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# COURT OF APPEALS

*Ocean Petroleum, Co., Inc. v. Estate of Dorothy Yanek, et al.*, No. 109, September Term, 2009, Filed October 4, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/109a09.pdf>

## CONTRACT LAW - INTERPRETATION OF A LEASE - "FAIR MARKET VALUE"

Facts: Ocean Petroleum leases property from Ms. Dorothy Yanek pursuant to a ninety-nine year lease that commenced on April 1, 1976. According to the terms of the lease, after twenty years, Ocean Petroleum had the option to purchase the property and the "purchase price of the land shall be the fair market value thereof at the time this option to purchase is exercised." The option to purchase provides that the "fair market value of the land shall only be established by Landlords and Tenant each appointing a real estate appraiser . . . ." The option to purchase further provides that, in the event that the appointed appraisers fail to agree on the fair market value of the land, the appraisers will select a third appraiser, who will make a binding determination as to the fair market value of the land.

On November 5, 2007, Ocean Petroleum exercised the option to purchase the property. However, the parties were unable to agree on a fair market value because they disputed the meaning of the phrase "fair market value of the land." To resolve the dispute, Ocean Petroleum filed in the Circuit Court for Worcester County a complaint seeking a declaratory judgment construing that phrase. At the hearing on the complaint, Ocean Petroleum argued that "fair market value of the land" should be interpreted to mean the fair market value of the land as encumbered by Ocean Petroleum's ninety-nine year lease. Ms. Yanek countered that the phrase should be interpreted to mean the value of the land unencumbered by the lease at the time Ocean Petroleum exercised the option to purchase. During the hearing, the Circuit Court observed that, once Ocean Petroleum took title to the property, Ocean Petroleum's leasehold interest would merge with its fee interest in the property such that it would own the property in fee simple. On February 18, 2009, the Circuit Court entered a declaratory judgement construing the disputed phrase to mean the value of the land as unencumbered by Ocean Petroleum's lease.

Ocean Petroleum timely noted a appeal to the Court of Special Appeals. Before briefing and argument in that court, the Court of

Appeals, on its own motion, issued a writ of certiorari to answer the question whether the phrase "fair market value of the land" was intended to mean the fair market value of the land as encumbered by Ocean Petroleum's lease or the fair market value of the land as an unencumbered fee simple estate.

Held: Affirmed. The Court of Appeals held that the phrase "fair market value of the land," as used in the lease between the parties, referred to the fair market value of the land as unencumbered by the lease.

The Court first recited Maryland's objective approach to contract interpretation, which requires that contractual language be given its ordinary meaning without concern for the subjective intent of the parties. The Court agreed with the Circuit Court that the meaning of "fair market value of the land" was clear and unambiguous when viewed from the reasonable person perspective. The Court clarified that the phrase must also be read in the context of the language of the lease and the circumstances under which the lease was executed, which indicate that the option to purchase was one between a landlord and tenant, not between an ordinary property owner and buyer. The Court concluded that in this context a reasonable tenant would understand that he was purchasing the property outright, and a reasonable landlord would understand that his obligation to sell terminated all of his interests in the property. Accordingly, the Court interpreted "fair market value of the land" to mean the value of the land as unencumbered by the lease.

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*State v. Rich*, No. 128, September Term 2009, filed August 31, 2010.  
Opinion by Murphy, J.

<http://mdcourts.gov/opinions/coa/2010/128a09.pdf>

CRIMINAL LAW - APPELLATE PROCEDURE - INVITED ERROR DOCTRINE -  
VOLUNTARY MANSLAUGHTER - THE RULE OF PROVOCATION:

Facts: In the Circuit Court for Baltimore City, Respondent Lewis Rich, was convicted of voluntary manslaughter. The murder occurred in a McDonald's restaurant on a stairwell leading to the second floor. Respondent made a post-arrest statement in which he admitted to investigating officers that he (1) followed the victim into the stairwell to buy marijuana, (2) the victim uttered a racial slur which offended him, and (3) as a result he punched the victim. Although Respondent denied attempting to rob or stab the victim, it was the State's theory that Respondent intended to rob the victim and, while attempting to do so, stabbed the victim to death. At the conclusion of the State's case-in-chief, Respondent's trial counsel made a motion for judgment of acquittal on all charges, and argued that -- even assuming Respondent did commit the stabbing -- the State's evidence generated the issue of whether there was adequate provocation that would reduce the homicide to manslaughter. Respondent's trial counsel expressly requested that the trial court deliver MPJI instruction 4.17.4- Voluntary Manslaughter (Hot Blooded Response to Legally Adequate Provocation).

The Court of Special Appeals reversed the Respondent's conviction on the ground that the evidence presented to the jury was insufficient to generate the issue of whether Respondent had stabbed the victim in "hot-blooded response to legally adequate provocation." According to the Court of Special Appeals, because "the instructional error materially affected [Respondent's] right to a fair and impartial trial," the delivery of the manslaughter instruction constituted "plain error."

Held: The Court of Appeals reversed the judgment of the Court of Special Appeals and reinstated Respondent's conviction. In doing so, the Court of Appeals applied the doctrine of "invited error," under which "a party [who] invites the trial court to commit error cannot later cry foul on appeal." The Court of Appeals held that when Respondent's trial counsel (1) argued that the issue of voluntary manslaughter was generated by the evidence and (2) made a specific request for a voluntary manslaughter instruction, that action constituted an intentional waiver of the right to argue on appeal that the evidence was insufficient to support the voluntary manslaughter conviction. The State's evidence entitled

the jury to (1) accept Respondent's claim that he had been vilified and spat on upon the victim, (2) find that the victim's conduct was something "the natural tendency of which is to produce passion in ordinary men and women," (3) reject Respondent's claim that his retaliation was limited to punching the victim and (4) find that Respondent inflicted the fatal stab wound upon the victim during mutual combat.

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*Martinez v. State*, No. 67, September Term, 2009, Filed October 26, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/67a09.pdf>.

CRIMINAL PROCEDURE - SIXTH AMENDMENT - CONFRONTATION CLAUSE - MARYLAND RULE 5-616(a)(4)

Facts: Following a jury trial in the Circuit Court for Prince George's County, Eduardo Escobar Martinez was convicted of involuntary manslaughter of one victim and attempted murder of another. During trial, the court prohibited Martinez from cross-examining the surviving victim about his potential bias in connection with the State's dismissal of unrelated charges filed against him and his incarceration status pursuant to a writ of body attachment to secure his presence at trial. Specifically, Martinez sought to cross-examine the surviving victim as to what he thought about the facts that, six days prior to his testimony at a pre-trial motions hearing, the State *nolle prossed* charges that were then pending against him, and, that at the time of the trial, he was in custody pending his testimony. The trial court denied the requests pursuant to Maryland Rule 5-403.

Martinez timely noted an appeal to the Court of Special Appeals, arguing that the trial court violated his Sixth Amendment right of confrontation by preventing him from cross-examining the surviving victim on matters that could demonstrate the witness's bias. The Court of Special Appeals, in an unreported opinion, held that the trial court did not abuse its discretion in preventing the inquiry under Rule 5-403.

Held: Reversed. The Court of Appeals held that Martinez's right of confrontation guaranteed by the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights had been violated.

The Court first explained that the right of confrontation includes the opportunity to cross-examine witnesses about matters relating to their biases, interests, or motives to testify falsely. That right, nonetheless, is subject to reasonable limits that may be imposed by the trial court when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant. This discretion, however, may only be exercised after the defendant has been afforded the constitutionally required threshold level of inquiry. This threshold level of inquiry requires that evidence of

potential bias be prohibited only if there is no factual foundation for such an inquiry in the presence of the jury, or the probative value of such inquiry is substantially outweighed by danger of undue prejudice or confusion.

The Court explained that it was of no consequence that the *nolle prossed* charges were not the result of a formal deal offered by the State, nor was it relevant that the trial court, rather than the State, had the authority to release the surviving victim from custody; all that is relevant is what the witness thought about the facts concerning the alleged bias. Because there was a solid factual foundation for the defense's inquiry into the witness's potential bias, and such inquiry was not outweighed whatsoever by the danger of confusion to the jury or undue prejudice to the State, the trial court should have permitted Martinez's proposed inquiry.

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*In Re: Elrich S.*, No. 101, September Term, 2009, filed September 24, 2010. Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/101a09.pdf>

JUVENILE PROCEEDINGS - FINAL, APPEALABLE ORDER - RULE 11-116 ORDER

CIVIL PROCEDURE - RULE 11-116 - SCOPE OF JUVENILE JUDGE'S REVISORY POWER - INEFFECTIVE ASSISTANCE OF COUNSEL

ETHICS - JUDICIAL RECUSAL - EX PARTE COMMUNICATIONS

JUVENILE PROCEEDINGS - COUNSEL - ASSIGNMENT

JUVENILE PROCEEDINGS - REVIEW OF DELINQUENCY ORDER

Facts: Following investigations into two intentionally set fires at a Baltimore County apartment building, the State of Maryland filed a delinquency petition against Elrich S., alleging first-degree arson. At his delinquency hearing, Elrich was represented by counsel from the Office of the Public Defender ("OPD"). The parties proceeded on stipulated facts and, after argument from both sides, the juvenile court found Elrich delinquent and remanded him into State custody. Months later, in the Circuit Court for Baltimore County, Elrich filed a Rule 11-116 Motion to Vacate the court's delinquency order on ineffective assistance of counsel grounds. At this juncture, Elrich was represented by a different OPD attorney. This attorney was also an investigator for an internal OPD assessment program, in which county OPD attorneys were being evaluated with the potential for adverse employment consequences. Elrich's previous delinquency counsel may have been among those under assessment. At his Rule 11-116 hearing, Elrich submitted an affidavit from his previous counsel, in which counsel admitted to numerous failures in her representation. The juvenile judge, who was generally aware of the OPD internal assessment program, was concerned that the affidavit was the product of coercion. In an effort to remove the taint, the judge struck the affidavit and recessed the case so that it could be assigned to an attorney wholly outside the OPD. Shortly after the hearing, Elrich moved for the judge's recusal, arguing that she learned of the OPD assessment program through ex parte communications. The judge denied his motion for recusal along with Elrich's earlier motion to vacate his delinquency finding, without reaching the merits of his ineffective assistance of counsel claims or determining whether Elrich had, in fact, committed first-degree arson or attempted arson. Elrich appealed to the Court of Special Appeals, and in

an unreported opinion, the intermediate appellate court affirmed the Circuit Court. Elrich then filed a petition for a Writ of Certiorari, which the Court of Appeals granted.

Held: The Court of Appeals affirmed in part, and reversed in part. The Court held that Rule 11-116 is the proper vehicle for ineffective assistance of counsel claims, and that a Rule 11-116 order is a final, appealable order. Additionally, the juvenile judge was not required to recuse herself because she became generally aware of the OPD assessment program through conversations about matters entirely unrelated to Petitioner's case. Yet, the Court concluded that the judge did err in ordering that the case be paneled to outside counsel, even though she was correct in removing his post-delinquency counsel. A "Chinese Wall" existed between the County OPD staff and other divisions within the OPD, thus the juvenile judge should have investigated whether the potential for coercion extended only to certain divisions within the OPD, leaving other divisions free of any taint. Finally, the judge abused her discretion by ruling on the merits of Petitioner's Motion to Vacate without addressing his ineffective assistance of counsel claims.

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*Wal\*Mart Stores, Inc. et al. v. Larry Holmes et ux.*, No. 141  
September Term, 2009, filed October 25, 2010. Opinion by Greene,  
J.

<http://mdcourts.gov/opinions/coa/2010/141a09.pdf>

LABOR AND EMPLOYMENT – STATUTORY CONSTRUCTION –  
SURVIVAL OF DISABILITY BENEFITS UNDER MARYLAND WORKERS’  
COMPENSATION ACT

Facts: Larry Holmes, Sr., the widower of Patricia L. Holmes, sought to obtain workers’ compensation benefits that his wife had been entitled to file for at the time of her death. On May 7, 2007, Mr. Holmes, through Mrs. Holmes’s attorney, filed post-mortem issues with the Maryland Workers’ Compensation Commission seeking permanent total disability benefits and alleging that the right to collect those benefits should pass to him because he was Mrs. Holmes’s surviving spouse. Mr. Holmes’s claim was based on Md. Code (1991, 2008 Supp. Vol.), §9-632 of the Labor and Employment Article, which provides for the survival of disability benefits to a surviving spouse: if there are no dependents, and if the deceased employee had “a legal obligation to support” the surviving spouse on the date of death. All parties stipulated that Mr. Holmes was not a dependent; therefore, Mr. Holmes claimed that he was a spouse to whom “a legal obligation of support” was owed. On October 3, 2007, the Workers’ Compensation Commission denied Mr. Holmes’s claim on the ground that he did not produce sufficient evidence of “a legal obligation to support” in his relationship with Mrs. Holmes, the covered employee. The Circuit Court for Baltimore City affirmed the Commission’s order. Mr. Holmes appealed. The Court of Special Appeals reversed and held that, in fact, Mrs. Holmes did have “a legal obligation to support” Mr. Holmes at the time of her death because they were married and Mr. Holmes had not agreed to or been adjudicated to have given up his “right to support,” which arose inherently from the fact of the marriage. *Holmes v. Wal Mart Stores, Inc.*, 187 Md. App. 690, 979 A.2d 744 (2009). The Commission sought review in this Court.

Held: The Court of Appeals reversed. Addressing the meaning of the term “a legal obligation to support,” within the context of the Maryland Workers’ Compensation Act (“Act”), the Court determined that the Commission had correctly interpreted the statute to require some evidence of an obligation, other than the mere fact of the marriage. The Court, moreover, concluded that the criminal non-support statute, Md. Code (1991, 2006. Repl. Vol.), § 10-201 of the Family Law Article, could not be read to impose “a legal obligation to support” as contemplated

under the Act. "A legal obligation to support" within the context of §9-632 of the Act arises from a legally enforceable contract, or from a decree or order issued by a court of competent jurisdiction.

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*Ameriquet Mortgage Company v. Paramount Mortgage Services, Inc.*, No. 52, September Term 2009, filed August 31, 2010, Opinion by Murphy, J.

<http://mdcourts.gov/opinions/coa/2010/52a09.pdf>

REAL PROPERTY - REAL ESTATE TRANSACTIONS - PRIORITY OF DEED OF TRUST - CHALLENGE TO VALIDITY OF AFFIDAVIT OF CONSIDERATION AND DISBURSEMENT; APPLICABILITY OF THE "CURATIVE" ACT:

REAL ESTATE TRANSACTIONS - PRIORITY OF DEED OF TRUST - TEST APPLICABLE TO DETERMINE WHETHER AFFIDAVIT OF CONSIDERATION AND DISBURSEMENT IS INVALID:

Facts: In the Circuit Court for Calvert County, Paramount (Respondent) filed a declaratory judgment action against Ameriquet (Petitioner) seeking to have a Deed of Trust recorded by Ameriquet on April 13, 2005 declared null and void or, in the alternative, establish that a Deed of Trust recorded by Paramount on April 15, 2005 had priority over Ameriquet's Deed of Trust. Ameriquet argued that Paramount's action was barred by the "Curative Act" codified in § 4-109 of the Real Property Article ("R.P."). The Circuit Court rejected that argument, and declared that Ameriquet's Deed of Trust recorded on April 13, 2005 was "null and void." That decision was affirmed by the Court of Special Appeals.

Held: The Court of Appeals reversed the judgment of the Court of Special Appeals and directed that the Circuit Court enter judgment in favor of Ameriquet. Although it agreed with the Circuit Court and the Court of Special Appeals that Paramount's complaint was not barred by R.P. §4-109(b) because a false affidavit of consideration or disbursement is not a "formal defect" that must be challenged within six months after it is recorded, the Court of Appeals held that (1) the "substantial compliance" test is applicable to the issue of whether a deed of trust complies with the requirements of R.P. § 4-106, (2) that test must be applied to the operative facts that existed on the date that the Deed of Trust was *actually recorded*, not to the operative facts that existed on the date that the deed was *signed*., and (3) because the affidavits attached to the Deed of Trust recorded by Ameriquet on April 13, 2005 were in substantial compliance with the requirements of R.P. § 4-106, Ameriquet's Deed of Trust had priority over the Deed of Trust that Paramount recorded two days later.

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*Carven v. State Retirement & Pension System of Maryland*, No. 58, September Term, 2009, Filed October 26, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/58a09.pdf>.

STATE RETIREMENT AND PENSION SYSTEM - BENEFIT ELIGIBILITY -  
ADMINISTRATIVE PROCEDURE - ADMINISTRATIVE APPEALS - TIME  
LIMITATIONS - CLAIMANT

Facts: From 1979 to 1996, Commissioner Carven worked as an attorney for the State of Maryland in various capacities. Accordingly, Commissioner Carven qualified to receive retirement benefits through the Maryland Employees' Pension System ("EPS"). Commissioner Carven received those benefits until 1998, when he was appointed County Attorney for Harford County, and due to the fact that his income exceeded the EPS earnings limitation, he was no longer eligible for retirement benefits. In 2004, Commissioner Carven was appointed to the State Workers' Compensation Commission ("WCC"). Although commissioners on the WCC are generally eligible for membership in Maryland's Judges' Retirement System ("JRS"), Commissioner Carven was informed that, based on then existing law, as an EPS retiree he was ineligible. Furthermore, because his income still exceeded the EPS earnings limitation, Commissioner Carven continued to be unable to receive EPS retirement benefits.

On May 6, 2004, Commissioner Carven wrote to the State Retirement and Pension System ("SRPS") Board of Trustees ("the Board"), seeking assistance with his issue concerning JRS membership. The executive director of the State Retirement Agency responded in a letter, dated May 24, 2004, that, based on Maryland Code (2004, Repl. Vol. 2007 Cum. Supp.), § 23-407(e) of the State Personnel & Pensions Article ("SPP"), EPS retirees were not permitted to rejoin any State system, including the JRS. Included in the letter was notification that Commissioner Carven could "request an administrative appeal of this action by submitting a Petition for Hearing to [the Agency] in the format required under COMAR 22.03.04.07," and that the petition must be submitted within 180 days of the letter or Commissioner Carven would have no right to appeal. Commissioner Carven took no further action until June 17, 2006, when he submitted a written application for JRS enrollment. On September 7, 2006, after Commissioner Carven's death, Mrs. Carven received a letter from the SRPS informing her that Commissioner Carven was ineligible for JRS membership.

On January 12, 2007, Mrs. Carven, as Commissioner Carven's sole heir and the beneficiary designated in the JRS membership application, filed a petition for an administrative hearing

pursuant to COMAR 22.03.04.07. The Board, following the recommendation of the State Retirement Agency, issued a summary decision denying Mrs. Carven's petition because Commissioner Carven had failed to request a hearing within 180-days of the May 2004 letter, and because, as an EPS retiree, Commissioner Carven was ineligible for membership in any other State pension system.

On May 7, 2007, Mrs. Carven filed a petition for judicial review in the Circuit Court for Harford County, which was transferred to the Circuit Court for Baltimore County. Following a hearing, that court issued a memorandum opinion and order dated October 31, 2008, reversing the Board's determination that Mrs. Carven's petition for a hearing was untimely. The Circuit Court found that Commissioner Carven was not a claimant under COMAR 22.03.04.02(B)(2) because, at the time he sent the May 2004 letter, he had not filed a request for a hearing within the meaning of COMAR 22.03.04.02B(5), which defines hearing as a contested case hearing to determine "a right, duty, statutory entitlement, or privilege of a person . . . ." Noting that Commissioner Carven had not yet applied for JRS membership at the time of the letter, the Court reasoned that Commissioner Carven had "no right" to be determined, and, thus, had no right to a hearing. Accordingly, Commissioner Carven was not a claimant subject to COMAR 22.03.04.06B's 180-day limitation. The Circuit Court, however, upheld the Board's decision to deny the membership application based on SPP § 23-407(e).

Mrs. Carven timely noted an appeal to the Court of Special Appeals. The Board noted a cross-appeal to the same court. Before consideration by that court, the Court of Appeals, on its own initiative, issued a writ of certiorari.

Held: Reversed. The Court of Appeals held that the Board correctly denied Mrs. Carven's petition for an administrative hearing on the ground that her petition was time barred under COMAR 22.03.04.06B.

The Court began with COMAR 22.03.04B, which provides that "[a] petition for hearing shall be filed within 180 days of the date that a claimant is given notice of an Agency action," and, COMAR 22.03.04.02B(2), which defines "claimant" as "a participant or participating employer that has filed a request for a hearing." That definition of "claimant," however, must be understood in light of the surrounding provisions, which refer to "claimant" as someone who may request a hearing but has not yet done so. The Court explained that, if the definition of "claimant" was limited to an individual who has already filed a petition for an administrative hearing, COMAR 22.03.04.07A would authorize a participant who

already has filed a request for a hearing to "request a hearing by submitting a petition for a hearing[.]" Because this construction would be nonsensical, and in light of related provisions, the Court construed "claimant" to mean a participant or participating employer, who, upon receiving notice of an Agency action, has a statutory, regulatory, or constitutional right to "a proceeding before an agency to determine . . . a right, duty, statutory entitlement, or privilege."

The Court next determined that Commissioner Carven met that definition of "claimant." First, Commissioner Carven was a "participant" as defined by SPP § 20-101(cc). Second, because JRS membership was a mandatory condition that commenced when he was appointed as a commissioner, Commissioner Carven had a statutory entitlement. Finally, the Court concluded that the Agency's May 2004 letter, which conformed to the APA's notice requirements and advised Commissioner Carven of his opportunity to request an administrative appeal, constituted final agency action as contemplated by COMAR 22.03.04.06B such that Commissioner Carven had the right to appeal that decision by petitioning for a "contested case" hearing. Because the 180-day time limitation ran as of the date of the Agency's May 2004 letter, Mrs. Carven's January 12, 2007 petition for an administrative hearing was time-barred under COMAR 22.03.04.06B.

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# COURT OF SPECIAL APPEALS

*Melvyn Lieberman, et al v. Mayavision, Inc.*, No. 2754, September Term, 2008, Opinion filed on October 1, 2010 by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2010/2754s08.pdf>

CONSTITUTIONAL LAW - PERSONAL JURISDICTION - CHOICE OF LAW - FULL FAITH AND CREDIT - ENFORCEMENT OF FOREIGN JUDGMENTS

Facts: Mr. Lieberman, a Maryland resident and licensed engineer, owns Lieberman & Walkisko, a consulting engineering firm located in Silver Spring Maryland. Mr. Lieberman and his firm provided telecommunications services to Mayavision in connection with its efforts to obtain a broadcast license and begin a television station. In providing his services, Mr. Lieberman communicated with individuals in Louisiana on a regular basis and traveled there on two occasions to consult with individuals regarding the installation of a television antenna and transmitter in the state.

The antenna and transmitter installation ultimately failed. Mayavision filed suit against Lieberman in Louisiana, and was awarded a default judgment. On July 29, 2008, Mayavision filed a Motion to Enroll Foreign Judgment in the Circuit Court for Montgomery County, and the circuit court issued a Notice of Foreign Judgment the same day. Mr. Lieberman filed a motion to vacate the Entry of a Foreign Judgment, arguing that the foreign court lacked personal jurisdiction over them.

Held: Affirmed. Maryland's Uniform Enforcement of Foreign Judgments Act, Md. Code (2006 Repl. Vol.), §§ 11-801 to 807 of the Courts and Judicial Proceedings Article, provides the procedure to enforce a foreign judgment. A state court is bound by a judgment recorded by a court in another state unless the recording court lacked jurisdiction.

A Louisiana court's exercise of personal jurisdiction over appellant was proper under the Due Process Clause of the Fourteenth Amendment. Mr. Lieberman communicated with individuals in Louisiana on a regular basis, he traveled to the foreign jurisdiction on two occasions to consult with the individuals regarding the installation of a television antenna and transmitter in Louisiana, and the litigation before the court resulted from the failed installation of the television antenna

and transmitter. This satisfied the minimum contacts test.

The assertion of personal jurisdiction was reasonable. Louisiana had an interest in adjudicating the dispute, and most necessary documentation and the majority of witnesses were located in Louisiana. The exercise of personal jurisdiction by Louisiana comported with "fair play and substantial justice." The circuit court properly denied appellants' motion to vacate recorded judgment.

When a party challenges the jurisdiction of a foreign court to render a judgment, the court is required to conduct an evidentiary hearing. Where the parties presented exhibits to the court, which were discussed by counsel and relied upon by the court, the hearing was tantamount to an evidentiary hearing. To the extent it was not, where appellants never asserted that they were entitled to a hearing other than that which occurred, appellants' contention on appeal that the hearing was insufficient is not preserved for review.

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*Louis Fireison & Associates, P.A. v. Anita M. Alkire*, No. 1288, September Term 2009, October 5, 2010. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2010/1288s09.pdf>

CONTRACTS - ARBITRATION - ATTORNEY-CLIENT FEE DISPUTE

Facts: Louis Fireison, and Louis Fireison & Associates ("Fireison"), filed a personal injury claim on Anita Alkire's behalf, in the United States District Court for the District of Columbia against Marriott International, Inc. ("Marriott"). On March 16, 2006, the court entered judgment in Ms. Alkire's favor. On April 30, 2007, Marriott filed a notice of appeal. On May 8, 2007, settlement negotiations began, and Ms. Alkire directed Fireison to accept the settlement the next day.

The contract entered into by the parties provided that Fireison would be paid 40% of the gross sum recovered as a result of judgment or settlement after filing of court proceedings and 50% of the gross sum recovered in the event of appeal or a second trial. Fireison claimed that it was entitled 50% of Ms. Alkire's total award because Marriott filed a notice of appeal. Ms. Alkire claimed that she owed Fireison only 40% of her award, and she requested that the fee dispute be submitted to arbitration pursuant to District of Columbia Bar Rule XIII.

Fireison refused and filed a Complaint in the Circuit Court for Montgomery County seeking a declaratory judgment awarding Fireison 50% of Ms. Alkire's total award. The circuit court ordered Fireison to submit the dispute to arbitration. After the arbitration board issued its decision, Fireison moved to vacate the arbitration award, arguing that the contract did not contain an agreement to arbitrate fee disputes. The circuit court denied Fireison's request and confirmed the award.

Held: Affirmed. Although there was no explicit language in the contract providing for an agreement to arbitrate a dispute regarding legal fees, laws existing at the time the parties entered into the contract are incorporated into their agreement even if the substance of the applicable law is not actually written into the contract. D.C. Bar R. XIII(a) provides that, in certain circumstances, "[a]n attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services."

When Mr. Fireison elected to avail himself of the right to practice in the District of Columbia, he agreed to abide by the Rules established by the District of Columbia Court of Appeals.

Pursuant to D.C. Bar R. XIII, Fireison agreed to arbitrate a fee dispute with Ms. Alkire upon her request. Fireison's contention that there was no agreement to arbitrate fee disputes is without merit.

The dispute between the parties was a fee dispute. Rule of Procedure 3(b) of the District of Columbia Attorney/Client Arbitration Board defines fee disputes subject to arbitration as disputes "about the fee paid, charged, or claimed for legal services." The dispute between the parties here, the amount of fees to which Fireison is entitled, clearly falls within the definition of a fee dispute subject to arbitration.

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*Maryland Transportation Authority Police Lodge #34 of the Fraternal Order of Police, Inc., et al. v. Maryland Transportation Authority, et al.*, No. 1885, September Term, 2008, filed September 30, 2010. Opinion by Hollander, J.

<http://mdcourts.gov/opinions/cosa/2010/1885s08.pdf>

CONTRACT - ELEMENTS OF CONTRACT - CONTRACTS AGAINST PUBLIC POLICY - CONTINGENCY CONTRACTS TO INFLUENCE LEGISLATION - PROCUREMENT CONTRACTS - EXHAUSTION OF ADMINISTRATIVE REMEDIES - "PALPABLY WITHOUT JURISDICTION" STANDARD - PUBLIC EMPLOYEE COLLECTIVE BARGAINING AGREEMENTS - PROMISSORY ESTOPPEL AGAINST STATE AGENCIES

Facts: The Fraternal Order of Police ("Lodge") sued the Maryland Transportation Authority ("MdTA") for breach of contract and promissory estoppel, seeking to enforce a written agreement ("Agreement") that called for the MdTA to fund a "personal patrol vehicle program" for the MdTA's police officers, in exchange for the Lodge's withdrawal of support for legislation authorizing MdTA police officers to collectively bargain with the MdTA. The circuit court granted summary judgment to the MdTA as to the Lodge's breach of contract claim and promissory estoppel claims.

Held: The Court of Special Appeals reversed as to the contract claim but affirmed as to the promissory estoppel claim. It determined that the Agreement was not an invalid contingency contract to influence legislation, because the Lodge had produced evidence that, taken in the light most favorable to it, did not show improper influence on legislators, and there was no contingent financial compensation to the Lodge. It also determined that the Agreement was not a procurement contract for the Lodge's "services" in lobbying the Legislature; therefore, the Board of Contract appeals was "palpably without jurisdiction," and the Agreement did not have to comply with State procurement requirements. Further, the Agreement was not subject to the requirement that collective bargaining agreements obtain express legislative authorization, because the Agreement neither delegated the MdTA's discretion to an arbitrator or other third party nor exceeded the MdTA's authority. And, it found that the Agreement was not invalid on the ground that it was too indefinite.

But, the Court ruled that the Agreement could not be enforced by a claim of promissory estoppel. Ordinarily, promissory estoppel cannot be asserted against a State agency in the exercise of its governmental, public, or sovereign capacity.

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*James Edward Breakfield v. State of Maryland*, No. 617, September Term 2009, filed October 4, 2010. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2010/617s09.pdf>

CRIMINAL LAW - INTENT TO PERMANENTLY DEPRIVE - MARYLAND RULE 4-263 - WILLFUL ACTION AND SPECIFIC INTENT TO DEFRAUD - RULE OF LENITY - RESTITUTION - CRIMINAL INJURIES COMPENSATION BOARD

Facts: Appellant was co-owner and manager of C&J Peaceful Assisted Living Home, Inc. ("C&J"), where Nellie Jackson resided. When Jackson entered C&J, appellant took control of \$27,404.36 of her funds, which he placed directly into C&J's account. In spite of Jackson's legally mandated resident agreement which stated that monthly fees would total \$3,500.00, she was charged \$17,404.36 for fifteen days of care that included—among other services not disclosed in the agreement or addenda—a private room, as well as 24-hour services for which there was no requisite physician's assessment. Appellant was charged and tried in the Circuit Court for Baltimore City on two counts: fraudulent misappropriation of Jackson's money in violation of Maryland Code (2002, 2006 Repl. Vol.), § 7-113(a)(1) of the Criminal Law Article ("CL"), and felony theft in violation of CL § 7-104. During trial, the court granted the State's motion under Maryland Rule 4-263 to exclude testimony from three defense witnesses whose names were only disclosed during *voir dire*, the day before. On February 2, 2009, appellant was convicted by a jury of misappropriation by a fiduciary and felony theft. On the misappropriation count, the court sentenced appellant to one year of imprisonment. On the felony theft count, the trial judge sentenced appellant to three years, suspended all but one year, to be served concurrently with the sentence imposed for the misappropriation conviction. In addition, the court ordered appellant to serve three years probation, beginning with his release from incarceration, and to pay restitution of \$14,000.00 to the Criminal Injuries Compensation Fund.

Held: Although preventing all witnesses from testifying was a harsh sanction for violation of the discovery rules, Rule 4-263 makes plain that defendants may not wait until trial to disclose their evidence, and if they do, the trial court has authority to exclude such evidence from the case. Evidence that appellant deposited victim's funds directly into commingled account and overcharged for services was sufficient for jury to find intent to permanently deprive the victim of those funds and that he acted willfully and with the specific intent to commit fraud. Appellants' sentence for felony theft merges with sentence for

misappropriation under the rule of lenity. The trial court erred when it ordered appellant to pay restitution to the Criminal Injuries Compensation Board, where the Board did not pay any amount to appellant's victim. Upon remand, appellant could be ordered to pay restitution to the personal representative of the victim's estate.

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Kelly v. State, No. 645, September Term, 2009, Opinion filed on October 4, 2010 by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2010/645s09.pdf>

CRIMINAL LAW - SIXTH AMENDMENT RIGHT TO PUBLIC TRIAL - PRESERVATION - PLAIN ERROR REVIEW - MOTION TO CONTINUE SENTENCING - MERGER

Facts: On September 4, 2008, at approximately 11:30 p.m., two men robbed Ronald Bennett as he walked home from work, taking his cell phone, wallet, and duffle bag. Mr. Bennett later identified appellant as the individual that went through his pockets, and appellant's co-defendant, as the individual that pointed the gun at him.

On April 27, 2009, a trial in the Circuit Court for Baltimore City commenced against appellant and his co-defendant. During the morning session of voir dire, a court sheriff instructed members of appellant's family that they had to leave the courtroom due to space constraints. Appellant's family members were excluded from the courtroom for approximately two to three hours. The court subsequently denied appellant's motion for mistrial, rejecting appellant's argument that his Sixth Amendment right to a public trial was violated.

During the voir dire proceedings, the court asked the prospective jurors the following question addressing the "CSI effect": "[I]f you are currently of the opinion that you cannot convict a Defendant without "scientific evidence," regardless of all of the other evidence in the case and regardless of the instructions that I give you as to the law of the case, please stand." The appellant made no objection to the question.

At the conclusion of the trial, the jury convicted appellant of robbery and conspiracy to commit robbery. The court denied appellant's motion to continue sentencing, and it sentenced appellant to 15 years for each conviction, for a total of 30 years, to run consecutively.

Held: Judgments affirmed. Although the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors, a closure of the courtroom may be so minimal that it is not of constitutional dimension. Here, the closure of the courtroom was *de minimus*, as evidenced by the following: (1) the limited duration of the closure, two to three hours during voir dire; (2) that the closure did not encompass the entire proceedings of voir dire and jury selection, and that a



significant portion of the proceedings during that time were not audible to spectators in the courtroom; and (3) the closure was a partial one, not a total exclusion of all spectators. Thus, appellant's Sixth Amendment right was not implicated by the closure.

Plain error review of the voir dire question regarding the "CSI effect" was not warranted in this case. Appellate courts will exercise their discretion to review an unpreserved error under the plain error doctrine only when the unobjected to error is compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.

There was no abuse of discretion by the trial court in denying appellant's request to continue his sentencing. The court had sufficient information to impose sentence, and appellant failed to identify what information he was unable to present due to the court's denial of his request.

Appellant's conviction for robbery did not merge into his conviction for conspiracy to commit robbery under the fundamental fairness doctrine. A conspiracy is not "part and parcel" of or "incidental to" the substantive offense; it is a separate offense. Principles of fairness do not prevent separate sentences for these separate offenses.

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*Lasater v. Guttman*, No.2364, September Term 2008, filed September 13, 2010. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2010/2364s08.pdf>

FAMILY LAW - CLAIMS FOR BREACH OF FIDUCIARY DUTY, FRAUD, CONVERSION, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY ONE DIVORCING SPOUSE AGAINST THE OTHER BASED ON ALLEGATIONS THAT DEFENDANT SPOUSE MISHANDLED THE COUPLE'S FINANCES DURING THE MARRIAGE.

Facts: Nancy E. Lasater and John S. Guttman, Jr., were married for 25 years. In the Circuit Court for Montgomery County, Lasater sued Guttman for breach of fiduciary duty, fraud, conversion and intentional infliction of emotional distress. All counts were based upon allegations that Guttman used the money in the parties' joint checking account to pay for speculative real estate ventures, a large collection of compact discs and other unknown personal expenses and that he lied to Lasater about their true financial condition. Both parties are lawyers. During most of the time Lasater claims that Guttman was wasting marital assets, Lasater did not look at any of their joint bank statements that came to their house.

Guttman filed for divorce. Lasater's tort action was stayed during the pendency of the divorce case, which was settled.

After the tort action was reactivated, Guttman filed a motion to dismiss or, in the alternative, for summary judgment. The circuit court granted judgment in Guttman's favor on all counts. Lasater timely appealed, arguing that the tort case should not have been stayed when it had been filed prior to the divorce case and that the circuit erred in granting judgment as to each count.

Held: Judgment affirmed. The stay of the tort suit was a proper exercise of the circuit court's discretion and, in any event, was mooted when the stay subsequently was lifted. Lasater's conversion claim could not survive as a matter of law because the monies she alleged were converted were commingled with the parties' joint funds. The facts alleged by Lasater did not meet the standard of "extreme and outrageous conduct for the tort of intentional infliction of emotional distress. Under Maryland law, marriage is not in the nature of a fiduciary relationship, unless the spouses enter into an agreement making it such. Also, spouses do not occupy a confidential relationship to each other as a matter of law. The existence of a

confidential relationship can be established as a matter of fact, however, and, when established, can be the predicate for the setting aside of a particular transaction between the parties. Once a confidential relationship is established, the burden shifts to the proponent of the transaction to prove that it was not the product of fraud, coercion or mistake.

On the summary judgment record, there was not a fiduciary relationship between Lasater and Guttman as a matter of law and there were no facts that could be adduced at trial to support a reasonable finding that the parties were in a confidential relationship. Moreover, Lasater was not seeking to set aside a particular transaction; she was seeking compensation for years and years of bad spending decisions by Guttman that she was claiming had reduced the marital estate. Wisconsin, the only state that recognizes such a cause of action, adopted by statute a duty of good faith by one spouse to another in all matters concerning marital property (or the other spouse's property), and does not allow the cause of action to proceed when the parties are seeking or have obtained a divorce. Maryland has no such statutory duty between spouses.

Summary judgment was properly granted on the claim for breach of fiduciary duty. The summary judgment facts similarly could not support a finding in Lasater's favor on the reliance element of fraud.

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Sean Porter v. Donna Zuromski- No. 369, September Term, 2009, filed October 4, 2010. Opinion by Zarnoch, J.

<http://mdcourts.gov/opinions/cosa/2010/369s09.pdf>

FAMILY LAW - CONSTRUCTIVE TRUST - A CONSTRUCTIVE TRUST WAS IMPOSED WITH RESPECT TO A RESIDENCE WHEN COHABITATING COUPLES CONTRIBUTED MONEY AND LABOR TO THE PROPERTY AND THE TITLE HOLDER SAID HE WOULD PUT THE PLAINTIFF ON THE TITLE, BUT LATER TOLD HER TO LEAVE

Facts: Appellant, Sean Porter, and appellee, Donna Zuromski, were romantically involved from 1993 to June 2007. During most of this time, they were engaged to be married. In 1998, they applied for a mortgage to purchase a home together, but were unable to qualify jointly because of Zuromski's impending bankruptcy filing. Porter applied again, this time alone, and was approved for the mortgage. The parties both contributed money toward the down payment and agreed that they would act as joint owners, each responsible for one half of the monthly mortgage payment and other property expenses. While the deed was in Porter's name only, they agreed that he would hold it for both parties and he promised to put Zuromski's name on the deed in the future.

Zuromski paid one half of the mortgage and property-related expenses, as agreed, until the parties' relationship deteriorated in 2007. The couple ended their engagement in January of 2007 and Porter moved out of their joint bedroom in May, but they continued to share property expenses. In July of 2007, Porter ordered Zuromski to vacate the property. He refused Zuromski's request to divide the equity in the home, and he instituted a refinance which stripped a substantial portion of the equity out of the property. Zuromski sued, and the circuit court imposed a constructive trust as an equitable remedy for Porter's unjust enrichment and because he was the dominant party in a confidential relationship. The court declared that each party had an undivided one half interest in the property and appointed a trustee to transfer title and cause preparation of a new deed reflecting joint ownership.

Held: The trial court's imposition of a constructive trust was supported by the evidence and not clearly erroneous. A constructive trust is a remedy that converts the holder of legal title to property into trustee for one who in good conscience should reap the benefits of the property. *Wimmer v. Wimmer*, 287 Md. 663, 668 (1980). The purpose of the constructive trust remedy is to prevent unjust enrichment, and it may be invoked for

inequitable circumstances independent of fraud. *Turner v. Turner*, 147 Md. App. 350, 421-22 (2002). In *Wimmer*, the Court refused to impose a constructive trust because the plaintiff had not invested any money or labor in the disputed property and therefore the defendant title holder was not unjustly enriched. The elements missing in *Wimmer* are all present here- Zuromski contributed money and labor to the property, and Porter told her he would put her on the title.

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*Samuel J. Brown v. Bernice D. Brown*, No. 1015, September Term, 2008, filed September 30, 2010. Opinion by Hollander, J.

<http://mdcourts.gov/opinions/cosa/2010/1015s08.pdf>

FAMILY LAW - MARITAL HOME OWNED AS TENANTS BY THE ENTIRETY;  
TRANSFER OF TITLE; RULE 9-207; NON-MARITAL PROPERTY § 8-  
201(e)(2); FAMILY LAW § 8-201(e)(3)(iii); FAMILY LAW § 8-  
205(a)(2)(iii); FAMILY LAW § 8-205(A)(2)(iii)(1)

Facts: Several years before the parties' marriage, the wife acquired the home in which the parties resided. After the marriage, the home was retitled as tenants by the entirety, although the wife continued to pay all expenses for the home, including the mortgage. In the parties' Rule 9-207 Statement, the home was characterized as non-marital, and the trial court found that they had agreed that the property was non-marital. Nevertheless, the court ordered the husband to transfer title of the home to the wife, pursuant to F.L. § 8-205(a)(2)(iii).

Held: The Court of Special Appeals vacated and remanded. Because the home was non-marital, the trial court erred in ordering the husband to transfer title of the home to the wife. F.L. § 8-205(a)(2)(iii) does not extend to non-marital real property.

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*Severstal Sparrows Point, LLC, et al. v. Public Service Commission*, No.418, September Term 2009, filed September 17, 2010. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2010/418s09.pdf>

PUBLIC UTILITIES - ELECTRICITY COMPANIES - DEREGULATION - AUTHORITY OF PUBLIC SERVICE COMMISSION.

Facts: Based on wholesale electricity auction results for the summer 2008 period, the Public Service Commission ("PSC") foresaw a price spike for certain small commercial customers who recently had been moved from one type of standard offer service ("SOS") to another. The PSC responded by directing the supplier, Baltimore Gas and Electric Company, to temporarily cap the SOS supply price for those customers and temporarily increase the distribution price to be charged to other large commercial customers. Severstal Sparrows Point, LLC, was one of those large commercial customers whose distribution rates rose as a result. It and other large commercial customers unsuccessfully challenged the PSC's order before the PSC and then on judicial review.

Held: The PSC does not have the authority to regulate SOS service so as to cap the electricity supply price for the benefit of certain small commercial customers and at the same time allow the supplier to recoup the loss it would incur due to that price cap by increasing the price for distribution of the electricity for large commercial customers for which SOS is not the source of their electricity supply. The deregulation of electricity companies by statute resulted in the PSC's having very narrow ratemaking authority over electricity supply prices. For SOS, its ratemaking authority is limited to regulating and overseeing the wholesale auction process for electricity purchase. The authority does not allow the PSC to cap the price of the SOS electricity supply, nor does its retained broad authority over electricity distribution allow it to increase a distribution rate when the increase is simply a shift in the SOS supply cost from one SOS customer to another non-SOS customer.

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*Gonsalves v. Bingel, et al.*, No. 983, September Term, 2009, filed September 17, 2010. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2010/983s09.pdf>

TORTS - RES JUDICATA - CLAIM SPLITTING - ACTUAL DAMAGES - LIQUIDATED DAMAGES.

Facts: Annette Gonsalves ("Buyer"), the appellant, contracted at public auction to purchase real property owned by Thomas Bingel and Wei Chen ("Sellers"), the appellees. The contract provided that, in the event of breach by Buyer, Sellers could recover Buyer's deposit and actual damages. When Buyer failed to settle, Sellers sued for breach of contract in Anne Arundel County Circuit Court, seeking to keep the deposit. While the litigation was pending, Sellers sold the property to a third party, for \$75,000 less than what Buyer had contracted to pay. Sellers moved to amend complaint to add \$75,000 in actual damages; their motion was denied. In a bench trial, Sellers recovered the \$25,000 deposit. Sellers did not appeal the court's denial of their motion for leave to amend.

While the Anne Arundel County litigation was pending, and after that court had denied leave to amend to add actual damages, Sellers filed suit against Buyer in the Circuit Court for Montgomery County, for breach of the same contract, but seeking to recover the actual damages the Anne Arundel County court had not let them amend their complaint to add. Buyer moved for summary judgment on the ground of *res judicata*. The Montgomery County court denied the motion, reasoning that, because Sellers had attempted, unsuccessfully, to amend their complaint in the Anne Arundel County case to recover actual damages, and the Anne Arundel County court should have granted them leave to amend, they could pursue actual damages in Montgomery County. In a jury trial in the Montgomery County case, Sellers recovered actual damages.

Buyer appealed from the judgment entered on the verdict in the Montgomery County case.

Held: Reversed. Under the transactional test set forth in section 24 of the RESTATEMENT (SECOND) OF JUDGMENTS, Sellers were obligated to bring a single cause of action against Buyer for breach of the real estate contract, and could not split that claim so as to recover one type of damages in one action and another type of damages in another action (assuming that both types of damages could be recovered at all). That principle was unaffected by the Anne Arundel County Circuit Court's ruling



denying Sellers leave to amend their complaint to add actual damages. If Sellers were of the view that they were entitled to recover the deposit and actual damages, and that the Anne Arundel County court erred in denying them leave to amend their complaint to add actual damages, they should have appealed that ruling once a final judgment was entered in that case. They did not do so. The doctrine of *res judicata* barred them from filing another law suit, on the same cause of action, to recover the damages they were not allowed to pursue in the first law suit.

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# ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated October 5, 2010, the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

CAROLYN MARIE HOLT

\*

By an Order of the Court of Appeals of Maryland dated October 5, 2010, the following attorney has been placed on inactive status by consent, effective immediately, from the further practice of law in this State:

DAVID NATHANIEL HONICK

\*

The following attorney has been replaced upon the register of attorneys in this Court effective October 7, 2010:

CHARLES M. JAMES, III

\*

By an Order of the Court of Appeals dated October 18, 2010, the following attorney has been placed on inactive status by consent from the further practice of law in this State:

RICHARD SEIDEN

\*

By an Order of this Court dated October 26, 2010, the following attorney has been disbarred by consent from the further practice of law in this State:

DONOVAN E. THOMAS

\*

# RULES ORDERS

Rules Order pertaining to the **165th Rules Report** regarding the rules governing the admission to the Bar of Maryland was filed on October 20, 2010:

<http://www.mdcourts.gov/rules/rodocs/ro165.pdf>

Rules Order pertaining to the **166th Rules Report** regarding foreclosures was filed on October 20, 2010:

<http://www.mdcourts.gov/rules/rodocs/ro166.pdf>