhancing the quality of life for all and to provide for the potential for preservation."); see also Article 66B, § 8.01(b)(1) and (c)(1).

Petitioner contended that, by placing the Property in Rockville's Historic District Zone without considering during the designation process the economic infeasibility and the resultant financial hardship to the Trust of rehabilitating the Property, the Mayor and Council's decision effected a regulatory taking of the Property without due process of law or just compensation. In other words, the Trust argued that "the placement of the Property within the City's Historic District Zone has rendered the Property economically inviable."

It is well-settled that preservation of architecturally significant areas is a valid exercise of government power. *Belman v. State*, 322 Md. 207, 211, 586 A.2d 1281, 1283 (1991) (citing *Donnelly Adver. Corp. v. City of Baltimore.*, 279 Md. 660, 671, 370 A.2d 1127, 1133 (1977); *City of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 91, 299 A.2d 828, 835 (1973)). Thus, in order for the zoning regulation to constitute a taking of private property or otherwise constitute a deprivation of due process, Petitioner must "affirmatively demonstrate[] that the legislative or administrative determination deprives him of all beneficial use of the property" *Mayor & City Council of Baltimore v. Borinsky*, 239 Md. 611, 622, 212 A.2d 508, 514 (1965). Essential to the successful assertion of any regulatory takings claim is a final and authoritative determination of the permitted and prohibited uses of a particular piece of property. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-49, 106 S. Ct. 2561, 2566, 91 L. Ed. 2d 285 (1986). Only when the governmental authority makes a final determination of the legal rights of the parties is it possible to ascertain whether all reasonable uses of the land are frustrated to the point that a regulatory taking has occurred. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 189 n.11, 105 S. Ct. 3108, 3116, 3118 n.11, 87 L. Ed. 2d 126 (1985); *Maryland Reclamation Assocs., Inc. v. Harford County*, 342 Md. 476, 502-06, 677 A.2d 567, 580-82 (1996).

In the present case, Petitioner equates erroneous historic designation of the Property with denial of the demolition permit when, in actuality, the former does not lead necessarily to the latter. To the contrary, once the Property was designated as historic, the HDC still must review the permit application under the regulatory scheme set forth in Article 66B, §§ 8.01 - 8.17, at which time there will be ample opportunity for all interested parties to have adjudicated fully the issues concerning the economic feasibility of preserving the Spates Bungalow. The entire purpose of Article 66B, §§ 8.09 and 8.10, two provisions which have yet to be applied by the HDC to the now-designated Property, consider precisely those economic impacts. In short, the filing of the local map amendment to rezone the Property with a historic district overlay zone did not "seal its fate," and the Mayor and Council's decision to designate the Property as historical leaves open the real possibility that the Trust yet may be able to

demolish the Spates Bungalow. Until there is some governmental determination by the HDC, or otherwise, that Petitioner may not proceed with its demolition plans or other financially fruitful uses of the Property, there is no way to determine with any particularity how historic designation ultimately will affect the use of the Property. As a result, the takings claim is not ripe for judicial resolution.

Betty Brown Casey, Trustee v. Mayor and City Council of Rockville, No. 85, September Term, 2006, filed July 30, 2007. Opinion by Harrell, J.

TORTS - MALPRACTICE, NEGLIGENCE, OR BREACH OF DUTY-ACTIONS AND PROCEEDINGS - CONDITIONS PRECEDENT - THE FILING OF A PROPER CERTIFICATE IS A CONDITION PRECEDENT TO FILING A CLAIM IN THE CIRCUIT COURT. IF A PROPER CERTIFICATE HAS NOT BEEN FILED, THE CONDITION PRECEDENT IS NOT MET AND THE ACTION MUST BE DISMISSED UNDER THE STATUTE.

MALPRACTICE, NEGLIGENCE, OR BREACH OF DUTY-ACTIONS AND PROCEEDINGS - AFFIDAVITS OF MERIT OR MERITORIOUS DEFENSE, EXPERT AFFIDAVITS- UNDER THE PLAIN LANGUAGE OF THE STATUTE AN EXPERT'S CERTIFICATE MUST AFFIRM (1) THAT THE DEFENDANT - PHYSICIAN DEPARTED FROM THE STANDARDS OF CARE, AND (2) THAT SUCH DEPARTURE WAS THE PROXIMATE CAUSE OF PLAINTIFF'S ALLEGED INJURY.

MALPRACTICE, NEGLIGENCE, OR BREACH OF DUTY-ACTIONS AND PROCEEDINGS - AFFIDAVITS OF MERIT OR MERITORIOUS DEFENSE, EXPERT AFFIDAVITS - MARYLAND LAW REQUIRES THAT AN EXPERT'S CERTIFICATE STATE THE APPLICABLE STANDARD OF CARE AND IDENTIFY BY NAME WHICH LICENSED PROFESSIONAL BREACHED THE STANDARD OF CARE.

Facts: On September 19, 2001, Dr. Imoke performed a unilateral mastectomy of Mary Carroll's left breast. As a part of the procedure, Dr. Imoke left a catheter inside Carroll's chest so that chemotherapy could be administered. Carroll claims that she was not aware that the catheter was inserted at the time that it occurred. The catheter was supposed to be removed within two months after Carroll completed chemotherapy. Dr. Imoke, however,

did not make a follow-up appointment to remove the catheter. Instead, he relied on Dr. Konits, Carroll's oncologist, to inform him that Carroll had completed chemotherapy.

She completed chemotherapy on April 11, 2002. The catheter was not removed, however, until March 25, 2003—two and one-half years after it was initially inserted. Carroll asserted that she suffered pain and discomfort, a deep vein thrombosis, and chronic venous stasis of the right arm with chronic lymph edema due to the catheter being left inside her chest for a prolonged period of time.

On March 25, 2005, Carroll filed a complaint with the Health Care Alternative Dispute Resolution Office ("HCADRO"). She alleged that Drs. Konits and Imoke were negligent in failing to communicate the need to have the catheter removed in a timely manner. Approximately four months later, on August 4, 2005, Carroll filed a letter signed by Dr. Wanda J. Simmons-Clemmons, which purported to be a certificate of qualified expert ("Certificate").

On October 3, 2005, after more than 180 days had elapsed from the time that Carroll initially filed her complaint, Drs. Konits and Imoke filed a motion to dismiss the claim with the HCADRO on the basis that Dr. Simmons-Clemmons's documentation was deficient under the requirements set forth in Maryland Code (1974, 2002 Repl. Vol., 2006 Cum. Supp.), § 3-2A-04(b) of the Courts and Judicial Proceedings Article. Several months later the matter was transferred to the Circuit Court for Baltimore City where the doctors again filed motions to dismiss. The Circuit Court dismissed the case on various grounds, including, but not limited to, Carroll's failure to submit a proper Certificate.

Held: Affirmed. The Court of Appeals held that a Certificate is a condition precedent and at a minimum, must identify with specificity, the defendant(s) (licensed professional(s)) against whom the claims are brought, include a statement that the named defendant(s) breached the applicable standard of care, and that such a departure from the standard of care was the proximate cause of the plaintiff's injuries. In the case *sub judice*, the certificate was incomplete because it failed to specifically identify the licensed professionals who allegedly breached the standard of care and failed to state that the alleged departure from the standard of care, by whichever doctor, or doctors, the expert failed to identify, was the proximate cause of Carroll's injuries.

Carroll v. Konits, No. 117, September Term, 2006. Opinion filed on July 27, 2007 by Cathell, J.

COURT OF SPECIAL APPEALS

APPEALS - COLLATERAL ORDER DOCTRINE - Denial of request to be heard *ex parte* on merits of a pretrial motion not immediately appealable - The question of whether the circuit court correctly ruled that it was not authorized to grant defendant's request to be heard *ex parte* on a pretrial motion regarding his proposed use and disclosure of confidential health records and school records of the alleged victim could not be raised on interlocutory appeal under the collateral order doctrine.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Montgomery County. Prior to trial, appellant, Elton Addison, appealed a pretrial order denying his motion for an *ex parte* hearing regarding his proposed pretrial use and disclosure of confidential health records and school records of the alleged victim that he had previously subpoenaed and reviewed *in camera* pursuant to a confidentiality order. The State moved to dismiss this interlocutory appeal, arguing that the ruling denying the *ex parte* hearing is not immediately appealable.

Held: Dismissed. Motion to Dismiss is Granted. The Court of Special Appeals held that the pretrial ruling could not be immediately appealed under the collateral order doctrine.

Elton Addison v. State of Maryland - Case No. 144, September Term 2005, filed on March 8, 2007. Opinion by Meredith, J.

CIVIL LAW - PROCEDURE - CLASS ACTIONS - Maryland Rule 2-231 provides that an action may be maintained as a class action if the court determines that the conditions set forth in Rule 2-231 are satisfied. When the circuit court properly determines that questions of law or fact common to all members of the class do not predominate over questions affecting only individual members of the class, the appellate court will not disturb the circuit court's exercise of discretion in refusing to certify that the case should

proceed as a class action.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Prince George's County. Former employees of Wal-Mart and Sam's Club stores in Maryland who claimed they were deprived of benefits and pay for work performed filed a putative class action suit against Wal-Mart Stores, Inc., the parent company of Wal-Mart and Sam's Club. The employees' motion for class certification was denied by the Circuit Court for Prince George's County on the ground that the employees failed to show that common issues predominate over individual issues. The case was later dismissed by the circuit court because, absent class certification, the named plaintiffs' claimed damages did not meet the \$5,000 threshold for civil cases filed in circuit court. The employees appealed, arguing that the circuit court abused its discretion in denying their motion for class certification.

Held: Affirmed. The Court of Special Appeals concluded that the circuit court did not abuse its discretion in ruling that the predomination of individual issues over common issues made it inappropriate to certify the claims asserted by the plaintiffs in this case as a class action.

Garrett Cutler and Micheal Pittman, on behalf of themselves and all others similarly situated v. Wal-Mart Stores, Inc., a Delaware Corporation; Sam's Club, an operating Segment of Wal-mart Stores, Inc., No. 1376 September Term, 2005, filed June 29, 2007. Opinion by Meredith, J.

COURTS AND JUDICIAL PROCEEDINGS - PRETRIAL PROCEDURE - SCHEDULING ORDER - SUBSTANTIAL COMPLIANCE. The appropriate sanction for a party's failure to meet the discovery deadlines established by a scheduling order is largely discretionary with the trial court. The exercise of discretion contemplates that the trial court will ordinarily analyze the facts and circumstances, and consider possible alternatives, before entering an order to exclude evidence that is material to a party's claim or defense. It must be discernable from the record that the judge in fact exercised discretion in a judicially reasonable manner. Under the facts of this case, where there was substantial compliance with the

scheduling order, it was an abuse of discretion for the court to exclude an important witness simply because there was not strict compliance with the disclosure deadlines set forth in the scheduling order.

Facts: This case comes to the Court of Special Appeals from the Circuit Court for Somerset County. Appellants, Lakeya Maddox and her children, suffered injuries as a result of a fire at their rented home. They alleged that the fire was caused by faulty wiring. They filed a complaint in the circuit court against the home's owners and other parties, including the appellee Stone Electrical Contractors, alleging the fire was caused by negligence of the parties. Because the plaintiffs did not provide the report of their expert witness until after the deadline established in a discovery, the defendant filed a motion to strike plaintiffs' expert witness even though plaintiffs had made the expert available for deposition prior to the close of discovery. Without addressing any of the considerations described in *Taliaferro v. State*, 295 Md. 376, 390-91 (1983), the circuit court granted appellee's motion striking the expert witness, citing only the scheduling order as its reason. Appellants filed this appeal.

Held: Vacated. Case remanded to the Circuit Court for Somerset County for further proceedings consistent with this opinion.

The Court of Special Appeals held that, under the facts of this case, the circuit court abused its discretion in striking one of the appellants' expert witnesses because of a lack of strict compliance with the scheduling order.

Lakeya Maddox, Individually, etc. vs. Francis L. Stone t/a Stone Electrical Contractors - Case No. 1179, September Term 2006, filed May 2, 2007. Opinion by Meredith, J.

CRIMINAL LAW - ASSUMING THE IDENTITY OF ANOTHER WITH FRAUDULENT INTENT - USE OF A FICTITIOUS NAME - ASSUMING THE IDENTITY OF ANOTHER MEANS ASSUMING ANY IDENTITY OTHER THAN ONE'S OWN

Facts: Appellant, Kazeem Adeshina Ishola, visited two branches

of Branch Banking & Trust ("BB&T") in Howard County and, in each instance, attempted to use a false identity to open a bank account. At both branches, he presented a Florida driver's license bearing the name of "Christopher J. Pitera." The bank discovered the fraud when an employee attempted to match the license to a sample Florida driver's license displayed in the bank's identification guide. When appellant attempted to open an account at a second branch of BB&T the same day, the bank called the police. Further investigation revealed that appellant opened an account with BB&T under another identity, "James P. Nicholas," about two months earlier.

Appellant was charged with two counts of obtaining personal identifying information without consent, and two counts of assuming the identity of another. At the close of evidence at his one day jury trial, appellant was acquitted of the two counts of obtaining personal identifying information without consent after the prosecution failed to offer evidence that Christopher J. Pitera and James P. Nicholas were actual existing people. The circuit court denied appellant's motion for acquittal as to the two charges of assuming the identity of another. Those charges were submitted to the jury, which found him guilty on both counts.

On appeal, appellant argued that the circuit court wrongfully denied his motion for acquittal on the two counts of assuming the identity of another. He contended that the State failed to satisfy the elements of the crime as set forth in Md. Code, Crim. Law § 8-301(c), because it did not prove that the identities used were actual existing people. Appellant argued that the word "another" in § 8-301(c) means an actual existing person, and does not include fictitious identities.

Held: Affirmed. Assuming the identity of another means assuming any identity other than one's own. Md. Code § 8-301(c) is not ambiguous and clearly encompasses the use of fictitious identities. To apply appellant's reasoning would reach the illogical result that a perpetrator need only assume a clearly fictitious identity to escape prosecution. The legislative history of Md. Code § 8-301(c) supports this conclusion. The harm of identity theft is not only to the individual whose identity has been appropriated, but also to the individuals and institutions who are victimized by the ensuing fraudulent use of assumed identities.

Ishola v. State, No. 1427, September Term, 2005, filed June 29, 2007. Opinion by Sharer, J.

CRIMINAL LAW - CONSTITUTIONAL LAW - FOURTH AMENDMENT VIOLATION

Facts: The State's case relied on a warrantless vehicle search. Two officers, working traffic enforcement utilizing a laser handheld speed motion detector, stopped William Carter going ten miles above the posted speed limit. During the stop, one officer wrote a warning ticket while the other, a validly certified K-9 handler, performed a K-9 scan of Carter's vehicle and upon being alerted, executed a search of that vehicle. Appellant moved to suppress the contraband seized from his vehicle on the ground that it violated his Fourth Amendment rights. At trial, the judge factored in his personal knowledge of laser speed motion detectors used by police officers in deciding to deny appellant's motion to suppress.

Held: Vacated; remanded. (1) Appellant is entitled to a new trial on the ground that when the defendant waived his right to counsel, the trial court failed to comply with Md. Rule 4-215(a)(1)-(5) to determine whether or not that waiver was knowing and voluntary before it granted defense counsel leave to withdraw from the case. (2) Appellant failed to object or request a supplemental or *de novo* hearing and so waived the claim that the trial judge improperly took judicial notice of the accuracy of a laser speed motion device used in detecting the appellant's vehicle's speed on direct appeal.

William Carter v. State of Maryland, No. 728, September Term, 2005, filed March 7, 2007. Opinion by Murphy, C.J.

CRIMINAL LAW - COURTS - SENTENCING AND PUNISHMENT

Facts: Upon a finding of guilty but not criminally responsible Jacqueline Mae Garnett (appellee) was ordered on July 25, 2001, in a criminal proceeding, to pay restitution to the Maryland State

Police for property damage to police cars as a part of the penal sanctions subject to her. The order of restitution was not dischargeable under the Bankruptcy Code because it was a criminal sanction, and following remand the State filed a Motion to Allow Garnishment of her wages to collect. Appellee filed a Motion to Dismiss and Correct Illegal Sentence requesting the State's motion be dismissed and the money judgment vacated on the ground that the restitution order was illegal because she could not, as a matter of law, be held accountable for the crimes. The circuit court granted appellee's motion, vacated the money judgment, and dismissed the State's motion, even though the Court of Appeals previously held the motion should have been granted. The circuit court held that imposing a criminal sanction of restitution upon a defendant found guilty but not criminally responsible was illegal.

Held: Affirmed. Maryland case law does not prohibit a defendant, found guilty of malicious destruction of property but not criminally responsible by reason of insanity, from asserting on remand that an order of restitution constituted an illegal sentence. Upon an affirmative finding that the appellee is not criminally responsible by reason of insanity the imposition of a restitution sanction is precluded and the court was ordered to (1) adhere to *Pouncey v. State*, 297 Md. 264 (1983), holding that no sentence of restitution should have been imposed, and (2) conclude that the illegal restitution sentence was properly rectified pursuant to Md. Rule 4-345(a).

Jacqueline Mae Garnett v. State of Maryland, No. 1253, September Term, 2005, filed February 2, 2007. Opinion by Murphy, C.J.

CRIMINAL LAW - EVIDENCE - AUTHENTICATION - TEXT MESSAGES.

Facts: John Otha Dickens shot and killed his estranged wife, Darlene Dowsey. Prior to her death, Dowsey had received a number of threatening text messages on her cell phone. One reading "She better enjoy her last day in the motel[.] Get ready for the shocker," was transmitted from a phone known to belong to Dickens after he had tried to force his way into a motel room Dowsey was sharing with a boyfriend. Another message, this one from an

unidentified number, referenced the estranged couple's daughter, Dajon: "You wanna stop me from seeing Dajon[.] Your [sic] keep taking me as a fucking joke[.] Im [sic] trying my best to keep it together." Dowsey received three other text messages from a person using the name "Doll/M," one of which read, "Until death do us part bitch[.]"

The jury returned guilty verdicts for first- and second-degree specific-intent murder, as well as depraved-heart murder and involuntary manslaughter.

Held: Affirmed. The text messages were properly admitted into evidence. The Court ruled that the content and text of the message provided sufficient circumstantial evidence that Dickens was the sender. In support of this ruling, the Court pointed to the following facts: (1) there was an exceedingly small number of persons who could have known that the victim was staying at a motel with a boyfriend at the time the first message was sent; (2) only Dickens had a right to "see" Dajon; (3) the appellation "Doll/M" was a clear reference to the movie "Dial M for Murder," in which a husband plots to kiss his wife; and (4) the content of the messages, including "[u]ntil death do us part bitch," indicated that they were from Dickens, the victim's husband.

Dickens' second argument on appeal was that the verdicts were inconsistent because the intent required for premeditated and specific-intent murder of which he was convicted made it impossible for the jury to find, as it did, that he was guilty of either involuntary manslaughter or depraved-heart murder. The Court held that the inconsistency was of no import because Dickens was not sentenced for depraved-heart murder or involuntary manslaughter.

Dickens v. State, No. 1739, Sept. Term, 2005, filed July 2, 2007. Opinion by Salmon, J.

CRIMINAL LAW - HOMICIDE - SELF-DEFENSE - REASONABLENESS OF BELIEF

Facts: On the night of September 23, 2005, Julianna B., appellant, was involved in a fatal altercation during which she cut

the victim, a fifteen-year-old girl, five times with a knife and stabbed her in the heart. The victim did not possess a weapon during the fight. Appellant was convicted of second degree murder in the Circuit Court for Montgomery County. The court found that during the fight appellant was never in immediate danger of death or serious bodily injury, never believed she was in such danger, and thus did not act in perfect or imperfect self-defense.

Held: Affirmed in part; reversed in part. The defense of imperfect self-defense is only available when (1) the defendant believed that he or she was in imminent danger of death or serious physical injury, and believed he or she had to use deadly force to avoid that danger; and (2) that belief was objectively unreasonable. The circuit court was not clearly erroneous in finding that at the time appellant inflicted the fatal stab wound she did not believe that she was in imminent danger of death or serious injury. That finding supported the court's ruling that appellant committed a second degree murder. Separately, appellee conceded that the circuit court's decisions concerning the charges of carrying a concealed deadly weapon and possession of a deadly weapon on school grounds must be reversed.

In re Julianna B., No. 2796, September Term, 2005, filed July 3, 2007. Opinion by Murphy, C.J.

CRIMINAL LAW - HOMICIDE - EVIDENCE - DOCUMENTARY EVIDENCE -
ADMISSIBILITY - ABUSE OF DISCRETION IN OVERRULING OBJECTIONS

Facts: Tjane Charmoise Marshall, appellant, was convicted of first degree murder and use of a handgun in the Circuit Court for Howard County. During the trial, the jurors were each provided a copy of a transcript of statements that the appellant made during a taped conversation with another individual. Appellant objected to the admission of the transcript on the ground that it was prepared by a lead detective in the case.

At trial, Marshall argued that someone else had committed the murder, and sought to introduce letters and a notebook recovered from the victim's residence to establish that two of the police's

other suspects may have had the motive and opportunity to commit the crime. A law enforcement official testified at the trial that at the time of the murder one of those suspects was in Ohio and the other was confined in a halfway house in the District of Columbia. The circuit court refused to admit Marshall's evidence.

During the State's closing argument, the prosecutor stated (1) that appellant was "up to no good in this area," and (2) that the victim " was a member of our community ... she lived here among us." Appellant's counsel objected to the first statement on that ground that it was "improper rebuttal", moved for a mistrial, and asked that the judge deliver a curative instruction. The court overruled the objection, denied the motion for mistrial and did not deliver a curative instruction.

Held: Affirmed. A circuit court is at its discretion to admit into evidence a transcript of a taped conversation where the objecting party has not provided an alternative transcript. The letter and notebook evidence that appellant sought to have admitted to establish that other suspects may have committed the murder was needlessly cumulative under Maryland Rule 5-403, and the circuit court neither erred nor abused its discretion in excluding them. An abuse of discretion occurs when no reasonable person would take the view of the trial court. The Court of Special Appeals held that the circuit court did not abuse its discretion in overruling appellant's objection to the prosecutor's statements during closing argument, denying appellant's motion for mistrial, or refusing to deliver appellant's requested instruction.

Marshall v. State, No. 2642, September Term, 2004, filed May 18, 2007. Opinion by Murphy, C.J.

CRIMINAL LAW - JURY TRIAL - JUROR VOIR DIRE - CHALLENGES FOR CAUSE
- WAIVER

Facts: Prospective juror, later seated as a member of the jury panel, failed to disclose the adverse relationship between appellant and members of the juror's family. Appellant called this fact to his counsel's attention during the trial, but neither

counsel nor appellant brought the juror's inaccurate response to the court's attention until after appellant was convicted of possession with intent to distribute heroin, cocaine, and marijuana. Following a hearing on appellant's motion for a new trial, the court denied the motion, inferentially ruling that appellant had waived his right to challenge the juror misconduct.

Held: Affirmed. Where a criminal defendant, or his trial counsel, is aware that a prospective juror has failed to disclose information that is sought by *voir dire*, and neglects to alert the trial court of the fact, the defense has waived its right to later complain that the juror remained on the panel. The trial court, therefore, did not abuse its discretion in the denying appellant's motion for a new trial.

Scott v. State, No. 1076, September Term, 2005, filed June 28, 2007. Opinion by Sharer, J.

CRIMINAL LAW - PROCEDURE - VOIR DIRE - QUESTION NEEDED TO PROBE JURY'S POTENTIAL BIAS AGAINST THE USE OF A HANDGUN IN THE COMMISSION OF A MURDER.

Facts: Harold Singfield, Jr., was arrested, charged, and tried for a murder. He was convicted by a jury sitting in the Circuit Court for Baltimore City of second-degree murder, use of a handgun in commission of a felony or a crime of violence, and unlawfully wearing, carrying, and transporting a handgun. He was sentenced to twenty years' incarceration for the murder and a consecutive twenty-year term for the use of a handgun.

At trial, the judge began the *voir dire* process by explaining its purpose and by introducing the jury to the crime charged, i.e. "first-degree murder." He then asked of the jurors, *inter alia*, the following questions: whether they or any of their family members have been convicted of or been a victim of a crime of violence or a crime that involved a handgun or weapon; whether they hold any belief that would prevent them from rendering a judgment in the case; and whether anyone had any belief that would affect one's "ability to render a fair and impartial verdict."

Once voir dire ended, defense counsel asked the trial court to present the following question to the venirepersons: "Does any member of the jury feel that the nature of this case would make it difficult or impossible for you to render a fair and impartial verdict, specifically because this case involves a murder with a handgun?" The trial judge refused to ask the question, stating that he had already posed questions aimed at uncovering potential biases towards the use of a weapon in the commission of a murder.

On appeal, Singfield posed the following inquiry, *inter alia*: "Did the trial court err in declining to ask the jury on voir dire whether the nature of the case - murder with a handgun - would make it impossible or difficult to render a fair and impartial verdict?"

Held: Case reversed and remanded for a new trial. The trial court's failure to ask the question specifically tailored to discover potential bias against the use of a handgun was error.

During voir dire, the trial court failed to tell the jury that the case involved murder *with the use of a handgun*, and therefore "when the court asked the various questions concerning any biases the jurors might have, the prospective jurors were unaware that a handgun was involved in the offence." Moreover, even though the potential jurors were asked if they or any member of their immediate family had been convicted of or were a victim of a violent crime or a crime involving a handgun or weapon, "the potential jurors may have had strong beliefs, biases, or feelings concerning the use of a handgun in the commission of a murder regardless of how they answered that question." Therefore, the Court held that "the questions asked by the trial court did not adequately cover the bias [the proposed question] sought to reveal."

The Court also ruled that the question proposed by defense counsel was aimed directly at uncovering any bias relating to Singfield's use of a handgun during the alleged commission of a murder. The question was therefore "reasonably likely to identify jurors with such strong feelings toward the use of handguns to commit murder that it would hinder their ability to render a fair and impartial verdict."

The Court's holding that failure to ask the question constituted error is consistent with previous cases. Recently, in *Thomas v. State*, the Court of Appeals ruled that the judge should have asked a question meant to uncover any bias directly related to the crimes in question, i.e., the possession and distribution of cocaine. 369 Md. 202 (2002). The question in *Thomas* read: "Does any member of the jury panel have such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts at a trial where narcotics violations have been alleged?" The trial court refused

to ask the question, and both the Court of Special Appeals and the Court of Appeals held that such refusal constituted error: the question was needed to uncover any bias directly related to the crime that, if strong enough, would have impaired the juror's impartiality. This rationale was also subsequently applied in *Sweet v. State*, 371 Md. 1 (2002) (second-degree assault and third-degree sexual offense against a minor), and in *Baker v. State*, 157 Md. App. 600 (2004) (murder with the use of a handgun).

In line with the above-quoted cases, here, too, the proposed question was necessary to elicit any potential bias specifically against the crime itself, i.e., the use of a handgun during the commission of a murder, and to determine if any such bias would have been strong enough to impair the trial's fairness. Therefore, this Court stated, "because we are unable to conclude that the questions actually asked by the trial court would have revealed the potential biases [the proposed question] was designed to uncover, the conviction cannot stand."

Harold Singfield, Jr. v. State of Maryland, Case No. 386, September Term, 2005, filed December 29, 2006. Opinion by Salmon, J.

CRIMINAL LAW - SEARCH AND SEIZURE - SCREEN DOOR EXTERIOR TO HOME.
Drug dealer who placed his stash of drugs in the space between an exterior screen door and the closed solid wood door at the entrance of a rowhouse did not have a reasonable expectation of privacy in that space, and the surveillant police officers were not prohibited from opening the screen door to seize the drugs without a warrant.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Baltimore City. Steven Christian was convicted of possession with intent to distribute heroin. Christian appealed arguing that the trial court erred in denying his motion to suppress evidence and proceeding with a not guilty/agreed statement of facts without determining that Christian knowingly and voluntarily waived a jury trial.

Held: Affirmed. The Court of Special Appeals affirmed the suppression court's ruling that the drug dealer did not have a

reasonable expectation of privacy in the area inside the screen door that served as the public means of access to the rowhouse. The Court of Special Appeals further held that the suppression court did not err in concluding that Christian's co-occupant of the property could give valid consent for the police to enter the house and see the objects in plain view upon entering.

Steven Christian v. State of Maryland - Case No. 987, September Term 2005, filed on January 2, 2007. Opinion by Meredith, J.

JUDGMENTS - FOREIGN JUDGMENT - QUASI IN REM JURISDICTION - WAGE GARNISHMENT - DUE PROCESS. In order to sustain a post-judgment wage garnishment issued pursuant to another state's judgment that has been enrolled in Maryland in accordance with the Uniform Enforcement of Foreign Judgments Act, due process requires that there must be a sufficient connection between Maryland and the judgment debtor that the seizure of the judgment debtor's wages by the Maryland courts "does not offend traditional notions of fair play and substantial justice." See *International Shoe v. Washington*, 326 U.S. 310 (1945). The mere fact that the judgment debtor's employer is a corporation that does business in Maryland, standing alone, is not a sufficient connection to the judgment debtor to support the garnishment in Maryland of wages owed by that employer for services rendered by the judgment debtor while residing in and working in another state.

Facts: This case came to the Court of Special appeals from the Circuit Court for Montgomery County. Thomas O. Naylor obtained a money judgment against George M. Livingston, IV, in North Carolina, where Livingston is a resident, and enrolled that judgment in Maryland pursuant to the Uniform Enforcement of Foreign Judgments Act. Naylor then obtained a Writ of Garnishment against Livingston's wages owed by his employer, Marriott International, Inc., which has its corporate headquarters in Maryland. Livingston filed a motion to dismiss the writ of garnishment of his wages, and that motion was denied. Livingston appealed the circuit court order denying his motion to dismiss. On appeal, Livingston argued that the Maryland court did not have an adequate basis to exercise personal jurisdiction over him, and was therefore without power to

either enroll the judgment from another state or garnish his wages owed to him by a company that does business in Maryland.

Held: vacated and remanded to Circuit Court for Montgomery County for further proceedings.

The Court of Special Appeals noted that Livingston had resided and worked in Maryland for at least six weeks. The Court assumed *arguendo* that enrollment of a foreign judgment requires sufficient personal contacts with the judgment debtor to satisfy *International Shoe v. Washington*, 326 U.S. 310 (1945), and held that there were sufficient contacts between Livingston and this State for Maryland to enroll a judgment from another state pursuant to the UEFJA. The Court of Special Appeals further held that the Maryland courts may garnish any of Livingston's property in Maryland. The Court of Special Appeals concluded that the State of Maryland could exercise territorial jurisdiction over intangible property within the State, which would include unpaid compensation he earned from Marriott for services Livingston rendered in Maryland.

But the Court of Special Appeals also held that due process does not permit the garnishment in Maryland of compensation Livingston earned for services rendered wholly outside the State of Maryland when such garnishment order is based solely upon the fact that Livingston's employer, Marriott, does business in this State that subjects Marriott to the jurisdiction of the Maryland courts. In this case, the tort that was the underlying basis of the North Carolina judgment was committed in North Carolina, and involved residents of North Carolina residents.

George M. Livingston, IV v. Thomas O. Naylor - Case No. 12, September Term 2005, filed on March 30, 2007. Opinion by Meredith, J.

JUDGMENTS - FOREIGN JUDGMENTS - CHALLENGE TO JURISDICTION OF STATE THAT RENDERED JUDGMENT. When a judgment entered by a court in

another state is recorded in Maryland pursuant to the Uniform Enforcement of Foreign Judgments Act, Maryland Code, Courts and Judicial Proceedings Article, § 11-801 et seq., the judgment debtor may challenge the jurisdiction of the court that entered the original judgment if the issue of jurisdiction has not previously been fully adjudicated. On the issue of jurisdiction, if the judgment debtor claims that documents purporting to provide a basis for the foreign court's jurisdiction were forgeries or fraudulent, the judgment debtor is not precluded from offering evidence of such defects in the jurisdictional basis for the foreign court's jurisdiction.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Prince George's County. A default judgment was obtained against the Oxendines by SLM Capital Corporation in the State of New York. This New York judgment was recorded against the Oxendines in the Circuit Court for Prince George's County, Maryland. The Oxendines then moved for the circuit court to vacate the entry of the New York judgment, arguing that the State of New York never had personal jurisdiction over them. But the circuit court ruled that the Oxendines had waived any challenge to personal jurisdiction by not raising the issue in the New York proceedings, and denied their motion. The Oxendines appealed the circuit court's ruling to the Court of Special Appeals, which reversed the judgment of the circuit court.

Held: Reversed and case remanded to the Circuit Court for Prince George's County for further proceedings to determine whether the Supreme Court of the State of New York had personal jurisdiction over the Oxendines under the principles enunciated in *International Shoe*.

The Court of Special Appeals ruled that the issue of personal jurisdiction had never been adjudicated in New York, and could still be raised by the Oxendines by way of a challenge to the validity of the New York judgment the creditor was seeking to enforce in Maryland.

Willie Oxendine, et al. v. SLM Capital Corp., et al. - Case No. 273, September Term 2006, filed January 30, 2007. Opinion by Meredith, J.

LABOR AND EMPLOYMENT - ARBITRATION OF DISPUTE ARISING OUT OF A PRINCE GEORGE'S COUNTY COLLECTIVE BARGAINING AGREEMENT:

When considering whether a dispute falls within the scope of an arbitration clause, a court must find, from the language actually employed in the contract, that the parties intended the disputed issue to be the subject of arbitration.

Where there is a broad arbitration clause, calling for the arbitration of any and all disputes arising out of the contract, all issues are arbitrable unless expressly and specifically excluded. When the language of the arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement, the question of substantive arbitrability initially should be left to the decision of the arbitrator rather than the courts.

Under Maryland Code, Courts and Judicial Proceedings Article, § 3-206(b), unless the parties to an employment agreement containing an arbitration clause specifically provide that the Maryland Uniform Arbitration Act shall apply, common law rules of interpretation govern such arbitration agreement.

When reviewing an arbitrator's award that is being challenged for allegedly coming to the wrong conclusion as to the substantive issues underlying the award, the reviewing court will generally affirm the award unless it was based on a completely irrational interpretation.

Under Prince George's County Personnel Law § 16-233(e), if a provision in a collective bargaining agreement conflicts with another provision in the personnel laws, then the collective bargaining agreement controls.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Prince George's County. The Chief of Police of Prince George's County issued a memorandum announcing his decision to change the procedure he intended to follow regarding promotions in the police department. Rather than promote the top-ranked candidate as his predecessors had done, he would select from the three top-ranked candidates, and, would thereby have greater discretion regarding promotions. A grievance by the FOP 89 was filed by the Fraternal Order of Police, Lodge 89, pursuant to the terms of the governing collective bargaining agreement. The grievance was denied and the matter proceeded to arbitration. The arbitrator found that Prince George's County had violated the collective bargaining agreement and ordered that the promotions be made by rank alone. The County appealed to the Circuit Court for Prince George's County, which affirmed the arbitrator's decision.

Held: Case Dismissed. The Court of Special Appeals held that the issue was moot. Although the appeal was dismissed on the grounds of mootness because the collective bargaining agreement had expired, the Court of Special Appeals expressed its view that the arbitrator had correctly ruled that the announced change in the promotion policy would have been a violation of the collective bargaining agreement.

Prince George's County, Maryland v. Fraternal Order of Police, Prince George's County, Lodge 89 - Case No. 2660, September Term 2005, filed January 4, 2007. Opinion by Meredith, J.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated July 31, 2007, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

JULIAN J. IZYDORE

*

By an Opinion and Order of the Court of Appeals of Maryland dated August 2, 2007, the following attorney has been disbarred from the further practice of law in this State:

HEKYONG PAK

*

By an Opinion and Order of the Court of Appeals of Maryland dated August 3, 2007, the following attorney has been indefinitely suspended, effective immediately, from the further practice of law in this State:

RONAR MAYO ROBERTSON

*