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Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

APPEALS - DECISIONS REVIEWABLE - FINALITY OF REVIEW - INTERLOCUTORY AND INTERMEDIATE DECISIONS

Facts: Petitioner Emmanuel Nnoli filed in the Circuit Court for Montgomery County a motion to quash an arrest warrant. The warrant was issued after a judgment granting petitioner a writ of habeas corpus was vacated by the Court of Special Appeals, and petitioner's habeas petition was remanded to the trial court for further consideration. Prior to grant of his habeas petition by the trial court, petitioner was incarcerated pursuant to a civil contempt Order subjecting him to arrest for failure to obey a court order awarding custody of his children to respondent, Nina Nnoli. The contempt order permitted petitioner to purge the contempt by turning his children over to the custody of the court. Petitioner, without appearing personally before the Circuit Court, sought to quash the arrest warrant on grounds that his children were emancipated, rendering it impossible for him to satisfy the purge provision. The Circuit Court denied the motion to quash on grounds that petitioner needed to appear personally before the court in accordance with the terms of the warrant in order to challenge the underlying civil contempt Order. In an unreported opinion, the Court of Special Appeals affirmed, holding that denial of the motion was proper because petitioner failed in the Circuit Court to present evidence sufficient to show that he was unable to satisfy the purge provision.

Held: Reversed and remanded with instructions to dismiss appeal. The Court held that the Circuit Court’s denial of the motion to quash the arrest warrant was a nonappealable interlocutory order. An order is appealable only if it is a final judgment, falls under a statutory exception to the final judgment rule, or is appealable under the common law collateral order doctrine. The Circuit Court’s Order denying the motion to quash was not a final judgment, because it was not a ruling on the underlying contempt Order petitioner was challenging in the proceeding. For the same reason, it did not meet the statutory exception for orders adjudging a person in contempt.

The Order was also not appealable under the common law collateral order doctrine because it was not unreviewable on appeal. An interlocutory order is unreviewable on appeal only in extraordinary situations. By moving to quash the arrest warrant, petitioner was claiming a right to avoid appearing personally before the Circuit Court in order to challenge the contempt Order. That an order denies a claim of a right to avoid some aspect of the

proceedings in the trial court is generally insufficiently extraordinary to render the order unreviewable on appeal.

Emmanuel Nnoli v. Nina Nnoli, No. 149, September Term, 2004, filed October 17, 2005. Opinion by Raker, J.

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ATTORNEYS MISCONDUCT - ATTORNEY GRIEVANCE COMMISSION - MRPC 1.4(b), 1.5(a), 1.8(a)(1) and 8.4(c) and (d)

Facts: Respondent began providing legal services to an elderly couple, the McPeakes, in 1993. The first matter concerned the sale of farmland in Tennessee. The initial fee agreement called for a fee of $100/hour. The farm matter lay dormant until 1998, at which time, respondent claimed that the fee agreement was orally modified to provide a 5% commission on the sale of the farm. He nonetheless continued to bill them at the $100/hour rate. The farm was sold in three stages. Upon settlement of the first parcel, respondent received a fee equal to 5% of the total purchase price for all three parcels ($48,056). He then arranged for the McPeakes to lend him $70,000 at 8% interest, the loan to be secured by a mortgage on land owned by respondent and his wife as tenants by the entireties. Respondent, an experienced real estate lawyer with his own real estate brokerage firm, prepared the mortgage that did not include a description of the property, did not include his wife as a party, and was not signed by his wife. He gave the defective mortgage, unrecorded, to the McPeakes, who never recorded it.

Although respondent suggested that the McPeakes speak with a banker, who was a mutual friend, regarding the loan, he did not suggest that they consult another lawyer, and they did not do so. Respondent never made any of the scheduled monthly payments. Instead, he credited against the principal and interest on the loan a 10% commission on the sale of the last two parcels ($63,613), to which he was not entitled. It was only when the McPeakes' daughter, in helping to prepare her parents' tax return, questioned the alleged interest that respondent showed was paid and consulted

an attorney, who filed suit against respondent, that he paid the loan in cash and acknowledged that he was not entitled to the $63,613.

Held: Respondent violated MRPC 1.4(b), 1.5(a), 1.8(a)(1), and 8.4(c) and (d). The loan was grossly unfair to the clients, respondent failed to advise them to seek independent counsel, and he took commissions to which he was not entitled. The appropriate sanction for those violations was disbarment.

Attorney Grievance Commission v. Parker, Misc. AG No. 26, Sept. Term 2004, decided October 4, 2005 by Wilner, J.

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CRIMINAL LAW - CAPITAL SENTENCING PROCEEDING - ILLEGAL SENTENCE - MOTION TO CORRECT - USE OF STATISTICAL SURVEY

Facts: In 1992, Petitioner was convicted of, among other crimes, first-degree murder and sentenced to death. In a Motion to Correct an Illegal Sentence filed in 2004 under Maryland Rule 4-345(a), which gave rise to the instant case, he argued that his death sentence was imposed in a racially-biased manner. Petitioner is African-American and the victim of his crimes was Caucasian. Petitioner alleged that the death penalty was sought more frequently in such situations statewide and in Baltimore County where the crimes were committed than in other racial combinations of accused and victim. He also claimed the sentence was geographically-biased. Petitioner asserted that the State's Attorney for Baltimore County, who elected to pursue the death penalty and whose office prosecuted the case against him, sought such punishment in eligible cases more frequently than state's attorneys for other Maryland jurisdictions. To support the alleged constitutional errors under the federal Equal Protection Clause of the Fourteenth Amendment and the Eighth Amendment (and their Maryland constitutional analogues), Petitioner relied principally on an assertedly empirical, government-sponsored

statistical study of Maryland's implementation between 1978 and 1999 of its death penalty statute, released publicly in early 2003 and published formally in 2004. The Circuit Court for Harford County denied the Motion to Correct an Illegal Sentence, without holding an evidentiary hearing.

Held: Affirmed. The Court of Appeals affirmed the Circuit Court on the basis that Maryland law interpreting what grounds are permitted to be raised as to the illegality of a sentence in a Rule 4-345(a) motion does not contemplate a statistical study as a qualifying predicate. Grounds for illegality of a sentence are those that inhere in the sentence itself, i.e., the sentence was illegal or should not have been imposed. A general statistical study of death-eligible case patterns, such as was offered here, did not demonstrate, or tend to demonstrate, that the specific death sentence in the Petitioner's case was illegal on its face. Moreover, Petitioner's motion failed to come within a recent exception, the so-called constitutional exception, to Rule 4-345(a) jurisprudence. With regard to this exception, the Court recently recognized that a defendant could seek relief via a motion under the Rule if he/she argued novel constitutional arguments that arose from decisions of the U.S. Supreme Court or the Court of Appeals of Maryland in an unrelated case or cases decided after imposition of the death sentence on the defendant/movant. Petitioner's motion here did not come within this exception. Finally, the Court declined to recognize any further exception to embrace a generalized statistical study as a predicate for arguing illegality of a specific sentence.

Wesley Eugene Baker v. State, No. 132, September Term, 2004, filed October 3, 2005. Opinion by Harrell, J.

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FAMILY LAW - CHILD SUPPORT - ARREARAGES - SUBROGATION TO STATE OF MARYLAND CHILD SUPPORT ENFORCEMENT ADMINISTRATION (CSEA) - FORGIVENESS - RETROSPECTIVE MODIFICATION

Facts: Derek Harvey, a Baltimore City father who accumulated significant delinquent child support arrearages flowing from paternity orders, reunited with his biological children after their respective mothers became unable to care for them. During the accumulation of the arrearages, Harvey's children were supported by the State through welfare applied for by their mothers, who assigned in return to the State their rights for child support from Harvey. Harvey sought forgiveness of his arrearages from the Child Support Enforcement Administration ("CSEA"), which has the authority to settle child support arrearages for less than the full amount if the CSEA believes such an action would be in "the best interest of this State." Md. Code (1974, 2004 Repl. Vol.), § 10-112 of the Family Law Article. The CSEA, however, refused to grant Harvey's request, instead acquiescing in the objections of MAXIMUS, Inc., a private company that contracted with the CSEA to operate the Baltimore City Office of Child Support Enforcement. Harvey petitioned the Circuit Court for Baltimore City to extinguish, under the revisory power of § 5-1038(b) of the Family Law Article, his child support arrearages. Harvey also asked the court to find that the CSEA's refusal to exercise its discretion to forgive Harvey's arrearages was "arbitrary or capricious" because it failed to take into account the "best interests of [Harvey's] children" and improperly acquiesced in MAXIMUS's financial and administrative considerations, respectively, that to grant Harvey's request might affect adversely the collection rate of subrogated child support arrearages and its computer program could not accommodate Harvey's proposal. The Circuit Court denied Harvey's request.

On direct appeal, the Court of Special Appeals affirmed in a reported opinion. *Harvey v. Marshall*, 158 Md. App. 355, 857 A.2d 529 (2004). It held that § 12-104 of the Family Law Article, which prohibits retrospective modification of a child support order prior to the filing of a motion for modification, limited the provisions of § 5-1038 (b) granting broad authority to the courts to set aside child support orders. The intermediate appellate court also concluded that the CSEA did not abuse its discretion in refusing to exercise its discretion under § 10-112 of the Family Law Article to grant Harvey's request because the applicable standard, whether the action was "in the best interest of the State," was satisfied by CSEA's implicit acceptance of the reasons given by MAXIMUS for recommending denial of the request.

The Court of Appeals granted Harvey's petition for writ of certiorari, 384 Md. 448, 863 A.2d 997 (2004), to consider two questions:

> I. Did the Court of Special Appeals err in holding that the Circuit Court had no

discretion to retrospectively extinguish a child support award prior to the date of the filing of a motion for modification?

II. Did the Court of Special Appeals err in holding that the CSEA did not act in an arbitrary, illegal, capricious or unreasonable manner when it refused to exercise its discretion under § 10-112 to forgive Harvey's child support arrearages?

Held: Affirmed. Although § 5-1038(b) grants a court authority to "modify or set aside" any paternity-related order (except for the declaration of paternity itself), this authority is limited by § 12-104 of the Family Law Article, which prohibits the retrospective modification of child support orders. When a court reduces or eliminates completely child support obligations, either of those actions is a "modification" rather than a "set aside."

By the same token, although § 10-118 of the Family Law Article provides that the CSEA must take into account the "best interests of the child" when performing its child support responsibilities, the enunciation by the Legislature of a competing standard, "the best interest of this State," in § 10-112 indicates that the standard in § 10-112 should be read as an exception to the broad policy of § 10-118. Furthermore, the CSEA's actions were not "arbitrary or capricious" because, by acquiescing in MAXIMUS's financial considerations, the CSEA was serving the "best interest of the State" when considered within the regulatory framework of applicable federal and State laws and regulations, as well as their pertinent legislative history. For example, federal financial incentives to the States and Maryland's contractual financial incentives to its child support collection vendor, MAXIMUS, use collection rate performance as a measuring standard.

Harvey v. Marshall, No. 109, September Term, 2004, filed October 14, 2005. Opinion by Harrell, J.

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TAXATION - APPLICATION OF SALES AND USE TAX - Considering the plain language of Section 11-102 of the Tax General Article and the statutory definitions of "sale"in Section 11-101 (i) of the Tax General Article, and "taxable price" of section 11-101(l) of the Tax General Article, it is clear that the payment of a termination fee to meet and complete a party's pre-existing obligations under a lease, does not constitute consummation and complete performance of a sale, and is thus not a payment of taxable price subject to sales tax.

APPLICATION OF SALES AND USE TAX - DEFINITION OF SALE - A transaction in which a lessor releases a lessee from its obligations under a lease for computer equipment, with the lessee paying a termination fee and returning the old equipment, does not fit within the statutory or regulatory definition of the word "sale" as upon termination of the agreement and payment of the termination fee to lessor, there was no transfer of title or possession of property to the lessee, as contemplated by § 11-101 (g) of the Tax General Article and section 03.06.01.28 of the Code of Maryland Regulations ("COMAR").

TERMINATION FEES - A termination fee not actually paid to fulfill a lessee's equipment lease obligations (which consist of the requirement to pay for the use of the equipment), but instead paid to cancel the lease, cannot be assumed to be a taxable consolidation of the payments the lessee would have paid under the lease if such an arrangement was not provided for by agreement between the lessor and lessee.

LEASE BUYOUT - TERMINATION FEE - The payment of a termination fee by a lessee cannot be viewed as a buyout of a lease if the lessee returns the leased equipment to the lessor upon signing the termination agreement and paying the termination fee. There is no comparable exchange of payment for possession and use of equipment, if the fee is paid all at once and the equipment is returned before the expiration of the lease term.

TAXABLE PRICE - SALES AND USE TAX - Payment in exchange for the termination of a lease is not part of the "taxable price" of a transaction because it is not among the transactions that fairly fit within the statutory definition of a "sale." As a result, the Comptroller has no statutory authority to impose a sales tax on such a transaction.

LEASE TERMINATION FEES - The relevant Maryland statutory provisions do not lend themselves to the conclusion that a payment made to terminate a lease is subject to sales tax.

Facts: On May 30, 1990, Citicorp International Communications, Inc. ("CICI") entered into a lease agreement ("Master Lease") with IBM Credit ("IBM") for computer equipment that CICI used in its data center in Silver Spring, MD. On September 3, 1998, CICI decided to upgrade its computer equipment and sought a release from the obligations of its lease with IBM. On October 20, 1998, CICI and IBM negotiated a termination agreement ("Termination Agreement") which released CICI from its Master Lease obligations. Pursuant to the Termination Agreement, CICI returned the old computer equipment to IBM and paid a termination fee of $7,219,998.

Initially, CICI did not pay sales tax on the lease termination fee. On December 1, 1998, IBM submitted another invoice to CICI for sales tax on the termination fee, in the amount of $360,999.90. On April 1, 1999, CICI paid the sales tax, even though they doubted their obligation to pay the tax. On April 24, 2000, CICI made an anonymous request to the Maryland Comptroller of the Treasury for a ruling on the taxability of the termination fee.

James Dawson, the Assistant Legal Director of the Office of the Comptroller, responded to the request by letter, and "declined to issue a formal declaratory ruling" but did agree to answer the question informally. Noting that the statutes and regulations do not address termination fees, Dawson opined that, the termination fee is a charge imposed by the lessor on the lessee to terminate the lease, with the property subject to the lease agreement returned to the lessor, and with title to the property in no way vesting to the lessee. The letter noted that Dawson considered the termination agreement as an agreement separate and apart from the lease agreement that did not appear to be a condition or requirement of the lease agreement. Dawson concluded: "Therefore, the termination fee cannot be deemed consideration in the 'consummation and complete performance of a sale' as provided in § 11-101 (j). The termination fee would not be considered part of the 'taxable price' and thus, would not be subject to the Maryland sales and use tax."

On September 5, 2000, CICI filed a Sales and Use Tax Refund Application with the Comptroller seeking a refund of the sales tax paid on the termination fee. By letter dated July 30, 2001, the Refund Supervisor denied CICI's request. On September 28, 2001, the Comptroller held an informal hearing on the matter. On January 4, 2002, the Comptroller issued a Notice of Final Determination, denying the refund. CICI appealed to the Maryland Tax Court and on November 6, 2002, the court heard oral arguments on the matter. On February 23, 2004, the Tax Court reversed the Comptroller. The Tax Court found that, under the lease termination agreement, CICI

"released its interest in the leased equipment and was relieved of all obligations with respect to such property after November 1, 1998." The court concluded that "the clear and unambiguous provisions of the Master Lease and the Lease Termination Agreement and the lack of any transfer of title of the leased property to the Petitioner establish that the lease termination payment was not made pursuant to a transaction that is a "sale" as defined by § 11-101 (g)."

The Comptroller appealed to the Circuit Court for Baltimore City. That court held a hearing on the matter and on August 24, 2004, affirmed the Tax Court's decision. The Comptroller filed a Motion for Reconsideration that was later denied by the Circuit Court. Subsequently, the Comptroller noted a timely appeal. While the case was pending in the Court of Special Appeals, the Court of Appeals granted *certiorari* on its own initiative. *Comptroller v. Citicorp,* 385 Md. 511, 869 A.2d 864 (2005).

Held: Section 11-102 of the Tax General Article provides that a sales and use tax is imposed on "(1) a retail sale in the State; and (2) a use, in the State, of tangible personal property or a taxable service." Md. Code (1988 , 2004 Repl. Vol.), § 11-102 (a) of the Tax General Article. Md. Code (1988 , 2004 Repl. Vol.), § 11-103(i) of the Tax General Article defines "sale" as, *inter alia*, "title or possession of property is transferred or is to be transferred absolutely or conditionally by any means, including by lease, rental, royalty agreement, or grant of a license for use." As made clear by § 11-102, the imposition of sales tax requires, in the first instance, a sale. Md. Code (1988, 2004 Repl. Vol.), § 11-102 of the Tax General Article. In keeping with that concept, the statutory definition of "taxable price" includes consideration paid "in the consummation and complete performance *of a sale*." Md. Code (1988, 2004 Repl. Vol.), § 11-101 (l) of the Tax General Article. (Emphasis added.) Considering the plain language of the statutory and regulatory provisions in question, it is clear that if the transaction at issue in this case is not a "sale," the consideration paid for the transaction, by definition, cannot be part of the "taxable price," and cannot be subject to sales and use tax.

The transaction between CICI and IBM, whereby IBM released CICI from its obligations under the lease and CICI paid the termination fee and returned the old equipment, does not fit within the statutory or regulatory definition of the word "sale." Upon termination of the agreement and payment of the termination fee to IBM, there was no transfer of title or possession of property to the lessee, as contemplated by § 11-101 (g) of the Tax General Article and section 03.06.01.28 of COMAR. In fact, in the instant

case, CICI, the party paying the fee, transferred the property back to IBM, the party receiving the fee. Such an arrangement cannot fairly be described as a "sale."

The Comptroller also argues that the Termination Fee is taxable because, even though IBM and CICI call it a termination fee, it should be viewed as a consolidation of the payments CICI would have paid under the Master Lease had the lease continued through the end of the term, discounted to present value. This transaction cannot be viewed as a buyout of a lease because CICI returned the leased equipment to IBM upon signing the Termination Agreement and paying the termination fee. The party that received the money also retained the goods. Consideration, within the context of the statutory definitions of "sale" and "taxable price," involves an exchange. Md. Code (1988, 2004 Repl. Vol.), §§ 11-101 (i), (l) of the Tax General Article.

Comptroller of the Treasury v. Citicorp International Communications, Inc., No. 147, September Term 2004, filed October 4, 2005, Opinion by Greene, J.

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TAXATION - SALE OF LAND FOR NONPAYMENT OF TAX - PARTIES - NOTICE - HOMEOWNERS ASSOCIATIONS - THE FAILURE OF A TAX SALE PURCHASER OF PROPERTY TO PROVIDE NOTICE TO A NON-OWNER HOMEOWNERS ASSOCIATION OF AN ACTION TO FORECLOSE THE EQUITY OF REDEMPTION WILL NOT AUTOMATICALLY CAUSE THE CIRCUIT COURT TO LACK JURISDICTION.

Facts: On May 22, 1989, Royal Plaza Associates Limited Partnership ("the developer") recorded in the Land Records of Prince George's County, four subdivision plats for a prospective development to be named Royal Plaza. Each plat delineated a separate section of the development and designated common areas within each section for recreation or open space. The property in question was one of the designated common areas.

On July 27, 1989, the developer formed Royal Plaza Homeowner's Association, Inc. ("HOA") as a non-profit Maryland corporation.

John Dowd, the general partner and resident agent of the developer, was listed as the HOA's resident agent and was a member of its board of directors. On May 3, 1991, the developer conveyed by deed two of the four common areas to the HOA. Parcel A, the property in question, for reasons not made clear in the record, was not conveyed to the HOA.

On May 12, 1997, there was a tax sale of the parcel and Willie Lenson ("Lenson") purchased the tax certificate for the property for the sum of $4,000. Lenson had a title search conducted on September 14, 1998, which confirmed that the developer was the sole owner of the property. On September 23, 1998, Lenson filed a Complaint to Foreclose the Equity of Redemption in the Circuit Court for Prince George's County. At the time of the tax sale and foreclosure, the developer was still the record title owner of the parcel. Lenson attempted to serve notice on the developer, but was unsuccessful. Lenson did not send written notice of the proceedings specifically to the HOA. It should be noted, however, that the HOA's resident agent, John Dowd, was also the developer's resident agent and listed the same address on record with the SDAT in his capacity as agent for both organizations.

On January 13, 2000, the Circuit Court foreclosed the right of redemption and conveyed full ownership of the parcel to Lenson. On October 22, 2001, well over a year later, the HOA filed a motion to vacate the judgment foreclosing the right of redemption on the parcel, along with a motion to intervene in the foreclosure action as a defendant. On November 6, 2001, before the motion was ruled on, Lenson sold the parcel to Eugene Bonds ("Bonds"), who recorded his deed to the property on December 5, 2001.

On January 14, 2002, Bonds filed a motion to intervene as successor-in-interest to Lenson. On February 15, 2002, the Circuit Court granted both the HOA's and Bonds' motions to intervene. In addition, the court vacated the order foreclosing the right of redemption, finding that the HOA was entitled to receive actual notice of the complaint.

On January 3, 2003, Bonds amended the original complaint to foreclose the right of redemption to include a claim to quiet title. On September 10, 2003, ruling on a motion by Bonds, the Circuit Court dismissed the claim for lack of jurisdiction. Bonds filed a timely appeal. On December 29, 2004, the Court of Special Appeals reversed the Circuit Court's ruling, holding that Lenson's failure to send the HOA notice did not deprive the Circuit Court of jurisdiction to enter judgment and that the Circuit Court erred in vacating the judgment and remanded the case to the Circuit Court to reinstate the order foreclosing the right of redemption. *Bonds v.*

Royal Plaza Comm. Assocs., Inc., 160 Md. App. 445, 864 A.2d 257 (2004). The HOA filed a petition for writ of certiorari which we granted on April 7, 2005. At no time has the record owner of the tract of land, the developer, challenged the foreclosure of the right of redemption.

Held: Affirmed. Where the party that failed to receive the notice is a homeowners association, without an ownership interest as defined by § 14-836(b)(1) of the Tax-Property Article, it is not a necessary party to the action. While a Circuit Court may lack jurisdiction to foreclose the equity of redemption when a tax sale purchaser fails to provide notice to necessary parties as enumerated in § 14-836(b)(1), it does not lack jurisdiction when the failure of notice relates to the entities described in § 14-836(b)(4). Because the HOA did not file its claim alleging constructive fraud within the statutory period of a year, pursuant to § 14-845(a), it lost its right to redeem.
Royal Plaza Community Association, Inc. v. Eugene Bonds. No. 5, September Term 2005, filed October 4, 2005. Opinion by Cathell, J.

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COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - CONTESTED CASE - STATES – ACTIONS

CONSTITUTIONAL LAW – DUE PROCESS OF LAW

Facts: Levi Dozier, a public at will employee, was terminated by written notice from his position at the Baltimore City Department of Social Services, where he had been employed for eighteen years.

The written notice provided no justification for the termination. Dozier filed a written appeal, in which he argued that several days after the termination, the Department director made a statement that Dozier interpreted to be defamatory. The Employer-Employee Relations Unit held a discretionary conference with Dozier and issued a written decision affirming his termination. The decision by the Unit was the "final administrative decision."

Dozier filed a petition for judicial review, which was dismissed by the circuit court. After the court denied Dozier's Motion to Alter Judgment, he noted an appeal to the Court of Special Appeals.

Held: Affirmed. For a proceeding to meet the definition of "contested case" under the Administrative Procedure Act, which provides a statutory right to judicial review, certain "trial type" procedures must be afforded to the complaining party in a hearing. In this case there was no "trial type" proceeding; neither the Secretary nor the Unit was acting in an "adjudicatory capacity." The General Assembly has made it quite clear when it intends to afford State employees a "contested case" hearing. No such right is provided to at will employees. Therefore, Dozier was not entitled to judicial review under the Administrative Procedure Act.

Dozier's argument that the circuit court's dismissal of his petition for judicial review constituted a denial of his due process rights was not raised before the circuit court and therefore was not properly preserved for appeal.

Were the Court to address Dozier's constitutional claims, it would conclude that they are without merit. As an at will employee, Dozier did not have a property interest in continued employment. Additionally, the statement Dozier alleged was made against him does not rise to the level of misconduct impugning his

honesty and therefore did not implicate a protected liberty interest.

Dozier v. Department of Human Resources, No. 1793, September Term, 2004, filed September 29, 2005. Opinion by Kenney, J.

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ADMINISTRATIVE LAW - COURT ENFORCEMENT OF ADMINISTRATIVE RULING - IN A CIVIL ACTION TO ENFORCE A DECISION OF AN ADMINISTRATIVE AGENCY PURSUANT TO MARYLAND CODE, STATE GOVERNMENT ARTICLE (1999, 2002 SUPP.), § 10-222.1, THE RELIEF THAT IS ORDERED BY THE CIRCUIT COURT CANNOT SUPPLEMENT OR MAKE ADDITIONS TO THE RELIEF ORDERED BY THE AGENCY. AN ISSUE THAT WAS NOT DETERMINED BY THE ADMINISTRATIVE AGENCY WHEN IT RULED UPON AN EMPLOYEE GRIEVANCE CANNOT BE DECIDED BY THE CIRCUIT COURT IN THE FIRST INSTANCE WHEN A CIVIL ACTION IS FILED TO ENFORCE THE AGENCY'S RULING.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Baltimore City. The Maryland Department of Health and Mental Hygiene ("DHMH") appealed a judgment of the circuit court that ordered DHMH to comply with an order of an administrative law judge to reinstate a terminated employee, Rynarzewski, with back pay and benefits. After an ALJ ruled in favor of Rynarzewski in a grievance proceeding, concluding that Rynarzewski should not have been terminated for insubordination, neither party filed a petition for judicial review. The ruling that concluded Rynarzewski's termination was improper is, therefore, final and not subject to further appeal. But Rynarzewski and DHMH were never able to come to an agreement as to the terms and conditions of Rynarzewski's return to duty, and Rynarzewski filed a complaint in the circuit court to enforce the ALJ's order. The circuit court ordered DHMH to comply with the ALJ's ruling that Rynarzewski be reinstated, and also ruled that Rynarzewski was fit to return to work as of March 3, 1999. The DHMH appealed.

Held: Judgment affirmed in part and reversed in part. Case

remanded to the Circuit Court for Baltimore City for further proceedings not inconsistent with this opinion.

The Court of Special Appeals concluded that the circuit court properly ordered DHMH to comply with the ALJ's ruling that the employee be reinstated and affirmed that portion of the judgment. However, the Court of Special Appeals concluded that the circuit court erred in construing the administrative decision to establish that the employee was fit to return to work as of March 3, 1999, because that issue was not within the scope of the grievance filed by Rynarzewski. Consequently, the Court of Special Appeals vacated that portion of the order that held that employee's entitlement to back pay should be calculated as if he had been fit to return to work on March 3, 1999.

The Court of Special Appeals held that the extent of the relief the courts can provide to Rynarzewski pursuant to his petition to enforce the administrative order dated July 31, 2002, is for the circuit court to order DHMH to reinstate Rynarzewski to the status he enjoyed on February 22, 1999, such that he will be in the same position he would have been in had the errant order to return to work as of February 1, 1999, and had the concomitantly errant notice of termination dated February 12, 1999, never been issued. Such order of enforcement shall be without prejudice to the right of Rynarzewski to pursue a new grievance in the event he is not satisfied with the employer's calculation of the compensation to which he is entitled in the way of back pay, leave, or other benefits of employment.

Department of Health and Mental Hygiene v. Bernard Rynarzewski, No. 653 September Term, 2004, filed September 15, 2005. Opinion by Meredith, J.

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ADMINISTRATIVE LAW - JUDICIAL REVIEW - WHEN REVIEWING THE DECISION OF AN ADMINISTRATIVE AGENCY, THE REVIEWING COURT MAY NOT CONSIDER ISSUES THAT WERE NOT RAISED AT THE AGENCY LEVEL.

ADMINISTRATIVE AGENCIES - UNEMPLOYMENT INSURANCE - JUDICIAL REVIEW - REMAND TO AGENCY. WHEN THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE DECISION OF THE ADMINISTRATIVE AGENCY, THE REVIEWING COURT MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE AGENCY, AND SHOULD NOT REMAND THE CASE IF THE ONLY PURPOSE OF THE REMAND IS TO GIVE THE LOSING PARTY A SECOND OPPORTUNITY TO PRESENT EVIDENCE.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Prince George's County upon judicial review of a Department of Labor, Licensing and Regulation ("DLLR") Board of Appeals' decision. Appellee Boardley applied for unemployment benefits after he was fired by his employer. The employer contested the request for benefits and a hearing was held before a hearing examiner who found that Boardley was terminated for gross misconduct and denied Boardley benefits. Boardley appealed to the DLLR Board of Appeals which affirmed the hearing examiner's decision to deny Boardley benefits. Boardley then petitioned the Circuit Court for Prince George's County for judicial review. The Circuit Court reversed the DLLR's decision and remanded the case to the agency for further proceedings. DLLR noted an appeal.

On appeal to the Court of Special Appeals, DLLR asserted that the circuit court erred in remanding the case where it made its own findings of fact and failed to determine whether substantial evidence existed to support the Board's decision that Boardley's termination of employment was for gross misconduct.

Held: Judgment reversed. Case remanded to the circuit court with directions to affirm the administrative decision.

The Court of Special Appeals held that the evidence regarding Boardley's misconduct was sufficient to support the conclusion of the DLLR Board of Appeals that Boardley became unemployed as a result of his own gross misconduct in the workplace.

When the case was being reviewed by the circuit court, Boardley presented new issues in support of his request for reversal of the DLLR's decision which were not presented before the Board of Appeals. Consequently, the circuit court was precluded from considering the new issues in the course of the court's review of the Board of Appeals decision. It is the function of the reviewing court to review only the materials that were in the record before the agency at the time it made its final decision.

Department of Labor, Licensing and Regulation v. Boardley, No. 01463, September Term, 2004, filed September 20, 2005. Opinion by

Meredith, J.

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ADMINISTRATIVE LAW - LEOBR - STATUTORY CONSTRUCTION; JUDICIAL REVIEW.

Facts: Kathleen Anderson, an officer with the Maryland-National Capital Park and Planning Commission (the " Commission"), was found not guilty of engaging in an unauthorized vehicular pursuit by an Administrative Hearing Board convened pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR"). Thereafter, the Commission sought judicial review in the Circuit Court for Prince George's County, which affirmed.

Held: Affirmed. In this case of first impression, the Court of Special Appeals was asked to consider whether the Commission has a right to judicial review when an officer is found not guilty of administrative charges. In doing so, the Court construed LEOBR. It focused, *inter alia*, on Md. Code, § 3-108(a)(3) of the Public Safety Article, which provides: "A finding of not guilty terminates the action." In contrast, P.S. § 3-108(c) provides that, upon a finding of guilt, an appeal may be taken in accordance with P.S. § 3-109. Applying principles of statutory construction, the Court concluded that the Commission does not have a right of judicial review when an officer is found not guilty under LEOBR.

Maryland-National Capital Park And Planning Commission v. Kathleen Anderson, No. 80, September Term, 2004, filed September 30, 2005. Opinion by Hollander, J.

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ADMINISTRATIVE LAW – PREVAILING MINORITY – FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Facts: To obtain a nonconforming use permit for the adult entertainment presented at its bar, "Club Bunns," appellant Mombee TLC, Inc., filed a "use" application with Baltimore City's Department of Housing and Community Development. When the Office of the Zoning Administrator denied that application, appellant took the matter before the City's Board of Municipal and Zoning Appeals (the "Board"). Three of the five Board members voted to allow appellant to continue presenting adult entertainment - two did not. Because a supermajority of the Board, that is, four out of its five members, must approve such an application, it was denied. Md. Code (1957, 2003 Repl. Vol.), Art. 66B § 2.08(i)(1).

Appellant filed a petition for judicial review in the Circuit Court for Baltimore City. When that court affirmed the Board's decision, appellant noted this appeal.

Held: Judgment vacated. A prevailing minority is required to issue findings of fact and conclusions of law so as to permit judicial review of its decision.

Mombee TLC, Inc. v. Mayor and City Council of Baltimore, No. 1779, September Term, 2004. Filed October 6, 2005. Opinion by Krauser, J.

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ADMINISTRATIVE LAW — WAIVER OF RIGHT TO OBJECT — ZONING — ADEQUATE PUBLIC FACILITIES ORDINANCE

Facts: On November 7, 2002, Mr. Crampton filed an "Ordinance Amendment Application" ("the application") with the Washington County Planning Commission. Crampton proposed to reclassify a 97.27 acre parcel of land ("the property") in Washington County from its "A" Agricultural zoning designation, to the "A" Agricultural Planned Unit Development ("PUD") zone.

In accordance with § 16.5(a)(2) of the Zoning Ordinance of Washington County ("zoning ordinance"), the Planning Commission scheduled a joint public hearing on Crampton's application before both it and the County Commissioners of Washington County.

On January 13, 2003, a joint public hearing on the application was held. None of the witnesses was placed under oath.

The Planning Commission and County Commissioners heard a report from a Planning Commission staff member, and received statements in favor of the application from Crampton, his attorney, and an engineer with Fox & Associates.

More than 25 members of the public, several of whom are appellants, spoke in opposition to the application. The protestants generally asserted that the existing public schools did not have the capacity to handle the influx of children the development of the PUD would produce, the PUD was not compatible with neighboring properties, and the development would adversely affect traffic along Marsh Pike.

On March 3, 2003, the Planning Commission voted three-to-one to recommend that the County Commissioners deny the application. In a letter dated the following day, the Planning Commission informed the County Commissioners of its recommendation. The Planning Commission stated that it "based this recommendation on" the traffic study submitted at the January 23, 2003 hearing, and on "concerns that the residential development density proposed for the [property] was not consistent with the residential density in adjacent developments." The Planning Commission also stated its "opinion that the road infrastructure in the immediate vicinity of the [property] was defici[ent.]"

On March 13, 2003, the County Commissioners held a regular meeting to consider and vote on the application. The County Commissioners voted unanimously to accept "the findings of fact as set forth in the report from the County Attorney." The County Commissioners also voted three-to-one to approve the rezoning of the property to PUD, thereby rejecting the Planning Commission's recommendation that the application be denied.

Appellants filed a petition for judicial review of the County Commissioners' decision, in the Circuit Court for Washington County. After a hearing, the court issued an opinion and order affirming the County Commissioners' decision.

On appeal to the Court of Special Appeals, appellees contended as they had before the circuit court, that the County

Commissioners' decision was not based on substantial evidence because the "evidence" was obtained from witnesses who had not been sworn; and that the County Commissioners did not properly interpret the County's zoning ordinance.

Held: Affirmed. Appellants' failure to object to the witnesses' not being sworn at the joint hearing before the Planning Commission and the County Commissioners constituted a waiver of appellants' right to raise the complaint for the first time on judicial review.

The County Commissioners properly construed the zoning ordinance. When read together with the county's Adequate Public Facilities Ordinance, the County Commissioners are not required to find, before approving the re-zoning of land to a PUD, that an adjacent roadway is currently adequate to handle both existing and future traffic. Instead, the statutory scheme as a whole mandates that the Planning Commission monitor adequacy of roadway facilities throughout the PUD review and approval process, and throughout the period of development.

James Cremins, et al. v. County Commissioners of Washington County, Maryland, et al., No. 2200, September Term, 2003, filed September 29, 2005. Opinion by Barbera, J.

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ARBITRATION — UNION'S DUTY OF FAIR REPRESENTATION

Facts: Appellant, Ramon Stanley, sued his Union, the American Federation of State and Municipal Employees Local No. 553, when it refused to pursue an employment grievance on his behalf against the City of Cumberland (the "City"). In 2000, the City terminated appellant's employment after he twice tested positive for marijuana. Before terminating his employment, the City held a pre-termination hearing, which appellant's Union Representative and President attended. During that hearing, the hearing panel provided the Union Representative additional time to submit

information on appellant's behalf to dispute appellant's test results. Following the hearing, the Representative received information regarding a new confirmatory test requirement that may have assisted appellant's case, but, for whatever reason, he did not submit that information to the panel. Accordingly, once the additional time lapsed, appellant was terminated.

In response to appellant's termination, the Union prepared a grievance, in accordance with the procedures in Article IV, §§ 1-5 of its Collective Bargaining Agreement (the "Agreement"), asserting that appellant was unjustly terminated. After exhausting its appeals, the Union's Executive Board decided not to arbitrate the grievance on appellant's behalf, though that decision was later overturned by a majority of the members' vote. The following month, a re-vote was held to reconsider the decision to arbitrate appellant's grievance. Based on a mistaken belief that a vote to reconsider required a two-thirds majority vote to proceed, rather than a bare majority, reconsideration was denied.

That problem was later corrected when the Union Representative learned of his mistake following the meeting and held a special meeting to reconsider the issue of arbitration. During the second meeting to reconsider, the Union Representative told the members that appellant could pursue arbitration against the City on his own if the Union chose not to assist him. As a result of that alleged misstatement, among other statements, the members chose not to pursue arbitration. Approximately one week later, the Union extended to appellant the right to proceed against the City on his own. When appellant attempted to proceed to arbitration, the City declined because the Union had withdrawn its grievance.

Appellant then filed a complaint against the City, and twice amended it to include the Union as well as the City. The first count of the second amended complaint sought a court order to compel the City to enter into arbitration; the second alleged wrongful discharge; the third sought a court order that appellant's grievance be decided in his favor; and the fourth alleged that the Union breached its duty of fair representation. In response, appellees each filed motions for summary judgment, all of which were granted on all counts.

Held: Affirmed in part and reversed in part. A labor union owes its members a duty of fair representation, requiring it to represent its members in good faith and honesty without engaging in discriminatory behavior or arbitrary conduct. Facts alleging that, *inter alia*, a union's representative provided its members with misinformation that may have influenced their decision not to seek arbitration on appellant's behalf created a dispute of material

fact related to whether the union acted in an arbitrary or bad faith manner. Thus, summary judgment was inappropriate. Likewise, the trial court erred in granting summary judgment on appellant's wrongful discharge claim because the Union might have breached its duty of fair representation, the finding of which was a prerequisite to a successful wrongful discharge suit.

Additionally, the Collective Bargaining Agreement clearly and unambiguously formed a contract between the Union and the City providing the Union with procedures to enforce and arbitrate appellant's grievance. Appellant was not a party to the contract and, thus, could not compel the City to arbitrate his grievance without the Union's assistance.

Ramon Stanley v. American Federation of State and Municipal Employees Local 553, et al., No. 1313, September Term, 2004, filed October 6, 2005. Opinion by Barbera, J.

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ATTORNEYS - ATTORNEY'S FEES - AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988 - WHO IS A PREVAILING PARTY UNDER THAT STATUTE

Facts: Appellant, the Maryland Green Party ("Green Party"), brought an action in the Circuit Court for Anne Arundel County, seeking declaratory and injunctive relief after its candidate for U.S. Representative from the 1st Congressional District was declared ineligible to run for that position by the appellee, the State Board of Elections ("Board"), based upon certain provisions of the Maryland Election Law Article ("EL"). The Green Party challenged those EL statutes and practices by the Board in implementing them on state and federal constitutional law grounds. The circuit court granted summary judgment in favor of the Board, ruling that the EL statutes were constitutional under the state and federal constitutions. The Green Party appealed to the Court of Special Appeals, but the Court of Appeals issued a *writ of certiorari* on by-pass. The Court of Appeals held that the challenged EL statutes and application of others by the Board

violated the Maryland Constitution and Declaration of Rights. It declined to address the federal claim. The Court remanded the case to the circuit court for entry of a declaratory judgment consistent with its opinion. The circuit court entered a declaratory judgment in favor of the Green Party, declaring that the EL statutes were unconstitutional under the Maryland Constitution and Declaration of Rights. The Green Party then filed a petition for attorney's fees pursuant to 42 U.S.C. § 1988 in the circuit court. The court granted the Board's motion to dismiss the petition, ruling that the Green Party was not a prevailing party for purposes of section 1988. The court determined that, because it had decided the Green Party's federal claim against it, and the Court of Appeals reversed only on state law grounds, its original decision that the EL statutes did not violate the federal constitution was undisturbed and remained decided against the Green Party.

Held: Reversed and remanded to the circuit court for proceedings consistent with this opinion. The circuit court erred in ruling that, after judgment against the Green Party on all claims, state and federal, was appealed and the Court of Appeals reversed on the state law grounds only, the federal claim remained decided against the Green Party. Under section 1988, a party is not entitled to an award of attorney's fees if it loses on a federal claim that could have supported such an award. When a party sues on state and federal grounds, loses on all claims in the circuit court, and the appellate court reverses on the state claim only, not reaching the federal claim, the federal claim is no longer decided for purposes of section 1988. It is an undecided federal claim. In those circumstances, the party who prevailed on its state law claim is entitled to attorney's fees on the undecided federal claim if the claim was substantial, arose from the same common nucleus of facts as the state claim on which it prevailed, and was reasonably related to the party's ultimate success on the state claim. The discretion not to award attorney's fees when the three-part test is met is limited, existing only when there are exceptional circumstances. Because the Green Party's federal claim was undecided when it filed its petition for attorney's fees, it was entitled to attorney's fees because it met the three-part test and there were no exceptional circumstances.

Maryland Green Party, et al. v. State Board of Elections, No. 1911, September Term, 2004, filed October 7, 2005. Opinion by Eyler, D. S., J.

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CONTEMPT - CIVIL CONSTRUCTIVE CONTEMPT – ATTORNEY'S FEES AND EXPERT WITNESS FEES UNDER MD RULE 2-603

Facts: The Bahenas and Fosters live on contiguous properties in Annapolis, Maryland. Overhanging the Fosters' house was the Bahenas' tree, large and purportedly in a state of decay. The Fosters asked the Bahenas to remove the intruding trunk. When the Bahenas declined to do so, the Fosters filed a suit in the Circuit Court for Anne Arundel County, seeking compensatory and punitive damages for nuisance and negligence and requesting an injunction compelling the Bahenas to remove the tree.

Eventually, to resolve their dispute, the parties entered into a consent order, dividing responsibility for the removal of the tree between them. When the Bahenas failed to comply with that order, the Anne Arundel circuit court held them in contempt and ordered them to pay the attorney's fees and expert witness fees of the Fosters.

Held: Affirmed in part and reversed in part. One may not be held in contempt of a court order unless the failure to comply with the court order was or is willful. The circuit court does not have to follow a script. Indeed, the judge is presumed to know the law, and is presumed to have performed his duties properly. That the circuit court did not use the term "willful" in finding that appellants had violated the consent order does not rebut this presumption, given that there is no evidence that the court did not know or apply this standard. Moreover, the court's ruling, when read as a whole, clearly implies that the court found appellants' conduct to be willful.

The award of costs is within the discretion of the circuit court. But, "costs," under Md. Rule 2-603, do not include either attorney's fees or expert witness fees.

Gary Bahena, et ux. v. Jonathon Foster, et ux., No. 787, September Term, 2004, filed September 16, 2005. Opinion by Krauser, J.

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CONTRACTS - AMBIGUOUS TERMS - GENERAL RULES OF CONSTRUCTION- EXISTENCE OF AMBIGUITY. CONTRACT IS NOT AMBIGUOUS WHERE THE TERMS ARE NOT SUSCEPTIBLE TO TWO OR MORE MEANINGS. THE NOTE SIGNED BY APPELLANT CONTAINS INSTRUCTIONS TO "SEE ADDENDUM TO NOTE," AND THE SIGNED ADDENDUM CONTAINS AN EXPRESS AGREEMENT TO PAY "PREPAYMENT" PENALTIES. A REASONABLE PERSON SIGNING THE NOTE AND THEN SEPARATELY SIGNING THE ADDENDUM, COULD NOT HAVE BELIEVED THAT NO PREPAYMENT PENALTY WOULD BE COLLECTED.

CONTRACTS- GENERAL RULES OF CONSTRUCTION- EXISTENCE OF AMBIGUITY. CONTRACT INCORPORATING BY REFERENCE MARYLAND LAW, PROHIBITING PREPAYMENT PENALTIES, AND FEDERAL LAW, WHICH PERMITS PREPAYMENT PENALTIES DEPENDING ON THE TERMS OF THE CONTRACT DO NOT CREATE AMBIGUITY. APPLYING THE BASIC RULES OF CONTRACT INTERPRETATION, WHEN CLAUSES IN A CONTRACT ARE SEEMINGLY IN CONFLICT AND THE CONTRACT GENERALLY INCORPORATES MARYLAND'S PROHIBITION ON PREPAYMENT PENALTIES, WHILE SPECIFICALLY ADDRESSING PREPAYMENT PENALTIES IN THE NOTE'S ADDENDUM, THE SPECIFIC CLAUSE TAKES PRECEDENT OVER THE GENERAL AND CONTROLS THE AGREEMENT.

Facts: Heist, appellant, held a mortgage loan with appellee. Appellant signed the Note, and, separately, the Addendum to the Note, whereby, it required appellant to pay prepayment penalties in the event she prepaid the balance of the loan. The Note incorporated by reference the Maryland statute that prohibits prepayment penalties, and Federal law governing federal savings banks, which allows for the collection of prepayment penalties. Appellant prepaid the loan, and was assessed a prepayment penalty of nearly $9,600. Appellant paid the penalty, and filed suit in the Circuit Court for Frederick County seeking a refund and other relief. The circuit court dismissed the complaint.

Held: Affirmed. A contract is unambiguous where there are express terms that cannot lead to two or more meanings. Reasonableness dictates that a person signing two separate sections understands the terms of both sections. References to conflicting statutes do not create ambiguity in a contract, where the court is lawfully bound by contract interpretation rules, to interpret and apply, the specific clause, rather than the general clause.

Nancy Heist v. Eastern Savings Bank, FSB, No. 1949, September Term, 2004, decided October 12, 2005. Opinion by Davis, J.

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CRIMINAL LAW – HOT BLOODED RESPONSE– FIRST DEGREE ASSAULT

Facts: Appellant, Kalilah Romika Stevenson, during an argument with her estranged husband, Antonio Corbin, at his mother's house, grabbed a butcher knife from the kitchen and stabbed him twice in the left arm. His wounds required 126 stitches and resulted in a loss of sensation in his left hand. Stevenson was convicted in the Circuit Court for Wicomico County of first degree assault.

Held: Affirmed. The rule of hot-blooded response to adequate provocation does not mitigate the crime of first degree assault to second degree assault.

Stevenson v. State, No. 730, September Term, 2004, filed September 6, 2005. Opinion by Krauser, J.

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CRIMINAL LAW - REGULATED FIREARMS - DEFINITION OF "TRANSFER" - DEFINITION OF "KNOWINGLY"

Facts: Appellant, Todd Lin Chow, a District of Columbia Metropolitan Police Officer, was tried at a court trial on charges that he violated Md. Code (1957, 1996 Repl. Vol., 2002 Supp.), Article 27, Sec. 442(d) for lending a gun he owned to a friend, Man Nguyen.

At appellant's trial, Nguyen testified that on April 1, 2003, the Prince George's County Police Department confiscated his pistols in connection with a murder investigation. The following day, Nguyen contacted the appellant, and discussed his desire to purchase another gun. Appellant and Nguyen a nine millimeter, semi-automatic handgun that he had owned since 1996. Nguyen wanted to test fire the weapon, as a precursor to a possible sale. On their way to a firing range, Nguyen received a business call on his cellular telephone, requiring that he abort the trip. Nguyen drove appellant back to the restaurant where appellant's car was parked and dropped him off. Appellant's weapon remained in Nguyen's car.

No money was exchanged between Nguyen and appellant.

Soon thereafter, Nguyen contacted appellant by telephone, to let him know that he still had the weapon, and that he might be interested in purchasing it. Appellant told Nguyen to keep the firearm in the house, and he would pick it up. Detective Donnie Judd testified that, on April 4, 2003, he and other members of the Prince George's County Police Department stopped Nguyen on a warrant to arrest him for having illegaly carried the gun that was found in his car three days earlier. In the ensuing search of Nguyen's car, the police discovered appellant's loaded handgun in the car's center console. Detective Judd ran an NCIC check and determined that the handgun had not been reported stolen. The gun was test fired and determined to be operable. Upon his arrest, Nguyen gave a written statement to police, the first paragraph of which described how he had obtained appellant's handgun. That portion of Nguyen's statement was admitted into evidence at appellant's trial.

Sergeant William Szimanski, of the State Police Licensing Division, Firearms Registration Section, testified that police records show no transfer of the handgun since appellant purchased it in 1996, and no application for a transfer of the fun from appellant to Nguyen. Sergeant Guillermo Rivera, of the Office of Internal Affairs of the District of Columbia Metropolitan Police Department, testified that appellant had not filed a stolen weapon report between November 17, 2001 and November 17, 2003.

In his motion for judgment of acquittal, appellant argued that lending a gun — temporarily transferring possession, without the payment of any consideration – does not come within the meaning of the term "transfer" under Sec. 442(d). In the alternative, appellant argued that he did not "knowingly" violate the statute, as required by Sec. 449(f), because the State did not prove that he knew that transferee, Nguyen, had not filed the application required by Sec. 442(d). The trial court denied appellant's motion, and found him guilty.

Held: Affirmed. The plain meaning of the vert "transfer" in Md. Code (1957, 1996 Repl. Vol. , 2002 Supp.), Article 27, Sec. 442(d) includes a loan of a regulated firearm. The plain construction of the term is confirmed by an examination of the general purpose of the regulated firearms subheading, and by the rule that the remedial portions of a statute are to be liberally construed. Therefore, appellant violated Sec. 442(d) by lending a regulated firearm to another person without first complying with the application process and seven-day waiting period set forth in that section.

In addition, appellant did not need to know of the proscriptions in Md. Code (1957, 1996 Repl. Vol., 2002 Supp.), Article 27, Sec. 442(d), in order to be convicted of "knowingly" participating in a violation of Sec. 442(d), as required by Sec. 449(f). In the context of this statute, "knowingly" simply means that the State must prov that the defendant had knowledge of the facts that constitute the offense. The State presented sufficient evidence to prove that appellant participated in a transfer of a regulated firearm with the knowledge that a firearm (as opposed to some other item) was being intentionally (as opposed to accidentally)transferred. The State need not also prove that the defendant knows that the transfer is being made without compliance with the application process.

Chow v. State, Case No. 2366, Sept. Term 2003. Opinion filed on June 2, 2005, by Barbera, J.

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CRIMINAL LAW - SEX OFFENDER REGISTRATION – MD. CODE, CRIMINAL PROCEDURE ARTICLE, §§ 11-705(d) and 11-721. MARYLAND STATUTE THAT REQUIRES REGISTERED SEX OFFENDERS TO PROVIDE NOTICE OF ANY CHANGE OF RESIDENCE WITHIN SEVEN DAYS AFTER THE CHANGE, SUBJECT TO CRIMINAL PENALTY FOR FAILURE TO DO SO, WAS NOT VOID FOR VAGUENESS WHEN APPLIED TO A HOMELESS PERSON. IN § 11-705(D), THE TERM "RESIDENCE" MEANS THE PLACE WHERE ONE ACTUALLY LIVES.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Montgomery County. James Jeandell was convicted of rape in 1977. Upon his release from imprisonment, after serving twenty-six years of a forty year sentence, Jeandell was required to register with the State of Maryland's Sex Offender Registry pursuant to Md. Code (1957, 2001 Repl. Vol., 2004 Cum. Supp.), Criminal Procedure Art. ("C.P."), § 11-704. The registration statute further provided, in C.P. § 11-705(d), that Jeandell was required to send written notice to the Department of Public Safety and Correctional Services (the "Department") within seven days of

any change in his residence. In May of 2003, Jeandell became homeless. Jeandell failed to notify the Department in writing that he was no longer living at his registered address, and failed to otherwise inform the Department of his whereabouts. Consequently, Jeandell was charged and found guilty of violating C.P. § 11-721. A time-served sentence was imposed by the Circuit Court for Montgomery County. Jeandell argued that, as a homeless person, because he did not have a new permanent residence to register with the Department, he was unable to comply with the statutory requirements.

Held: Judgment affirmed. Judge Meredith wrote for the Court:

> Because the commonly accepted meaning of "residence" as that word is used in the context of C.P. § 11-705(d) is clearly "the place where one actually lives," the Maryland Registration of Offenders statute does provide adequate guidance on how to comply with its requirements. Section 11-705(d) simply requires a registrant to provide written notice to the Department within seven days after there has been a change in the place where the registrant was living.
>
> Even a homeless person lives *someplace*. In other words, even though a homeless person may not have a structural residence that the person permanently occupies, that person can still comply with § 11-705(d) by sending the Department written notice that the registrant no longer lives at the last noted residence of record, and by keeping the Department informed of the registrant's *whereabouts* each time that those whereabouts have changed.

James William Jeandell v. State of Maryland, No. 1491 September Term, 2004, filed October 6, 2005. Opinion by Meredith, J.

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CRIMINAL LAW - SUFFICIENCY OF EVIDENCE - POSSESSION OF CONTROLLED DANGEROUS SUBSTANCE - KNOWLEDGE OF PRESENCE AND DOMINION AND CONTROL OVER SUBSTANCE.

Facts: The appellant, James Bradley Larocca, was arrested and charged with possession of marijuana with intent to distribute and simple possession. On the night in question, Larocca and two friends, David Hinkle and Jeremy Miner, were riding through town in a Honda Civic registered to Hinkle's mother. Hinkle was driving, Larocca was the front seat passenger, and Miner was sitting in the back seat. Larocca directed Hinkle to drive into a high-crime neighborhood. As they were driving, Miner produced and smoked a marijuana blunt and passed it to Hinkle, a communal partaking which continued in Larocca's presence until Hinkle parked the vehicle and Larocca entered a home on N. Mulberry Street. Undercover police officers watched Larocca enter the house. Upon his return, Larocca opened the car door and one officer smelled burning marijuana in its vicinity. The marijuana smoking continued after the trio had departed. They then were stopped by a marked police car. The officers could smell marijuana smoke inside the car and ordered the occupants to exit the vehicle. A search of Hinkle revealed rolling papers and currency. A search of Miner revealed a small baggie of marijuana. No drugs or paraphernalia were found on Larocca. A search of the vehicle revealed a white, opaque plastic bag containing baggies of marijuana located immediately under the front passenger seat. None of the occupants claimed ownership of the marijuana at the time of the stop. Hinkle indicated to the officers that Larocca knew of the marijuana. He changed his story at Larocca's trial, testifying that Larocca had no knowledge of the marijuana. Larocca was convicted of possession with intent to distribute marijuana and simple possession in the Circuit Court for Washington County, based upon the court's finding that the evidence was sufficient to convict Larocca as to both charges beyond a reasonable doubt.

Held: Affirmed. The evidence was sufficient, based on these facts, to support a finding beyond a reasonable doubt that Larocca knew of the presence of marijuana in the vehicle and exercised dominion and control over it. The trio knew each other; they were in a small car; Hinkle made a stop for Larocca in a neighborhood known for its illegal drug problems; communal smoking occurred in Larocca's presence; Miner had marijuana; Hinkle had paraphernalia; the car was being followed by a marked police car, providing an opportunity for the three to hide the marijuana; the bag was found within Larocca's easy reach, directly under his seat between his legs; and Hinkle's testimony was found to be incredible because it contradicted his earlier statement to the police. A reasonable fact-finder, based upon these facts, could infer that Larocca was

in constructive possession of the marijuana, which was packaged in a manner indicating the intent to distribute.

Larocca v. State, No. 2628, September Term, 2003, filed September 29, 2005. Opinion by Eyler, D. S., J.

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HANDGUNS - PERSONS ENTITLED TO A HANDGUN PERMIT – APPLICANT FOR HANDGUN PERMIT WHO HAS NO CRIMINAL CONVICTIONS DOES NOT HAVE A RIGHT PROTECTED BY THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION OR BY THE MARYLAND DECLARATION OF RIGHTS TO HAVE A HANDGUN PERMIT.

Facts: H. Robert Scherr, Esq., applied to the Maryland State Police for a permit to carry a handgun pursuant to Article 27, Section 36E, of the Maryland Annotated Code. The Secretary of the Maryland State Police denied the permit on the ground that Scherr had not shown "good and substantial reason to wear, carry, or transport a handgun."

Scherr appealed the denial to the Handgun Permit Review Board ("the Board") but introduced no evidence to the Board that he had received threats or been the victim of assaults or robberies. Nevertheless, he testified that he wanted a permit to carry a handgun for protection. Scherr asserted that, in his domestic relations practice, he sometimes "felt uncomfortable" by the behavior of some litigants and that, when traveling into Baltimore City, he feared for his safety and that of his family. The Board affirmed the decision of the Secretary of the Maryland State Police to deny Scherr's application for a handgun permit based on Scherr's failure to demonstrate a good and substantial reason to "wear, carry, or transport a handgun as a reasonable precaution against apprehended danger."

Scherr filed a petition for judicial review in the Circuit Court for Baltimore County. The circuit court remanded the matter to the Board because neither the Board nor the state police

official who made the initial decision to deny the permit considered that Scherr worked as a Baltimore City prosecutor from 1975 through 1977. On remand, Scherr testified that, although he did not receive any specific threats as a result of his prosecutorial activities, he did have a fear of retaliation by those whom he had prosecuted. The Board found that his professed fear was merely a "convenient, after-the-fact justification . . . that clearly did not enter into his thinking or motivation when he applied for a permit." The Board also found, due to the lack of specific threats and the 26-year period that had elapsed since Scherr's time as a prosecutor, that he had not shown a good and substantial reason to justify issuance of a permit. A second petition for judicial review was filed by Scherr. The circuit court then affirmed the Board's decision. Scherr appealed that decision to the Court of Special Appeals.

Held: The Board's decision was based on substantial evidence. Scherr's professed need for a handgun permit was based upon ill-defined and vague fears. In the Court's view, if fears of that type justified the issuance of a handgun permit, then any law-abiding citizen would have a basis for the grant of a permit allowing him or her to carry a handgun. In addition, the time elapsed since Scherr last performed prosecutorial activities, coupled with the absence of threats from those he had prosecuted, justified the Board's conclusion that he had no sound reason to carry a handgun.

The Court also rejected Scherr's claim that the denial of a handgun permit violated his Second Amendment rights. Contrary to Scherr's assertion, the Second Amendment to the United States Constitution makes no "declaration" that apprehended danger exists in every person's life. Moreover, Supreme Court precedent clearly establishes that the Second Amendment is not applicable to the states and therefore imposes no restriction on a state's power to enact handgun legislation.

The Court also rejected the contention that the provisions of Article 27, Section 36E(a)(6), violated the due process clause of the Fourteenth Amendment. That claim was rejected because: (i) the Second Amendment is not incorporated through the Fourteenth Amendment to apply to states, (ii) even if the Second Amendment was applicable to states, Scherr would not benefit because he failed to identify any substantive right that had been violated, and (iii) Scherr did not meet the burden of proving that the statute did not bear a real and substantial relationship to its governmental objective. The handgun permit statute was therefore held to be a reasonable exercise of the state's police powers.

H. Robert Scherr v. Handgun Permit Review Board, No. 780, September Term, 2004, filed July 10, 2005. Opinion by Salmon, J.

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INSURANCE - AGENT'S BOOK OF BUSINESS - ADMINISTRATIVE LAW - INSURANCE - CAPTIVE AGENT - NOTICE AND RENEWAL RULES

Facts: In this dispute between an insurance company and one of its former agents, we are asked to decide who owns the agent's book of business or "expirations" for purposes of § 27-503 of the Insurance Article. Enacted primarily to prevent insurance purchasers from losing their coverage when their agent and their company parted ways, this legislation transfers, when that occurs, ownership of the information contained in the agent's book of business to the insurer and then requires the insurer to renew all policies produced by the agent. To off-set the agent's loss of his "expirations," it further requires the insurer, under § 27-503(b)(2), to provide the agent with 90 days' notice of termination and then, under § 27-503(b)(3), to renew the agent's policies, through him or her, for at least two years or until the policies are placed elsewhere. Because the purpose of subsection (2) of § 27-503(b) is to provide the agent with adequate notice of termination and that of subsection (3) is to ensure policy renewal, they are known respectively as the "notice rule" and the "renewal rule."

These rules do not apply, however, when the insurance producer is a "captive agent," that is, an agent who works exclusively for a company or group of companies, whose termination will not interfere with the renewal of any of the policies of his customers, and whose book of business is owned by that entity. As there is no dispute that appellant David B. Metz worked exclusively for appellee Allstate Insurance Company and that the termination of his agreement did not imperil his customers' policies with Allatate, the only issue before us is whether he or Allstate owned his book of business. If he did, then he was entitled to the protections afforded by the notice and renewal rules; if he did not, then he

fell within the "captive agent" exception to the applicability of those two prophylactic provisions.

Determining who owned Metz's expirations is no mean task. Under his contract with Allstate, Metz was professionally neither fish nor fowl, that is to say, neither "captive" nor "independent" agent, but a combination of both. He was one of Allstate's "exclusive independent agents," a company designation which conveys the paradoxical nature of his position. As a "exclusive independent agent," he was both an independent contractor and an exclusive agent, traditionally incompatible positions. He did not "own" his book of business, according to Allstate; yet he had an undefined "economic interest" in it, which he could sell to a buyer approved by Allstate or pledge as collateral for a loan. Indeed, given the novelty and complexity of the parties' business arrangement, it is understandable that the Insurance Commissioner and the circuit court came to different conclusions as to who owned Metz's expirations for purposes of §§ 27-503(b)(2) and (3).

The Insurance Commissioner accepted Metz's claim that he owned his expirations; the Circuit Court for Baltimore City did not. Reversing the Commissioner's decision, the circuit court declared that, under the parties' agreement, the expirations clearly belonged to Allstate and that Metz was therefore not entitled to the statutory benefits he claimed.

Held: Affirmed. The insurer and its agents are free to negotiate the terms of their contractual relationship, including who owns the expirations. Indeed, when the legislative purpose of Ins. § 27-503 of protecting insureds is addressed in a contract between insurer and agent, by assigning ownership of the expirations to the insurer at the outset, as occurred here, the insurer and agent are free to agree to any terms which they feel meet their respective needs and goals.

Compliance with the notice and renewal rules is required when the agent to be terminated owns his expirations; when he does not, he falls within the captive agent exception of that stature and no such compliance is necessary; were it otherwise, the insurer would, in effect, be required by law to compensate a former agent for expirations that it, not he, owns.

Metz v. Allstate Insurance Company, No. 373, September Term, 2004, filed September 20, 2005. pinion by Krauser, J.

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TORTS- FRAUDULENT INDUCEMENT- MATERIAL MISREPRESENTATION. MISREPRESENTATIONS ARE MATERIAL WHERE APPELLEE RELIED ON APPELLANT'S CLAIMS THAT HE WAS VERY EXPERIENCED AS A CPA IN THE AREA OF TAX PREPARATION BUT HE HAD NOT PREVIOUSLY PREPARED ANY TAX RETURNS, THAT HE LED A TEAM OF PROFESSIONALS WHEN NO TEAM ACTUALLY EXISTED, THAT HIS BUSINESS WAS LOCATED WHERE ANOTHER WAS LOCATED, AND THAT HE HAD CLIENTS THAT HE DID NOT HAVE.

TORTS- FRAUDULENT INDUCEMENT- MATERIAL MISREPRESENTATION. VICTIM OF FRAUD WAS ENTITLED TO RELY ON THE MISREPRESENTATION OF THE APPELLANT. UNDER THE CIRCUMSTANCES, THE APPELLEE WAS NOT REQUIRED TO CONDUCT ANY INVESTIGATION INTO THE APPELLANT'S MISREPRESENTATIONS OR ASK VIRGINA LICENSING BOARD HOW LONG APPELLANT HAD BEEN CPA BECAUSE THERE WAS NO APPARENT EVIDENCE THAT SHOULD HAVE SERVED AS A WARNING THAT SHE WAS BEING DECEIVED.

Facts: Appellee was engaged in a very successful tax preparation service to Israelis residing in the Rockville, Maryland area. Appellant contacted appellee and claimed he was servicing a specialized client base, namely Israelis residing in the U.S. He claimed he was an experienced CPA leading a team of tax preparers and that he had a Rockville office for his business. Appellant's misrepresentations induced the appellee to sell her client list, of approximately seven hundred names, to appellant. Appellee, in attempting to investigate appellant's bona fides, verified that he was, in fact, a licensed CPA and, in an attempt to visit appellant's offices, was taken to the offices of another corporation in Northern Virginia, C-Biz, where appellant was working as a tax preparer. After selling appellant the client list, appellee discovered that appellant was not an experienced CPA, but rather had been a CPA for only about five weeks. Appellee also discovered that appellant had no clients at the time the client list was sold and the company did not have a Rockville, Maryland office. Appellee sued for recission of the sales contract and restitution.

Held: Affirmed in part and reversed in part. There is sufficient evidence to support the trial court's conclusion that appellant's misrepresentations were material. His claim that he was an experienced CPA was the primary reason appellee decided to sell the client list. Appellee was also entitled to rely on appellant's misrepresentation and not obligated to perform an in-depth investigation into appellant's background. The trial court, however, committed error in calculating the amount of the damages award. The trial court relied on expert testimony, which failed to account for the expenses required to produce the gross income.

Arie Rozen et al. v. Michal Greenberg, No. 1990, September Term, 2004, decided October 7, 2005. Opinion by Davis, J.

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TORTS - TRESPASS- INVASION OF PRIVACY- INTRUSION UPON SECLUSION- MOTIONS FOR SUMMARY JUDGMENT.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS- MOTIONS FOR SUMMARY JUDGMENT.

Facts: Walter F. Roche, Jr. and Ivan L. Penn, reporters for the Baltimore Sun Company, ventured to the Keswick Multi-Care Center, a nursing home, in an effort to interview former Congressman Parren Mitchell for an upcoming article. The reporters arrived at Keswick during regular visiting hours, and Penn signed his name in a book at the security/reception desk, indicating his intention to visit Congressman Mitchell. The reporters then went to the Congressman's private nursing room and entered, unannounced and uninvited. According to the reporters, Congressman Mitchell's door was open when they entered. Upon doing so, the reporters announced who they were and engaged in a cordial interview with the Congressman. The reporters' account is supported by the affidavit of Congressman Mitchell's private duty nurse, Ella Simpson, who claimed she witnessed the encounter.

According to Congressman Mitchell, the reporters entered his room while he was alone in his room. He cannot remember whether his door was open or closed, but he assumes it was closed because he was preparing to take a nap. Congressman Mitchell claims that he requested the reporters to leave numerous times, but they did not comply. They repeatedly questioned the Congressman about unpaid bills, which he answered "in an effort to defend himself and his family." In addition, Congressman Mitchell asserts that one of the reporters "rifled" through his files.

Congressman Mitchell filed a complaint in the Circuit Court for Baltimore City against the Baltimore Sun, Roche, and Penn,

alleging claims of trespass, intrusion upon seclusion, and intentional infliction of emotional distress. The defendants moved for summary judgment, which the circuit court granted on all counts.

Held: Affirmed in part, reversed in part. Viewing the evidence in the light most favorable to Congressman Mitchell, the non-moving party, there are genuine disputes of material fact as to whether the Congressman impliedly consented to the interview, and the scope of that consent, if any, which would provide an affirmative defense to the claims of trespass and intrusion upon seclusion. Therefore, the circuit court erred in granting summary judgment on those claims.

The trial court did not err in granting summary judgment on the claim of intentional infliction of emotional distress because the evidence viewed in the light most favorable to Congressman Mitchell fails to establish that the reporters' conduct was sufficiently extreme and outrageous. In addition, the emotional distress allegedly suffered by the Congressman does not rise to the level of severity required to prevail on a claim of intentional infliction of emotional distress.

Mitchell v. Baltimore Sun Co., No. 266, September Term 2004, filed September 29, 2005. Opinion by Kenney, J.

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WORKERS' COMPENSATION – COVERED EMPLOYEE

Facts: Flippo Construction Company, Inc., hired Hodgson, a carpenter by trade, in Maryland, where it is headquartered and where Hodgson resides. For the first three years of his employment, from November 1995 through 1998, Hodgson worked almost exclusively at job sites in Maryland. From 1999 until the date of his accident, three years later, in 2001, Hodgson was principally assigned to District of Columbia job sites. While employed chiefly in the District of Columbia, Hodgson continued to perform work in Maryland and Virginia. Hodgson also traveled to Maryland two to

three times a week, when requested to do so by his employer, to purchase supplies from Maryland vendors; after which he either delivered them to his D.C. job site the same day or kept them in his truck overnight at his Maryland apartment and delivered them the next morning. Hodgson also periodically drove to Flippo's headquarters in Maryland to deliver checks and pick up payroll documents. And he attended meetings and classes at Flippo's Maryland headquarters approximately three times a year.

On December 7, 2001, Hodgson was injured while working at a company job site in the District of Columbia. He filed a claim for his injuries with both the Maryland Workers' Compensation Commission and the District of Columbia Workers' Compensation Commission. Seeking dismissal of the Maryland claim, Flippo argued that the Maryland Commission did not have jurisdiction over Hodgson's claim because his injury occurred in the District of Columbia where he had been working for most of the year preceding his injury. The Circuit Court for Prince George's County affirmed the Maryland Commission's decision.

Held: Affirmed. Hodgson's employment, though initially rooted in Maryland, became "fixed and centralized" in the District of Columbia over the three-year-period leading up to his accident. Appellant's presence was "substantially greater" in the District of Columbia for the last three years of his employment than it was in Maryland. Therefore, because his work in Maryland was on a "casual, incidental, or occasional basis," Hodgson was not regularly employed in Maryland and, thus, was not a covered employee under Md. Code (1991, 1999 Repl. Vol.), § 9-203(a) of the Labor and Employment Article.

Hodgson v. Flippo Construction Company, Inc., et al., No. 861, September Term, 2004, filed September 15, 2005. Opinion by Krauser, J.

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WORKERS'COMPENSATION - STATUTORY CAP ON DEPENDENCY DEATH BENEFITS:

Facts: Edward Bernard Scheibel died after sustaining a

work-related automobile injury on I-95 in Howard County. Appellant, Dicie Weatherly, applied for, and was granted, dependency death benefits after the Workers' Compensation Commission (the "Commission") determined that she was wholly dependent upon Scheibel at the time of his death. Appellant has never been married to Scheibel, but lived with him for a number of years before his death.

Appellees, Great Coastal Express Co., Inc., and Liberty Mutual Fire Insurance Co., requested that the Commission reconsider its finding. After the Commission refused, appellees sought judicial review of the Commission's decision. The Circuit Court for Howard County upheld the Commission's decision.

Several years later, the Commission ceased making payments to appellant. Appellant asked the Commission to order appellees to resume payments. Appellees asserted that they had paid well over $50,000.00 in excess of the $45,000.00 statutory cap for dependency death benefits found in Maryland Code (1991, 1999 Repl. Vol., 2004 Suppl.), § 9-681 of the Labor & Employment Article. Appellant asserted that principles of res judicata and collateral estoppel operated to bar appellees from asserting that the statutory cap applied to Weatherly as a non-spouse. Appellant also asserted that § 9-681 does not discriminate between a spouse and a non-spouse; instead, the statute affords a non-spouse the ability to collect dependency death benefits beyond the $45,000.00 cap, if the person remains "wholly dependent" upon the deceased covered employee.

The Commission determined that Weatherly remained wholly dependent upon Scheibel. It also determined that, although Weatherly was not a "surviving spouse" of Scheibel, appellees were required to continue to pay benefits to Weatherly beyond $45,000.00, under § 9-681.

Appellees sought judicial review in the Circuit Court for Howard County. The circuit court reversed.

Held: Affirmed. Principles of collateral estoppel and res judicata did not operate to bar appellees from asserting that appellant was not entitled to continue to receive dependency death benefits. Collateral estoppel, which bars a claim that has already been "actually determined" in a previous action, was inapplicable to this case because the issue of whether appellant was entitled to benefits in excess of the $45,000.00 statutory cap had never been "actually determined."

Assuming that res judicata applies generally to Commission decisions, §§ 9-736(b)(2) and 9-681(j) limit its effect. When the

Commission revisited its original award of dependency death benefits to appellant to decide whether § 9-681 authorized her to continue to receive benefits beyond the $45,000.00 statutory cap, res judicata did not bar appellees from arguing, for the first time at that juncture, that appellant is not legally entitled to seek benefits exceeding the statutory cap.

The language of § 9-681 is clear and unambiguous. It delineates instances when a *spouse* or *child* of the deceased covered employee may be eligible to receive continuing benefits above $45,000.00. By capping benefits for any claimant at $45,000.00, but expressly providing for circumstances under which a *spouse* or *child* of the deceased covered employee is eligible to receive benefits above the $45,000.00 cap, the General Assembly necessarily excluded claimants, who are neither surviving spouses nor children of the deceased employee, from seeking benefits beyond the statutory cap.

Weatherly v. Great Coastal Express Co., et al., No. 1176, September Term, 2004, filed September 19, 2005. Opinion by Barbera, J.

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ZONING – NONCONFORMING USE - LANDOWNER CANNOT OBTAIN VESTED RIGHTS IN NONCONFORMING USE UNTIL ALL PENDING LITIGATION RELATING TO THE USE IS COMPLETED.

Facts: Appellant, Jack Antwerpen and AntBren, LLC ("Antwerpen"), sought to move a used- automobile dealership into an area zoned B.M. ("Business Major") in Baltimore County. Antwerpen filed a petition for a special hearing with the Baltimore County Department of Permits and Development Management, asking whether a used-automobile dealership was permissible in a B.M. zone. After the petition was filed, but before the special hearing took place, the Baltimore County Council passed a bill that permitted sales of used automobiles in a B.M. zone by special exception and only as part of a commercial planned unit development ("PUD"). The effective date of the bill was October 19, 2001.

The special hearing took place one week after the bill was passed, on September 11, 2001. The Deputy Zoning Commissioner, who presided at the hearing, was unaware that the county council had passed the new bill and granted Antwerpen's request to open the used-car dealership on the subject property.

On September 28, 2001, the Office of the People's Counsel appealed the Commissioner's ruling to the Board of Appeals. That same day, the State of Maryland issued Antwerpen's used-car dealership a license to sell used automobiles on the property. On October 10, 2001, Antwerpen began operating the dealership.

The People's Counsel filed a motion to dismiss Antwerpen's petition for special hearing. The Board granted the motion to dismiss based on its understanding that Antwerpen had not begun using the property in the nonconforming manner before the effective date of the new bill, and that even if it had, Antwerpen did not have a vested right because the Deputy Zoning Commissioner's decision was, at all times pertinent, the subject of an appeal. The Circuit Court for Baltimore County affirmed the Board's decision.

Held: Affirmed. Although there was no support in the record for the Board's "understanding" that Antwerpen had not begun operating the used-car dealership on the property, Antwerpen did not obtain a vested right by operating the used automobile dealership from October 10 to October 19, 2001.

Relying on *Powell v. Calvert County*, 368 Md. 400 (2002), the Court noted that the zoning commissioner's approval was not free from all pending litigation. In *Powell*, the Court of Appeals had held that "a vested right does not come into being until the completion of any litigation involving the zoning ordinance from which the vested right is claimed to have originated. The Court of Special Appeals held that *Powell* was apposite because Antwerpen's request for a special hearing was, in legal effect, a request for a declaratory judgment to obtain both a license to sell used cars and an occupancy permit to operate the used-car lot. Antwerpen's right to operate the used-automobile dealership could not vest until the declaratory judgment became final.

Jack Antwerpen, et al. v. Baltimore County, Maryland, No. 696, September Term, 2004, filed July 7, 2005. Opinion by Salmon, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated October 6, 2005, the following attorney has been placed on inactive status by consent, from the further practice of law in this State:

MARLENE J. ROBERTSON
*

By an Order of the Court of Appeals of Maryland dated October 11, 2005, the following attorney has been disbarred by consent from the further practice of law in this State:

MATTHEW STROHM EVANS, JR.
*

By an Opinion and Order of the Court of Appeals of Maryland dated October 11, 2005, the following attorney has been indefinitely suspended from the further practice of law in this State:

KRISTIN E. KOVACIC
*

By an Order of the Court of Appeals of Maryland dated September 30, 2005, the following attorney has been suspended for ninety (90) days effective October 31, 2005, from the further practice of law in this State:

CHARLES E. MCCLAIN, SR.
*