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http://mdcourts.gov/opinions/coa/2013/50a12.pdf

CIVIL PROCEDURE – STANDING – COUNTY ACTIONS

Facts:

Petitioners, Paul F. Kendall and Frank Martin, both residents of Howard County, Maryland, filed an action for declaratory judgment and injunctive relief against Respondent, Howard County. In their amended complaint, Petitioners asked the Court to declare null and void *ab initio* a host of County resolutions, zoning regulations, code provisions, administrative decisions, and other actions related to planning, zoning, and land use. Petitioners claimed that these County actions were carried out in violation of the Howard County Charter, which, in § 202(g), defines certain planning and zoning activities as "legislative acts" and requires them to be accomplished by original bill, rather than by resolution or administrative decision. Respondent, Howard County, moved to dismiss the complaint. Petitioners argued that, because § 211 of the Howard County Charter reserves to the people the right to petition any County law to referendum, any person in the County has standing to challenge County decisions they believe were effectuated in violation of those Charter provisions. Petitioners further argued that their allegations that the County's actions infringed their First and Fourteenth Amendment rights also provided them standing to litigate their claim.

The Circuit Court for Howard County granted the County's motion to dismiss. The Court of Special Appeals affirmed, reasoning that Petitioners lacked standing because they had demonstrated no "concrete injury."

Held: Affirmed.

The Court of Appeals held that Petitioners' complaint failed to demonstrate standing. In reviewing its standing jurisprudence, the Court observed that a plaintiff challenging the validity of local government actions must allege some special harm flowing from the challenged actions different from the harm suffered by the general public. A plaintiff may allege that he or she has been specially aggrieved as a property owner, based on the plaintiff's property's proximity to an area affected by challenged action, or as a taxpayer, based on the reasonable probability that the challenged action will result in pecuniary harm. Yet, in the course of this litigation and appeal,

Petitioners purposefully did not attempt to invoke a theory of property owner or taxpayer standing.

In light of the Court's prior consistent application of the special harm aspect of standing, the Court rejected Petitioners' argument that the right of referendum in the County Charter, in and of itself, confers standing on all persons in the County to challenge the validity of the County's actions. The Court also determined that Petitioners' allegations that their free speech and voting rights had been violated did not establish standing because (1) the challenged County decisions were related to planning, zoning, and land use—not petition circulation, referenda, or voting—and (2) the Charter granted Petitioners a facultative, rather than an automatic right to approve or reject County laws at the polls. Moreover, the Court dismissed Petitioners' suggestion that limiting standing to enforce the right of referendum to a certain class of aggrieved persons would violate the Equal Protection Clause of the Fourteenth Amendment.

In sum, the Court concluded that Petitioners' complaint amounted to an abstract, generalized claim that the County's actions violated its own Charter. Petitioners' desire that the County comply with its own Charter is an interest shared by all people in the County, and without a showing of special harm as to these Petitioners, the Court held there was no standing.

State of Maryland v. Sean Fennell, No. 72, September Term 2012, filed May 17, 2013. Opinion by Harrell, J.

Battaglia, J., joins in the judgment only.

http://mdcourts.gov/opinions/coa/2013/72a12.pdf

CRIMINAL LAW AND PROCEDURE – DOUBLE JEOPARDY – MANIFEST NECESSITY FOR A MISTRIAL – IMPACT OF AMBIGUOUS JURY INDICATION OF UNANIMOUS PARTIAL VERDICT

Facts:

Respondent Sean Fennell was indicted in the Circuit Court for Montgomery County on four charges: (1) first degree assault; (2) conspiracy to commit first degree assault; (3) robbery; and (4) conspiracy to commit robbery. A one-day jury trial took place on 18 October 2010. Prior to the conclusion of jury deliberations, the jury sent to the trial judge an unsolicited, completed verdict sheet indicating apparently that the jury voted unanimously to acquit Fennell on charges of first degree assault, conspiracy to commit first degree assault, and conspiracy to commit robbery. The jury sheet indicated further, however, that the jury had not agreed unanimously as to the disposition of an additional charge of robbery and a lesser included charge to first degree assault of second degree assault. After examining the verdict sheet, the trial judge instructed the jury to continue to deliberate "regarding the counts as to which you are undecided." The jury continued to deliberate, but, upon being called back into open court, indicated that it was not making progress and was unable to reach a unanimous verdict. Fennell, through counsel, requested of the judge that he take a partial verdict on the counts as to which the judge indicated unanimity previously. The State objected. The judge declared a mistrial as to all counts. After a retrial date was scheduled, Fennell filed a motion to bar retrial on the charges for which he believed the first jury acquitted him. The motion was denied ultimately, and Fennell appealed immediately.

The Court of Special Appeals reversed, determining that, because the trial judge failed to engage in the process of exploring reasonable alternatives, there was no manifest necessity for a mistrial. Thus, the court concluded that retrial on the three counts for which the jury indicated a unanimous vote on the verdict sheet was barred by double jeopardy. The Court of Appeals granted a writ of *certiorari* to consider (1) whether the trial judge exercised properly his discretion in declaring a mistrial as to all charges where the jury indicated previously unanimity as to some, but not all, charges; and (2) whether a trial judge is required to accept a partial verdict at the request of one party and over the objection of the other.

Holding: Affirmed.

Because the trial judge declared a mistrial without consent as to the three counts on which the jury indicated unanimity and defense counsel requested a partial verdict, the Court of Appeals reasoned that retrial of Fennell on those three charges was permitted only if there was a manifest necessity for the declaration of the mistrial. Although generally the trial judge has broad discretion to declare a mistrial and need not jump over specified hurdles in mechanical fashion prior to doing so, the Court noted that, to find a manifest necessity for the act, the trial court still must determine that no reasonable alternative exists to a mistrial.

Noting that Maryland permits the entry of partial verdicts, the Court determined that, where the jury indicates that unanimity was reached, at some point, on one or more counts, Maryland Rule 4-327(d) points the way for a trial judge to reasonable alternative to the declaration of a mistrial. Thus, prior to declaring a mistrial without consent on those counts, generally the trial judge should take steps to determine that genuine deadlock exists as to those counts, if it can do so without coercing the jury. Although the Court noted that the partial verdict inquiry is largely an exercise of the trial judge's discretion, the Court determined in the present case that the trial judge abused his discretion in failing to make further inquiry of the jury where defense counsel requested the entry of a partial verdict and the jury's unanimity on three counts remained ambiguous. The Court stated that, where the trial judge is on notice that the jury may have reached a partial verdict, an ambiguity as to unanimity persists throughout the colloquy with the jury, defense counsel requests a partial verdict, and the specter of coercion is low because of the unusual posture of the jury's deliberations, Maryland Rule 4-327(d) provides the trial judge with a reasonable alternative to the declaration of a mistrial. Thus, before a proper finding of manifest necessity for a mistrial could have been made, the trial judge should have inquired into the jury's status of unanimity prior to its discharge. Failure to do so was an abuse of discretion, and retrial of Fennell on the charges of first degree assault, conspiracy to commit first degree assault, and conspiracy to commit robbery was therefore barred by double jeopardy.

State of Maryland v. Tyres Kennard Taylor, No. 60, September Term 2012, filed May 21, 2013. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2013/60a12.pdf

CRIMINAL LAW – MD. RULE 4-215(e) – RIGHT OF DEFENDANT TO COUNSEL OF HIS/HER CHOICE – CONTINUANCE TO REPLACE EXISTING COUNSEL – DISCRETION OF TRIAL COURT TO REGULATE

Trial court did not violate the procedural rights accorded defendant under MD. Rule 4-215(e) who requested a continuance to substitute counsel on the eve of a re-trial because the court provided defendant a forum in which he may assert his right to discharge counsel, considered his explanation for his request for postponement in order to substitute counsel, and employed its discretion appropriately in finding no meritorious reason to do so.

CRIMINAL LAW – RIGHT OF DEFENDANT TO COUNSEL OF HIS/HER CHOICE – CONSTITUTIONAL RIGHT – NOT WITHOUT LIMITS

Although the defendant's Constitutional right to counsel of choice enjoys ordinarily a strong presumption to be indulged, the trial court is not required to submit to this qualified Constitutional right when it finds that the defendant provides no meritorious reasons for his request to substitute counsel and the demands of the court calendar for re-trial of the case do not allow for further delay so that late-identified proposed substitute counsel may prepare for representation.

Facts:

Tyres Kennard Taylor was convicted in 2007 of the murder of Robert Perlie and the robbery of three other men, among other charges. Taylor was assigned Assistant Public Defender Gil Amaral, Esquire, as his attorney in the Perlie matters. At or about the same time, Taylor was charged with some unrelated crimes, for which Amaral was to represent him initially, but Leslie Stein, Esquire, replaced him as privately-retained counsel. The initial trial of Taylor in the Perlie matters was conducted in January 2010, resulting in a hung jury. A mistrial was declared. Stein obtained a similar result in the initial trial of the unrelated charges. In the re-trial on the unrelated charges in May 2010, Stein achieved an acquittal of Taylor. Against this backdrop, Taylor's re-trial on the Perlie matters, where Amaral continued to represent him, was scheduled for trial on 8 June 2010.

On the morning of June 8, prior to commencement of Taylor's re-trial on the Perlie matters, a postponement request hearing occurred before Judge Barry Williams of the Circuit Court for Baltimore City. Judge Williams, at the time, was a designee of the Administrative Judge for the purpose of entertaining requests for continuance. Amaral was present at the hearing, but Taylor

was not. Stein was present also at the hearing. Stein informed Judge Williams that a family member of Taylor's had contacted him the night before to retain him to represent Taylor in the Perlie case. Stein requested the court to postpone the trial for ten days in order that he might prepare for his representation of Taylor. Judge Williams denied the request, noting that the case had been assigned priority status, and sent the case to Judge David W. Young for trial.

On 9 June 2010, the State requested Judge Young to return the case to the Administrative Judge or designee in order to "resolve" Taylor's request for a postponement. Judge Young decided to return the case to the Administrative Judge (or designee) based on Md. Rule 4-271, which provides that the Administrative Judge (or designee) has sole authority to grant a postponement. Judge Sylvester Cox, another designee of the Administrative Judge, received the case on June 9. Amaral and the State indicated to Judge Cox that they were prepared to go to trial. Stein, who was present also, averred that he would only enter his appearance if the court would grant a one-week continuance. The court denied the requested continuance and returned the case to Judge Young for trial on June 10.

On June 10, the State asked Judge Young to resolve what it perceived to be Taylor's embedded request to discharge Amaral and retain Stein, asserting that, pursuant to Md. Rule 4-215(e), Taylor's request required the court to address that issue before proceeding to trial. After Amaral explained to the court the procedural history of Taylor's two previous re-trials and the roles Amaral and Stein had in the results of those re-trials, he asked Taylor whether there was any point in his representation of Taylor with which he was unsatisfied. Taylor replied, "I just felt as though as far as litigating on the certain of law, it seems to be the best of my knowledge as I can understand it, that's the only thing I just didn't see eye to eye with you on. But other than that, I had no problem, I was pleased with." After the State contended that the Md. Rule 4-215 issue still had not been resolved, Judge Young passed the case to Judge John N. Prevas for trial on June 10. Judge Prevas provided the State and Amaral an opportunity to explain the procedural background of the case and Stein's willingness to represent Taylor only if the court granted a continuance. Ultimately, however, the court found no meritorious reason for granting Taylor's request to replace Amaral, and denied his request.

The trial commenced. On 16 June 2010, a jury found Taylor guilty of first degree murder, second degree murder, attempted robbery, three counts of first degree assault, three counts of second degree assault, two counts of robbery with a dangerous weapon, two counts of robbery, two counts of stealing a cellular phone valued at less than $500, three counts of conspiracy to commit robbery with a dangerous weapon, and four counts of use of a handgun during the commission of a felony or crime of violence. Taylor was sentenced to life imprisonment, plus forty years.

Taylor appealed to the Court of Special Appeals, arguing that he expressed to Judges Williams, Young, Cox, and Prevas his desire to replace Amaral with Stein, and that each judge failed to comply with Rule 4-215(e) when they did not inquire as to whether he had a meritorious reason for his request. Taylor contended also that the failures to comply with the Rule violated his constitutional right to counsel of his choice. In an unreported opinion, the Court of Special

Appeals agreed with Taylor and reversed his convictions, concluding that Judges Young and Prevas did not consider the reasons for Taylor's request, as mandated by Md. Rule 4-215(e).

On 15 June 2012, the State filed a Petition for Writ of Certiorari to the Court of Appeals, arguing that the intermediate appellate court's application of Md. Rule 4-215(e) was erroneous because Taylor did not request explicitly the court for permission to discharge Amaral. The State contended further that, even if Rule 4-215(e) was triggered by Taylor's communications with the court, the court did not fail to comply with the Rule's requirements. Taylor filed a conditional Cross-Petition for a Writ of Certiorari, averring that each judge's failure to follow Rule 4-215(e) after Taylor requested to discharge his counsel violated Taylor's right to counsel of his choice. The Court of Appeals granted both petitions, *State v. Taylor*, 428 Md. 543, 52 A.3d 978 (2012).

Held: Reversed and remanded.

Judgment reversed and remanded for further proceedings. The Court determined first that, even assuming *arguendo* that the statements made to the trial court by Taylor, Amaral, and Stein were sufficient collectively to engage a Rule 4-215(e) inquiry into the putative merits of Taylor's purported request to discharge Amaral and replace him with Stein, the conduct of the trial judges who considered Taylor's request(s) as such complied with the requirements of Rule 4-215(e). Taylor was given an opportunity to explain the reasons underlying his requests and, after considering what Taylor had to say (which was incoherent and nonsensical), the trial court found that his "reasons" did not merit a discharge of counsel and/or a postponement and denied his requests. Rule 4-215(e) and Maryland case law construing that Rule require no more of a trial court.

Second, the Court held that, after balancing Taylor's constitutional right to counsel of choice against the trial court's discretion to fairly and orderly administer criminal trials, the trial court did not violate Taylor's constitutional right by denying his request for a continuance. Therefore, the Court reversed the judgment of the Court of Special Appeals and remanded the case to the intermediate appellate court with directions to affirm the judgment of the Circuit Court.

Jeffrey Robert Valonis v. State of Maryland, No. 46, and *Anthony Tyler v. State of Maryland*, No. 52, September Term 2012, filed May 20, 2013. Opinion by Greene, J.

Adkins and McDonald, JJ., dissent.

http://mdcourts.gov/opinions/coa/2013/52a12.pdf

CRIMINAL LAW – WAIVER OF RIGHT TO JURY TRIAL – MARYLAND RULE 4-246

CRIMINAL LAW – WAIVER OF RIGHT TO JURY TRIAL – REVERSIBLE ERROR

Facts:

Jeffrey Robert Valonis ("Valonis") was charged with robbery, second-degree assault, and theft of property. In a separate case, Anthony Tyler ("Tyler")(collectively, "Petitioners") was charged with burglary and malicious destruction of property. The trial judge in each case conducted a jury trial waiver proceeding, after which, Petitioners were tried and convicted in a bench trial, as opposed to a jury trial. In both cases, the trial judges did not make an explicit determination and announcement on the record that the defendant's waiver to trial by jury was knowing and voluntary.

Petitioners appealed to the Court of Special Appeals. They argued that under Maryland Rule 4-246, the rule governing jury trial waivers, the court may not accept a waiver until, after an examination of the defendant on the record, "the court determines and announces on the record that the waiver is made knowingly and voluntarily." Md. Rule 4-246(b). The intermediate appellate court affirmed both convictions.

Held: Reversed.

The Rule unambiguously directs circuit court judges to make an explicit determination of the defendant's knowing and voluntary waiver, or lack thereof, on the record. In other words, after the examination of the defendant, the judge is required to announce his or her factual determination as to the defendant's knowing and voluntary waiver on the record. Under the totality of the circumstances test, a trial court's failure to follow the dictates of the Rule should not be treated as no more than a technicality. Rather, the Rule must be complied with to validly waive the right to trial by jury.

Moreover, because the onus is on the trial court to announce its determination, in the two cases before the court the issue of waiver is preserved for appellate review notwithstanding the

defendant's failure to object. Additionally, the trial judge's failure to announce its determination on the record is not a mere technicality and is not subject to harmless error analysis. Instead, the courts' failure to comply strictly with the Rule constitutes reversible error because the Rule's provisions are in place to ensure that the defendant's waiver of the important constitutional right to trial by jury is made knowingly and voluntarily.

Pines Plaza Limited Partnership v. Berkley Trace, LLC, et al., No. 30, September Term 2012, filed May 21, 2013. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2013/30a12.pdf

REAL PROPERTY - CONTRACTS - ASSIGNMENTS

REAL PROPERTY - CONTRACTS - DEADLINE FOR CLOSING - FORFEITURE OF PURCHASER'S DEPOSIT

SET-OFF AND RECOUPMENT - ASSIGNMENTS

Facts:

Pines Plaza Limited Partnership ("Pines Plaza") sought to sell a shopping center it owned ("the property") in Worcester County and enlisted Crimmins Associates Real Estate ("Crimmins Associates"), a real estate broker.

After the passage of several years, an agreement to sell was ultimately reached between Pines Plaza and Q-C Pines Plaza, LLC ("Q-C"). The original agreement provided that Q-C would indemnify Pines Plaza for any broker's fee owed to Crimmins Associates. The original agreement was rescinded prior to payment of a deposit. The parties later revived the deal by agreeing to a First Amendment to Contract of Sale ("First Amendment"). They failed to close, however, by the specified date of June 30, 2003. A Second Amendment to Contract of Sale ("Second Amendment") was then agreed upon, and it provided for an additional $200,000 deposit that would be retained by Pines Plaza as liquidated damages in the event the sale did not close by January 12, 2004.

Prior to the closing date, Q-C recruited additional investors (the "Berkley Investors") – the respondents in this case. Q-C assigned the Berkley Investors tenant-in-common interests "in and to the contract". The assignments did not state that the Berkley Investors were undertaking Q-C's obligations under the contract. Closing documents were soon executed, the $200,000 deposit was paid, and half of the purchase price was transferred to Pines Plaza's agent. The remainder of the purchase price was not transferred, however, and closing did not occur at the appointed time.

Unbeknownst to the Berkley Investors, one of the principals of Q-C negotiated a Third Amendment of Contract of Sale ("Third Amendment") between Pines Plaza and Q-C. The Third Amendment declared the prior attempt at closing a nullity, stated that the $200,000 deposit was forfeited, and set a new closing date of March 1, 2004. The sale was completed on March 1. The $200,000 deposit was not credited against the purchase price. No payment was made to Crimmins Associates as a commission.

In 2005, Crimmins Associates filed a lawsuit against Pines Plaza seeking a commission on the sale. A judgment was entered against Pines Plaza for $200,000, later reduced by agreement to $196,666.66.

In 2008, Pines Plaza filed suit against Q-C and the Berkley Investors seeking indemnification for the commission it had paid to Crimmins Associates. A default judgment was entered against Q-C, but the Berkley Investors actively defended and counterclaimed, seeking recovery of the $200,000 deposit that had not been credited to the purchase price. The Circuit Court concluded that the Berkley Investors, as assignees, were not obligated under the indemnification provision. It also concluded that, by proceeding to settlement in March 2004, Pines Plaza had opted to disregard the earlier failure to complete the closing and was thus not entitled to forfeit the deposit. The Court of Special Appeals affirmed.

Held: Affirmed in part, Reversed in part.

The Court of Appeals reached three legal conclusions.

First, the Court ruled that an assignment of a buyer's interest in a contract for land does not include an assumption or delegation of the purchaser/assignor's obligations under the contract. Such an assumption/delegation will only occur by express provision in the assignment. There was no express delegation of the obligation to indemnify Pines Plaza for a realtor commission in Q-C's assignments to the Berkley Investors. Accordingly, Pines Plaza was not entitled to indemnification by the Berkley Investors.

Second, the Court observed that the forfeiture clause in the contract did not clearly provide that forfeiture would be automatic upon the occurrence of the forfeiture condition and without regard for whether the parties proceeded to closing in spite of the breach. Instead, the contract permitted the non-breaching party to ignore a breach and proceed to closing; Pines Plaza's choice to proceed to closing without declaring a default was an election to disregard the default. The Court also noted the general rule in such cases that a purchaser may make payment after the prescribed date and may compel performance by the vendor so long as the delay is neither willful nor harmful to the vendor. Pines Plaza was not entitled to forfeiture of the $200,000 deposit.

Third, the Court ruled that a party that asserts a claim as the assignee of a contract right against another party to the contract is generally subject to any defense, including recoupment, that the other party would have against the assignor, even if the other party to the contract could not affirmatively prosecute a claim against the assignee for the amount of recoupment because the assignee had not assumed the assignor's obligation under the contract. Therefore, Pines Plaza's indemnification claim, while without merit as an independent action against the Berkley Investors, could be used to offset the judgment for refund of the deposit.

Maryland Economic Development Corporation v. Montgomery County, Maryland, Case No. 44, September Term 2012, filed April 9, 2012. Opinion by Adkins, J.

Bell, C.J., dissents.

http://mdcourts.gov/opinions/coa/2013/44a12.pdf

STATUTORY CONSTRUCTION – MARYLAND ECONOMIC DEVELOPMENT CORPORATION – TAX LAW – RECORDATION TAX – EXEMPTIONS:

STATUTORY CONSTRUCTION – TAX LAW – TAX EXEMPTIONS:

STATUTORY CONSTRUCTION – TAX LAW – RECORDATION TAXES:

Facts:

In 1998 the Maryland Economic Development Corporation ("MEDCO") originally financed the Shady Grove Technology Development Center by issuing bonds. In 2009, MEDCO sought to retire the bonds but still finance the project and arranged to borrow $3,300,000 from PNC Bank ("PNC"). On March 26, 2009, MEDCO executed a Leasehold Deed of Trust, Assignment and Security Agreement with PNC, which required MEDCO to pay all recording costs and taxes. To close the loan transaction, MEDCO presented the deed of trust for recording in Montgomery County, claiming an exemption from the recordation tax based on § 10-129(a) of the Economic Development Article ("ED"). The County Transfer Office denied the exemption and required MEDCO to pay $31,450 in recordation tax, which MEDCO paid under protest.

The Montgomery County Department of Finance denied MEDCO's refund claim, and the Maryland Tax Court agreed—dismissing MEDCO's petition. The Circuit Court for Montgomery County reversed and "found that the Maryland Economic Development Corporation is exempt from paying the Recordation Tax on the Deed of Trust." But, the Court of Special Appeals reversed and vacated the Circuit Court's decision, affirming the judgment of the Maryland Tax Court.

Held: Reversed

Section 10-129(a) of the Economic Development Article provides that "Except as provided in subsection (b) of this section, the Corporation is exempt from any requirement to pay taxes or assessments on its properties or activities." It is our job to interpret the plain meaning of this language to carry out and effectuate its general purpose. The plain meaning of this language exempts MEDCO from both direct and excise taxes. The recording of the deed of trust was a MEDCO "activity" within the meaning of the statute. And, paying the recordation tax was a "requirement" of MEDCO's upon recording the deed of trust. Exempting MEDCO from paying

the recordation tax under this interpretation directly effectuates the purpose for creating MEDCO by allowing it to promote additional, less expensive, business development in the State.

Additionally, although tax exemptions are generally strictly construed, they may be liberally construed when the legislature specifically instructs them to be. Furthermore, MEDCO's tax exemption can easily be harmonized by reading ED § 10-129(a) as a limited exception to the general rules set out in the Tax-Property Article. Alternatively, even if this interpretation were read to bring the statutes into conflict, it is well established that the more specific statute will override the more general statute. And finally, MEDCO did not waive its right to claim a tax exempt status.

COURT OF SPECIAL APPEALS

Madison Park North Apts., L.P. v. The Commissioner of Housing & Community Development, No. 71, September Term 2012, filed May 3, 2013. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2013/0071s12.pdf

APPELLATE JURISDICTION – WRIT OF MANDAMUS
STATUTORY INTERPRETATION – VOID FOR VAGUENESS

Facts:

Madison Park North Apts., L.P. ("Madison Park") owned and operated Madison Park North Apartments ("MPNA"), comprising approximately two city blocks along North Avenue in Baltimore City. The North Avenue area where MPNA is located is notorious for crime, particularly rampant drug trafficking and associated violence. By letter dated August 16, 2010 ("Notice of Hearing"), the Commissioner notified Madison Park that the Department would hold a hearing on September 9, 2010, to "determine if the [License] for the property should be revoked." pursuant to Baltimore City Code ("BCC"), Art. 13, §§ 5-15 and 5-16. On September 22 and 23, 2010, the Commissioner conducted the revocation hearing, taking testimony from Madison Park management, Baltimore City police, MPNA residents, and MPNA security officers.

Finding that the testimony demonstrated a significant amount of criminal activity in MPNA and a failure of Madison Park to prevent such activity, on October 15, 2010, the Commissioner issued a decision and order revoking Madison Park's Multiple-Family Dwelling License. On October 28, 2010, Madison Park filed a Petition for a Writ of Administrative Mandamus & Petition for Judicial Review. After multiple postponements, a hearing on the Petition was held on February 6, 2012. On February 21, 2012, the circuit court denied the Petition, and its opinion and order were entered on March 5, 2012. On March 22, 2012, Madison Park noted a timely appeal.

Held: Affirmed.

The only avenue for Madison Park to seek appellate review was through either Md. Rule 7-401(a) or the common law writ of mandamus. A writ of mandamus will only be granted if no other avenue of appeal is available and the actions of the administrative agency were arbitrary and capricious or unsupported by the law. The Commissioner's revocation of Madison Park's

license was supported by substantial evidence and therefore not arbitrary, therefore the circuit court's denial of the writ was not in error.

Compliance with Baltimore City Code, Art. 13, § 5-15 is not impossible because the language in the statute requiring a property owner to "prevent" crime on the property is clear, has a plain meaning, and can be understood by a reasonable person. The statute is not unconstitutionally vague because it allows the Commissioner to exercise discretion in determining whether a property owner has complied with the statute. The statute requires notice and opportunity for a hearing before a license can be revoked, weighing against arbitrary enforcement.

Chris Bush v. Public Service Commission of Maryland, No. 32, September Term 2012, filed May 29, 2013. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2013/0032s12.pdf

RULE INTERPRETATION – PLAIN MEANING – MAILBOX RULE

Facts:

On February 1, 2012, the Circuit Court for Baltimore City dismissed as untimely a petition for judicial review ("Petition") filed by Chris Bush, appellant, contesting an October 31, 2011 order issued by the Public Service Commission of Maryland ("Commission"), appellee. Maryland Rule 7-203 permits a party seeking judicial review of a Commission order to file a petition no later than thirty days after issuance of the order. Bush mailed his Petition to the circuit court by certified U.S. mail on November 30, 2011, thirty days after the Commission issued its order. On December 2, 2011, the clerk's office docketed receipt of Bush's Petition. The Commission responded by filing a motion to dismiss the Petition as untimely.

At the motions hearing, Bush argued that his Petition was timely because the Commission's posting of the order on its website constituted "service," triggering the mailbox rule pursuant to Maryland Rule 1-203(c) and extending his time to file the Petition by three days. The Commission countered that the mailbox rule was inapplicable given that Bush never received service of process by mail, a condition necessary to invoke the three-day extension provided by Md. Rule 1-203(c). Bush also claimed that his due process rights were violated by Md. Rule 7-203, as applied, because the Commission was not required to send him notice of the order.

Reasoning that a petition is "filed" upon receipt by the clerk and not by date of mailing, the circuit court found Bush's Petition to be untimely. The circuit court found Bush's due process claim lacked merit because Bush received actual notice of the Commission's order. A timely appeal followed.

Held: Affirmed.

The circuit court did not err in dismissing Bush's Petition as untimely. Online posting of a Commission's order does not trigger Md. Rule 1-203(c) because such posting is not "service by mail," a prerequisite under the Rule. The Commission was not required to send notice of the order to Bush; therefore, under Md. Rule 7-203(a)(1), a petition for judicial review is timely if received by the clerk prior to the expiration of the 30-day filing period – "mailing" does not constitute "filing."

Brault Graham, LLC, et al. v. The Law Offices of Peter G. Angelos, P.C., No. 2887, September Term, 2011, filed May 5, 2013. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2013/2887s11.pdf

QUANTUM MERUIT – CONTINGENT FEE RETAINER AGREEMENTS – ATTORNEY FEE-SHARING AGREEMENTS.

Facts:

Harry Bargar, now deceased, and his wife, Carole, entered into a contingent fee retainer agreement with The Law Offices of Peter G. Angelos, P.C. ("PGA"), in which they agreed to pay PGA 40% of any settlement, verdict, or recovery derived out of a medical malpractice lawsuit filed. William Gately, Esq., a direct employee of PGA at the time the retainer agreement was executed, testified that he was advised that he would receive 25% of the fee of any case he brought into the firm.

From February 2004 through April 2005, Mr. Gately was the only attorney handling the Bargars' case. In April 2005, he was authorized to engage the services of Albert Brault, Esq., of Brault Graham, to handle the medical malpractice aspects of the litigation. At that time, there was no discussion about Mr. Brault's fee, but there was a subsequent discussion about a 25% fee split.

On December 16, 2005, after more than three weeks of trial, the jury returned a verdict in favor of the Bargars, awarding $2,253,250 in compensatory damages and $2,750,000 in punitive damages. On appeal to this Court, we vacated the judgment and remanded the case for a new trial based on evidentiary grounds.

At some point prior to this Court's decision, the relationship between Mr. Gately and PGA had "significantly deteriorated," and Mr. Gately was informed that PGA would terminate its association with him, effective April 30, 2008. After being advised of their options, the Bargars discharged PGA and retained Mr. Gately and Mr. Brault pursuant to a contingent fee agreement providing that, in the event of settlement or favorable judgment, the Bargars would pay them a 40% contingency fee out of "the gross amount recovered," minus costs and expenses. That representation included a July 10, 2008, petition for certiorari in the Court of Appeals, which was denied on August 26, 2008.

On September 25, 2009, Mr. Gately and Mr. Brault settled the Bargars' claims for a confidential amount. Mr. Gately and Mr. Brault retained 40% of the settlement proceeds, plus reimbursable expenses, in Brault Graham's escrow account. PGA then filed a complaint seeking quantum meruit measured by the reasonable value of the services PGA provided and the expenses it disbursed on behalf of the Bargars.

The circuit court found that PGA was entitled to a fee based on quantum meruit in the amount of 65% of the contingency fee paid to Mr. Gately and Mr. Brault. With respect to the fee-splitting agreements, the court determined that Mr. Gately was not entitled to a 25% fee. With respect to Mr. Brault, it stated that it had considered the agreement in making its calculations. Accordingly, the court entered judgment in favor of PGA, requiring appellants to pay PGA 65% of the 40% contingent fee earned in the Bargar case, as well as an additional $21,165.26 as reimbursement for expenses incurred by PGA in the Bargar case.

Held:

Judgment vacated. In a contingency fee case, an attorney who is discharged prior to the occurrence of the contingency, i.e., when the client recovers damages, is not entitled to recover on the contract. The attorney, however, may be entitled to recover fees on a quantum meruit basis, and the court did not err in awarding quantum meruit fees to PGA.

The circuit court properly held that when a discharged attorney sues to recover a percentage of a contingency fee, the new attorney must be joined as a party to the action. The discharged attorney's recovery will be derived from the new attorney's share of the recovery based on the discharged attorney's contribution to the successful legal efforts prior to the discharge. Quantum meruit is a quasi-contractual claim, and recovery can be based on an implied-in-fact contract or an implied-in-law contract. The reasonable market value of plaintiff's services can be viewed as the correct remedy in most quantum meruit cases.

The court erred in giving weight to the fee-splitting agreements. When a client discharges his or her lawyer, any contingency fee contract ceases to exist, and generally, absent contractual language to the contrary, any fee-splitting agreement predicated on the initial contingency fee contract also ceases to exist. The termination of a contingency fee agreement terminates a fee-sharing agreement predicated on that contingency agreement. Any claim for fees must be based on the reasonable value of the attorney's services.

Return to ToC

Edward Charles Schmitt v. State of Maryland, No. 1439, September Term 2011, filed March 21, 2013. Opinion by Raker, J.

http://mdcourts.gov/opinions/cosa/2013/1439s11.pdf

CRIMINAL LAW – SEXUAL ABUSE OF A MINOR – SEXUAL EXPLOITATION

Facts:

Edward Charles Schmitt was convicted in the Circuit Court for Howard County of sexual abuse of a minor and visual surveillance with prurient interest of an individual in a private place. In early 2010, Bethany G. found a small camera belonging to her boyfriend, Schmitt, who lived with her and her daughter Brooke. On the camera, Bethany found a video of Schmitt masturbating in Brooke's closet. After a few minutes, Schmitt left the camera's view and Brooke entered the closet to change clothes. At one point, the camera depicts Brooke in her underwear. Bethany contacted police and handed over the camera. Brooke did not know that Schmitt had recorded her until after Bethany contacted police.

Following a bench trial, Schmitt was convicted of sexual abuse of a minor and visual surveillance with prurient interest of an individual in a private place. Before the Court of Special Appeals, Schmitt appealed his conviction for sexual abuse of a minor.

Held: Affirmed.

Maryland Code (2002, 2012 Repl. Vol.) § 3-602 prohibits sexual abuse of a minor by a household member. To convict a defendant of sexual abuse of a minor, the State must prove that the defendant sexually molested or exploited the victim. Though section §3-602 does not define "exploitation," Maryland courts have held that exploitation encompasses a wide range of conduct in which a household member unjustly or improperly uses the child for his or her own benefit. To prove that the defendant sexually exploited the victim, the State need only show the defendant engaged in behavior that has an adverse sexual impact on the victim and does not need to offer specific evidence that the defendant's conduct actually harmed the minor victim because the harm to the victim is often patent from the defendant's conduct.

The evidence was sufficient to support a conviction for sexual abuse of a minor where the defendant recorded images of the fifteen-year-old daughter of his girlfriend, with whom he resided, even though the minor was unaware that he recorded her because the evidence supported a finding that Schmitt acted to satisfy his own selfish, sexual purpose by videotaping Brooke.

Drew Para, et al. v. 1691 Limited Partnership, et al., No. 657, September Term 2011, filed May 1, 2013. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2013/0657s11.pdf

ENVIRONMENTAL LAW – NATURAL RESOURCES & PUBLIC LANDS – WATER QUALITY – NONTIDAL WETLANDS PROTECTION ACT – PERMITTED REGULATED ACTIVITIES – DREDGED OR FILL MATERIAL (Environmental Law Art., sec. 5-907) – ALTERNATIVES ANALYSIS (Environmental Law Art., sec. 5-907(b)) – PRACTICABLE ALTERNATIVE

ADMINISTRATIVE LAW & PROCEDURE – AGENCY ADJUDICATION – HEARINGS – EVIDENCE – ADMISSIBILITY – HEARSAY & RELEVANCE

ADMINISTRATIVE LAW & PROCEDURE – AGENCY ADJUDICATION – JUDICIAL REVIEW – STANDARDS OF REVIEW – STATUTORY & REGULATORY INTERPRETATION

Facts:

In January of 2002, 1691 Limited Partnership ("1691") with the Maryland Department of the Environment ("MDE") a permit application for construction in freshwater nontidal wetlands on a piece of property it owns in the unincorporated area of Crofton, Anne Arundel County, Maryland. The property for which 1691 sought a permit is approximately seventeen to twenty acres and fronts along the west side of Maryland Route 3. Previously, sand and gravel mining was conducted on the property. 1691's application identified the proposed regulated activity as the development of a "big box" retail store greater than 130,000 square feet with an associated parking lot and drives on the site of a former sand and gravel pit.

Upon receipt of 1691's application, MDE notified 1691 that the Department required additional information. After a series of exchanges between the Department and applicant, MDE notified 1691 that its application was complete and additionally gave notice of the application and the opportunity to submit written comments or request a public informational hearing. No comments were filed and no request for hearing was submitted to MDE based upon the public notice.

Because 1691 had continued to provide comprehensive answers to MDE's questions and because neither comments nor requests for a public hearing had been received during the public notice period, MDE informed 1691 on April 15, 2003, of its favorable decision to grant a Nontidal Wetlands and Waterways Permit for the project proposed.

Sometime following the release of MDE's favorable decision, 1691 announced that Wal-Mart was the prospective end-user for the development. After it became known that Wal-Mart was

under contract to purchase the property, the degree of public interest significantly increased, prompting MDE to open an additional comment period in the fall of 2006 prior to its issuance of the Nontidal Wetlands and Waterways Permit. MDE additionally held a public hearing on November 13, 2006.

Ultimately, MDE issued 1691 a Nontidal Wetlands and Waterways Permit on January 28, 2009. The Department additionally issued notice of its permit decision and attached a summary explaining the basis of its decision. Within the summary, MDE noted that the proposed "big box" retail operation satisfied the intent of the CSAP that was filed with 1691's initial application of January 28, 2002, by "allowing Crofton residents to save time, fuel and money, without duplicating existing services of displacing local businesses."

On February 13, 2009, Drew Para and other members of the community (collectively "appellants") filed a petition for a formal contested hearing regarding MDE's decision to issue the Nontidal Wetlands and Waterways Permit to 1691. Over a period of six days, a contested case hearing was held before an administrative law judge ("ALJ") in September and October of 2009. On December 30, 2009, the ALJ issued a sixty page proposed decision and order. The Proposed Decision and Order upheld MDE's issuance of the construction permit, with certain modifications.

Appellants subsequently filed exceptions, which were ultimately denied by the Department's Final Decision Maker ("FDM"), who additionally adopted the ALJ's proposed decision and order. Thereafter, appellants filed a petition for judicial review of the FDM's Final Decision with the Circuit Court for Anne Arundel County. Following argument, the circuit court further denied appellants' exceptions and affirmed the FDM's decision to issue a construction permit to 1691.

Held: Affirmed.

Preliminarily, the Court of Special Appeals observed that the appellate court reviews the agency's decision and not the circuit court's and further noted that when the agency decision being reviewed is a mixed question of law and fact, the appellate court applies the substantial evidence test. Thereafter, the Court engaged in a discussion of Section 5-907 of the Environmental Article, which enumerates a set of preconditions which must be satisfied in order for the appropriate issuance of a nontidal wetlands permit. After comprehensively reviewing the provisions of the statute, the Court acknowledged that a nontidal wetlands permit for a proposed project independent of water requires that the proposed project maintains no practicable alternatives.

The Court of Special Appeals observed that the practicable alternative analysis is comprised of two steps. First, the Department must define the applicant's principal reason for conducting all regulated activities and other activities on the project site. Second, the Department must then consider four sub-factors: (1) whether the basic project purpose cannot be reasonably

accomplished utilizing one or more other sites in the same general area that would avoid or result in less adverse impact on nontidal wetlands; (2) whether a reduction in the size, scope, configuration, or density of the project as proposed and all alternative designs that would result in less adverse impact on the nontidal wetland would not accomplish the basic purpose of the project; (3) in cases where the applicant has rejected alternatives to the project as proposed due to the constraints such as inadequate zoning, infrastructure, or parcel size, whether the applicant has made reasonable attempts to remove or accommodate these constraints; and (4) the economic value of the proposed regulated activity in meeting a demonstrated public need in the area and the ecological and economic value associated with the nontidal wetland.

Because appellants only contested the design of 1691's proposed project and whether there was a demonstrated public need, the Court of Special Appeals declined to consider the other enumerated sub-factors found in Md. Code (1996, 2007 Repl. Vol.), § 5-907(b)(2) of the Environmental Article. Thereafter, the Court discussed the meaning of the practicable alternative's first step: "project purpose." Observing that the issue is one of first impression in Maryland, the Court subsequently evaluated the decisions of the United States Courts of Appeals and ultimately concluded that it is not only permissible for MDE to consider 1691's stated objective, but, rather, the Department has a duty to take into account the objectives of an applicant.

The Court noted, however, that an applicant may not so narrowly define a project in order to preclude the existence of any alternative sites and, therefore, make what is practicable appear impracticable. Rather, the Court concluded, the applicant's purpose must be legitimate. Yet, in determining whether an alternative site or design is practicable, the Court concluded that MDE was not entitled to reject 1691's genuine and legitimate conclusion that the type of design it wished to construct is economically advantageous, in compliance with current county planning and zoning, and allows Croften residents to save time, fuel and money, without duplicating existing services or displacing local businesses. As a consequence, the Court could hardly reject MDE's determination of the project's basic purpose and deem it unsupported by substantial evidence. Based on the exchange between MDE and 1691, the Court found that the FDM committed no error in concluding that no practicable alternative designs existed. The Court subsequently determined that the FDM's finding of a demonstrated public need was supported by substantial evidence, notwithstanding appellants' failure to preserve the issue for the Court's review.

Lastly, the Court of Special Appeals addressed appellants' final contention, in which they asserted that the FDM "erred legally" in approving 1691's mitigation plan. The Court rejected appellants' argument, noting the well-settled principle that an administrative agency is entitled to deference in its interpretation of its own propounded regulations unless the agency's interpretation is clearly erroneous or inconsistent with the regulation. Observing that the Maryland Nontidal Wetland Protection Act, its supporting statutory provisions, and its accompanying regulations do not prohibit MDE to allow the approved mitigation plan, the Court concluded that the FDM committed no error in upholding the approved plan.

Waterkeeper Alliance, Inc., et al. v. Maryland Department of Agriculture, et al., No. 1289, September Term 2011, filed May 2, 2013. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2013/1289s11.pdf

ENVIRONMENTAL LAW – WATER QUALITY – WATER QUALITY IMPROVEMENT ACT – FEEDING OPERATIONS – POLLUTANTS – DISCHARGE PERMITS – NUTRIENT MANAGEMENT PLANS

Facts:

In June 2007, Waterkeeper Alliance submitted a Public Information Act request to the Maryland Department of Agriculture ("MDA") regarding several agricultural records, including inspections relating to (1) nutrient management plans ("NMPs") for the Nest Egg Farm in Princess Anne, Maryland, and (2) NMPs for Animal Feeding Operations with approximately 125,000 broiler chickens that conducted waste management practices and were located in the Chesapeake Bay watershed. In July 2007, the MDA denied access to the Waterkeeper Alliance, alleging that disclosure would be contrary to the Water Quality Improvement Act. Waterkeeper Alliance presented additional requests, which the MDA again denied.

Subsequently, in February 2008, appellants–environmental organizations filed a complaint in the Circuit Court for Anne Arundel County against appellees, the MDA and its administrators, alleging that "Maryland law keeps confidential a summary of an NMP only to the extent that the *identity* [sic] of the individual for whom the NMP was prepared would be revealed," but the MDA "broadly and inappropriately refused to disclose any and all portions of NMPs." After being notified of possible disclosure, the Farm Bureau brought an action in the Circuit Court for Dorchester County against the MDA to prevent the disclosure of confidential information, averring that Md. Code (1974, 2007 Repl. Vol.), § 8-801.1(b)(2) of the Agriculture Article [hereinafter "Agric."] required that the MDA protect its members' identifies beyond three years. In September 2008, the Circuit Court for Dorchester County granted the MDA's motion to transfer the Farm Bureau's action to the Circuit Court for Anne Arundel County.

In September 2008, the MDA filed a motion to consolidate the Farm Bureau's case with appellants' action. The Farm Bureau filed a motion for summary judgment. Thereafter, the MDA filed a cross-motion for summary judgment and an opposition to the Farm Bureau's motion for summary judgment. A motions hearing was held in December 2008, and in February 2009, the court filed an order [hereinafter "2009 order"], which granted the MDA's cross motion for summary judgment, and denied the Farm Bureau's motion for summary judgment. The court declared that the MDA must disclose NMP summaries that were maintained by the MDA for less than three years, as well as more than three years, but to redact any information from any documents subject to disclosure under the Public Information Act that were related to NMPs if such information would allow for the identification of the individual for whom the NMP was prepared.

In April 2010, one of the appellants filed a Public Information Act request concerning a Worcester County farm that allegedly violated provisions of the Water Quality Improvement Act. In response, the MDA proposed to provide an electronic spreadsheet, which the Farm Bureau contested. In May 2011, the Farm Bureau filed a motion for clarification of the court's 2009 order. The court granted the motion, and issued its second order [hereinafter "2011 order"], granting the Farm Bureau's motion for clarification, and ordered that the MDA redact information, concerning the electronic spreadsheet, that could be used to create a linkage between a specific individual and a specific NMP, including visit types, operation types, total farmed acres, and compliance comments.

Held: Affirmed.

The Court of Special Appeals offered a comprehensive analysis of the pertinent reasons regarding its determination. First, the NMPs at issue constituted public records pursuant to the Public Information Act, and it permitted the public to inspect any public record at any reasonable time. Moreover, if the Court determined that the General Assembly intended to offer an exemption concerning NMP documents for three years, but after, the NMP records could be disclosed, this interpretation would frustrate the purpose of Agric. § 8-306(b)'s language. Thus, Agric. § 8-306's required soil conservation and water quality plans would be forever exempt from disclosure. Lastly, the MDA articulated the reasons why it possessed the NMP documents beyond three years, and neither reason concerned confidentiality of the permit applicant's identity. Instead, the reasons were comparisons of the original and new filings, determining whether there was a willful violation by examining past compliance, and ascertaining the impact and success of the program.

Pursuant to the above reasoning, the Court determined that the General Assembly intended that NMP documents could be disclosed regardless of the year, but that the MDA must protect identifying information that would reveal specific applicant's identity during disclosure of such documents. The Court affirmed the circuit court's judgment because appellants had access to the NMP documents, and the Farm Bureau's members had protection regarding their identities and personal information.

In the Matter of Merilee Rosenberg for the Appointment of a Guardian of the Property, No. 2744, September Term 2010, filed May 1, 2013. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2013/2744s10.pdf

ESTATES AND TRUSTS – TERMINATION OF GUARDIANSHIP OF THE PROPERTY

Facts:

Merilee Rosenberg suffers from Parkinson's disease. When her symptoms grew worse, she followed her doctor's advice and underwent "deep brain stimulation," in an effort to treat her disease. As a consequence of that surgery, Ms. Rosenberg was unable to manage her financial affairs and ultimately consented to the appointment, in the Circuit Court for Montgomery County, of a guardian of her property, Robert McCarthy, Esquire.

Two years later, believing that she had sufficiently recovered to resume control over her affairs, Ms. Rosenberg requested that Mr. McCarthy seek a hearing before the circuit court to determine whether the property guardianship should be terminated. After a hearing, the Montgomery County circuit court denied her request to terminate the guardianship, stating that it did not "have some comfort and reliance that [Ms. Rosenberg] is indeed in a position to manage her affairs and to manage her property."

Ms. Rosenberg noted this appeal, contending that the circuit court applied the wrong legal standard in reaching its decision. She contends that the statute applicable to termination proceedings, Estates & Trusts Article § 13-221, is "silent as to the standard of proof and as to who bears the burden of persuasion" but that we should adopt a clear and convincing standard, with the burden on the guardian to show that the guardianship should be continued. She further contends that the circuit court erred in failing to consider a less restrictive alternative to guardianship and that, in any event, there was insufficient evidence to support the circuit court's decision to continue the guardianship.

Held: Vacated and remanded.

The Court of Special Appeals interpreted Estates & Trusts Article § 13-221 as providing for a preponderance of the evidence standard. That conclusion follows from subsection (b)(4) of the statute, a catch-all provision which requires that a guardianship terminate upon "[o]ther good cause for termination as may be shown to the satisfaction of the court." Maryland caselaw has equated the "satisfaction of the court" standard with preponderance of the evidence. The appellate court's conclusion is further bolstered by a comparison of the statutes governing guardianships of property, contained in Estates & Trusts Article, Title 13, Subtitle 2, with those

governing guardianships of the person, contained in Estates & Trusts Article, Title 13, Subtitle 7. The latter statutes expressly provide that, in imposing or terminating a guardianship of the person, the clear and convincing standard applies. The Court of Special Appeals reasoned that, if the General Assembly had intended that the same standard should apply to termination of guardianships of property, then it would have expressly done so but that it did not.

As to which party bears the burden of proof in a proceeding to terminate a guardianship of property, on the grounds that the disability, which justified the imposition of that guardianship, has ceased, the Court of Special Appeals looked to Maryland Rule 10-710, which applies to termination proceedings. The court held that, once the ward satisfies the requirement in Rule 10-710(e)(3) to file "a certificate, signed by a physician who has examined the person within 21 days of the filing of the petition, attesting to the cessation of the disability," the burden of proof shifts to the guardian to establish, by a preponderance of the evidence, that the disability has not ceased. If the guardian does not meet that burden, the circuit court should order that the guardianship of property be terminated.

As to whether a circuit court must consider a less restrictive alternative to a guardianship of property, the Court of Special Appeals held that, although a court has the discretion to do so, there is no such statutory requirement. This conclusion follows from the plain language of Estates & Trusts Article §§ 13-201 and 13-221, neither of which contains such a mandate (unlike Estates & Trusts Article § 13-705(b), applicable to guardianships of the person, which does so require).

Because the Court of Special Appeals was unable to conclude, from the record, that the circuit court had required the guardian, Mr. McCarthy, to shoulder the burden of proof, it vacated the circuit court's order and remanded for a new hearing, in accord with its opinion and with Rule 10-710.

James Patrick Guidash, II v. Lisa Tome f/k/a Lisa Guidash, et al., No. 502, September Term 2012, filed May 6, 2013. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2013/0502s12.pdf

DIVORCE – CHILD SUPPORT – APPROVAL AND INCORPORATION OF PARTY AGREEMENTS

CHILD SUPPORT – ALTERNATIVE ARRANGEMENTS

CHILD SUPPORT – MODIFIABILITY

CHILD SUPPORT – MATERIAL CHANGE IN CIRCUMSTANCES

CHILD SUPPORT – CALCULATION OF CHILD SUPPORT UNDER THE GUIDELINES

Facts:

The court granted former spouses, Guidash and Tome, an absolute divorce in 2002, incorporating, but not merging, the parties' separation agreement. This agreement, in relevant part, included a provision waiving Guidash's obligation to pay child support for the parties' two minor children in lieu of an alternative child support arrangement where the parties agreed that Tome and the minor children would live in the marital home at no cost for ten years, with Guidash assuming all expenses related to the marital home during that ten year period.

After ten years passed, Tome and the remaining minor child moved out of the marital home to an apartment pursuant to the parties' agreement. Subsequently, Guidash, the sole owner of the marital home, began renting out the marital home for $1,500 per month. Tome filed a motion for modification of child support with the Circuit Court for Cecil County, which first went before a master. At the conclusion of the master's hearing, the master found as fact that the termination of the rent-free arrangement under the separation agreement was a material change in circumstances warranting modification and that a modification of child support was in the minor child's best interests. The master also found that the parties' combined actual monthly income before taxes was $11,865 (including Guidash's rental income) and that Tome incurred $433 per month to transport the minor child to a school which met his academic needs. As such, and using the child support guidelines, the master recommended that Guidash pay $1,140 per month for the support of the minor child.

Guidash filed exceptions to the master's findings and recommendations. At the conclusion of the exceptions hearing before the circuit court, the court denied Guidash's exceptions and entered an order adopting the master's recommendations which required Guidash to pay the $1,140 per month in child support. Guidash appealed.

Held: Affirmed.

Before addressing the parties' contentions, the Court briefly commented upon the 2002 judgment of divorce. Parents may agree that child support is to be provided in non-monetary forms. However, before a court approves such an arrangement, the record must reflect that the court has engaged in the analysis required by § 12-202(a)(2)(v) of the Family Law Article ("F.L."). The record in the present case did not indicate that the circuit court undertook the statutorily-required analysis before it entered the judgment of absolute divorce. Its failure to do so would have been reversible error had an appeal been filed. *See Walsh v. Walsh*, 333 Md. 492, 503-04 (1994)*; see also Knott v. Knott*, 146 Md. App. 232, 253 (2002); *Shrivastava v. Mates*, 93 Md. App. 320, 330 (1992).

Turning to the issues presented by Guidash on appeal, the Court affirmed the circuit court's modification of child support. Child support, regardless of any parental agreement, is always subject to court modification because the best interest of the minor child is paramount. *See Shrivastava*, 93 Md. App. at 333; *Ruppert v. Fish*, 84 Md. App. 665, 674 (1990). A parent's obligation to pay child support is to the minor child, not his former spouse, and no agreement, regardless of its terms, can relieve him of that obligation. *See* F.L. § 8-103(a); *Stambaugh, Stambaugh v. Child Support Enforcement Administration*, 323 Md. 106, 111 (1991); *Corapcioglu v. Roosevelt*, 170 Md. App. 572, 605–06 (2006). A court may modify an award of child support at any time upon a material change in circumstances that justifies the action. An agreement between parties that the agreement's child support provision was non-modifiable violates public policy and does not limit the circuit court's authority to revisit this issue in light of changed circumstances. From the record, the Court concluded that the court did not err by finding that there was a material change of circumstances where, at the expiration of the ten year period, Tome and the remaining minor child moved out of the rent-free premises and, as such, began having to pay rent for housing.

While it ultimately deferred to the master's findings, the trial court conducted the sort of thorough, independent review of the evidence required by *Domingues v. Johnson*, 323 Md. 486, 492 (1991). The appellate court has no basis to disturb the trial court's resolution of the factual disputes in this case.

Robert B. Dapp v. Linda C. Dapp, No. 500, September Term 2011, filed May 1, 2013. Opinion by Pierson, W. Michel, J. (Specially Assigned)

http://mdcourts.gov/opinions/cosa/2013/0500s11.pdf

FAMILY LAW – MARITAL PROPERTY SETTLEMENT AGREEMENTS – ASSIGNMENT OF RAILROAD RETIREMENT ACT BENEFITS

Facts:

Appellant, Robert Dapp, and Appellee, Linda Dapp, were divorced in 1988. The parties' Marital Separation and Property Settlement Agreement ("the Agreement") provided that Mrs. Dapp would be entitled to one-half of all pension accrued by Mr. Dapp as an employee of Amtrak. As a railroad industry employee Mr. Dapp was entitled to retirement benefits under the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq* ("the Act"). When Mr. Dapp retired in 2009, he received retirement benefits under the Act comprising two components: Tier I benefits, which are commensurate with and a substitute for Social Security retirement benefits; and Tier II benefits, which are similar to a private pension. Mrs. Dapp filed suit in the Circuit Court for Baltimore County to enforce the Agreement and to require Mr. Dapp to pay her half of all of his benefits. Mr. Dapp argued that enforcement of the Agreement as it applied to Tier I benefits was precluded by section 14(a) of the Act (45 U.S.C. § 231m(a)), which prohibits assignment or anticipation of those benefits. The circuit court ordered Mr. Dapp to pay Mrs. Dapp half of all benefits he had already received, and half of all monthly benefits he would receive in the future. The court held that although section 14(a) of the Act prohibited it from directly dividing the Tier I benefits, it did not preclude an order requiring Mr. Dapp to pay Mrs. Dapp an equivalent amount each month from his general assets.

Held:

Judgment of the circuit court reversed in part and remanded to that court with directions to vacate those portions of its order awarding Tier I benefits. Section 14(a) of the Railroad Retirement Act prohibits any assignment of Tier I benefits. Mr. Dapp's promise to split his future Tier I benefits with Mrs. Dapp was an assignment within the Act, which was void and unenforceable by state court action, whether by direct division of the benefits or by an order to pay from general assets. In reaching its conclusion, the Court of Special Appeals examined cases holding that the similar anti-assignment provision of the Social Security Act prevents recipients of Social Security retirement benefits from making agreements to divide their benefits, and concluded that this authority supported its interpretation of the provision of the Railroad Retirement Act.

Phyllis K. Barson, M.D. v. Maryland Board of Physicians, No. 2673, September Term 2011, filed May 3, 2013. Opinion by Nazarian, J.

http://mdcourts.gov/opinions/cosa/2013/2673s11.pdf

CONSENT ORDERS - ADMINISTRATIVE AGENCY

Facts:

Phyllis K. Barson, M.D. was a licensed physician who practiced in the fields of pain management and anesthesiology. The Maryland Board of Physicians charged her with improperly prescribing controlled substances to her patients, and she settled the charges by entering into a Consent Order with the Board. By the Order's terms, she waived her right to contest or appeal the Order, and she expressed that she understood it. (The Order was also signed by her counsel.)

After the Order had been in effect for some months, Dr. Barson determined that she could not practice anesthesiology at the hospital where she wished because, under the terms of the Order, she had forfeited the requisite Federal DEA and Maryland CDS registration numbers. She claimed that she did not realize at the time she entered into the Order that forfeiting these registration numbers would prevent her from practicing anesthesiology, so she returned to the Board and asked it to revise the Consent Order in light of this ostensibly unintended consequence.

The Board, with the recommendation of an Administrative Prosecutor, declined to revisit the Order. Dr. Barson then petitioned the circuit court for judicial review, administrative mandamus, or a declaratory judgment; the court denied relief. Dr. Barson appealed, arguing that the Board's refusal to revisit the Order was arbitrary and capricious, and that the circuit court erred as a matter of law in refusing to compel the Board to revise it.

Held: Affirmed.

The narrow issue on appeal concerned not the validity of the Consent Order, but Dr. Barson's post-agreement rights under the Order. In the Order she specifically agreed to be bound by its "conditions and restrictions," acknowledging the validity of the Order and the "legal authority and jurisdiction of the Board" to enforce it. She specifically waived the right to appeal any adverse ruling of the Board.

The Court of Special Appeals held that it should review a party's right to challenge the terms of a consent order validly entered into with an administrative agency according to the same principles of law that govern consent orders issued by courts. Administrative agencies have been granted the authority to settle disciplinary matters such as this one within their own regulatory

spheres through consent orders, enforcing violations thereof in the same manner as court-approved consent orders. Moreover, a party to a consent order in any forum can waive the right to appeal by the terms of the order. So where a party to a consent order is not challenging the formation, validity or legality of a consent order and has waived her right to challenge or appeal its terms, that party cannot compel an administrative agency to revise the order after the fact.

In this case, Dr. Barson gave up the right to appeal as part of her agreement with the Board, thereby sparing herself the potentially more serious consequences of going through an administrative hearing. She was aware of its terms and could not now make the Board revisit it. Dr. Barson incorrectly interpreted the Board's decision not to revisit the Order as suggesting that it lacked the statutory authority to do so. Although the Board did state that there was nothing in the relevant statutory provisions *requiring* it to revisit the Order, it did not state it lacked authority to do so but simply, in keeping with the above, that it saw no need to revisit it given Dr. Barson's knowing and voluntary execution of the Order.

Neither was Dr. Barson entitled to administrative or judicial review under the relevant sections of COMAR, Md. Code Regs. 10.32.02.02 and 10.32.02.03(G)(1), (2) (2012), which permit a motion for reconsideration of a final order but do not require that one be granted. And once she entered into the Order, Dr. Barson no longer qualified as an "aggrieved party" who had the right to review under Md. Code (1981, 2009 Repl. Vol., 2012 Cum. Supp.), § 14-408 of the Health Occupations Article. Finally, she was not entitled to administrative mandamus under Maryland Rule 7-403, because the circuit court correctly read *Perry v. Department of Health & Mental Hygiene*, 201 Md. App. 633 (2011), as applying. Under *Perry*, Dr. Barson had not shown any "clear legal right or protected interest" in having her registration numbers reinstated and actually specifically forfeited that right when she entered into the Order.

Dionne Davis, et vir. v. Tania Nicole Arevalo Martinez, et al., No. 2605, September Term 2011, filed May 2, 2013. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2013/2605s11.pdf

INSURANCE LAW – MOTOR VEHICLE INSURANCE – COVERAGE – UNINSURED MOTORISTS – GENERAL OVERVIEW

CIVIL PROCEDURE – PARTIES – JOINDER – NECESSARY PARTIES

Facts:

On May 25, 2010, appellants, Dionne Davis and Darryl Davis, filed suit in the Circuit Court for Prince George's County against appellee, Tania Martinez, for negligently causing an automobile accident. Martinez tendered the $20,000 limit of her liability insurance policy but the Davises' underinsured motorist ("UIM") policy carrier, State Farm Mutual Automobile Insurance Company ("State Farm"), the other appellee, rejected the offer in order to preserve its subrogation rights. Later, the Davises amended their complaint to include a count against State Farm titled "Breach of Contract and/or Statutory Duty for Failure to Pay Underinsured Motorist Insurance Benefits." State Farm then filed a cross claim against Martinez.

Prior to trial, Martinez filed a Motion in Limine to preclude any reference to her insurance policy or to State Farm as a defendant. The trial court granted the motion over the Davises' objection. On November 23, 2011, a jury found that Martinez was not negligent by way of a special verdict. The Davises filed a timely motion for a new trial, arguing that the trial court erred in precluding identification of State Farm. On January 9, 2012, the trial court denied the motion. On February 7, 2012, the Davises filed this appeal.

Held: Reversed and remanded.

The circuit court abused its discretion when it granted appellee's motion to hide the existence of her underinsured motorist policy carrier from the jury. Although it is well-settled that "[i]n cases where the insurance carrier is a party to the litigation, obviously the existence of insurance cannot be kept from the jury," the court concealed the existence of State Farm as a party in its entirety. *King v. State Farm Mut. Auto. Ins. Co.*, 157 Md. App. 287, 293 (2004) (quoting *Farley v. Allstate Ins. Co.*, 355 Md. 34, 42 (1999)); *accord Allstate Ins. Co. v. Miller*, 315 Md. 182, 191 (1989). Our holding here reaffirms "the general principle that the identity of the parties to a lawsuit should not be concealed." *Id.* at 294-95 (citations omitted).

Randall Reiner, et ux., v. Clifford Ehrlich, et al., No. 33, September Term 2012, filed May 29, 2013. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2013/0033s12.pdf

COMMON INTEREST COMMUNITIES – BUSINESS JUDGMENT RULE

Facts:

Appellants, Randall and Orna Reiner ("the Reiners"), own a house located in a community known as "Avenel." The Avenel community is governed by a homeowners association ("the Association"). The Reiners submitted a request with the Association to install a new roof on their home using materials not authorized by the bylaws of the Association. Upon denial of the request, the Reiners filed a complaint in the Circuit Court for Montgomery County against the Association and sixteen individual homeowners in the community (collectively, "appellees"). The appellees filed motions to dismiss the Reiners' complaint, or, alternatively, moved for summary judgment. After holding a hearing, the circuit court dismissed the complaint as to the individual homeowners, and entered summary judgment in favor of the Association. Thereafter, the Reiners filed a motion to alter or amend the judgment, which was denied.

On appeal, the Reiners argued that the circuit court erred by: (1) entering summary judgment in favor of the Association; and (2) granting the individual homeowners' motion to dismiss the complaint. The Reiners further argued that the circuit court abused its discretion by denying the Reiners' motion to alter or amend the judgment.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err in entering summary judgment in favor of the Association. The Reiners did not allege any fraud or bad faith on the part of the Association in denying the Reiners' request to install a new roof on their home using materials not authorized by the bylaws of the Association. Accordingly, the business judgment rule precluded judicial review of the Association's decision.

Second, the Court of Special Appeals held that the circuit court did not err in granting the individual homeowners' motion to dismiss the complaint. The Maryland Code permits only an association, and not its officers, directors, or members, to be named as a defendant in an action challenging the acts of a homeowners association.

Finally, the Court of Special Appeals held that the circuit court acted well within its discretion in finding that there were insufficient grounds for altering or amending the judgment.

Cherice Willis v. Derrick Ford et al., No. 256, September Term 2012, filed May 3, 2013. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2013/0256s12.pdf

JURY INSTRUCTIONS – ACTS IN EMERGENCIES

Facts:

Appellees, Derrick Ford and Tylisha Ford ("the Fords"), were traveling in their vehicle on a divided highway in Suitland, Maryland. The Fords' vehicle stalled on the highway after stopping for a red light at approximately 1:30 a.m. There were two traffic lanes on the right side of the Fords' vehicle, and one traffic lane on the left side of the Fords' vehicle. Beyond the left lane was a grass median. The Fords remained inside their vehicle and attempted to restart the vehicle.
Appellant, Cherice Willis ("Ms. Willis"), was driving down the same highway at a rate of speed of approximately 50 miles per hour. Ms. Willis observed a driver in front of her slam on the brakes and quickly swerve into the right lane. Within a matter of seconds, Ms. Willis saw the Fords' vehicle stopped in the same lane ahead of her and collided into the rear end of their vehicle. Ms. Willis testified that she had no choice but to crash into the Fords' vehicle. The Fords sued Ms. Willis for negligence, and a jury returned a verdict in favor of the Fords.

On appeal, Ms. Willis argued that the circuit court erred by: (1) failing to find the Fords contributorily negligent as a matter of law; and (2) failing to provide a jury instruction regarding "Acts in Emergencies."

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err in finding that the Fords were not contributorily negligent as a matter of law by remaining inside their stalled vehicle rather than getting out of the vehicle and walking to the median of the road. It was not so unreasonable for plaintiffs to conclude that it was safer to remain in their vehicle that no ordinary person would have reached the same conclusion.

Second, the Court of Special Appeals held that the circuit court did not err in declining to provide a jury instruction regarding "Acts in Emergencies." Pursuant to the Maryland Pattern Jury Instructions, a driver faced with a sudden emergency is not required to use the same coolness or accuracy of judgment required of a person with ample opportunity to exercise judgment. The Court of Special Appeals observed that a defendant is not entitled to an "Acts in Emergencies" instruction where the defendant did not suddenly find himself in a position of peril, and was not required to choose between alternative courses of action. Ms. Willis testified that within a matter of seconds of seeing a vehicle swerve in front of her, she "went into the back

of the [Fords'] car." Accordingly, the Court of Special Appeals held that an "Acts in Emergencies" instruction was not warranted, because even if there was an "emergency," Ms. Willis took no "act" and made no "choice" for the jury to judge in the context of the emergency.

Tracy Scott, as Mother and Next Friend of Charlie Scott, a Minor v. Raja Hawit, et al., No. 2838, September Term 2011, filed May 3, 2013. Opinion by Rodowsky, J.

http://mdcourts.gov/opinions/cosa/2013/2838s11.pdf

VENUE – FORUM NON CONVENIENS – RULE 2-327(c) – PLAINTIFF'S CHOICE OF VENUE – DEFENDANTS IN MULTIPLE COUNTIES – DEFENDANT'S AGREEMENT TO TRANSFER CASE AWAY FROM ITS HOME COUNTY

Facts:

Plaintiffs, a mother and her minor child, filed a medical malpractice action in the Circuit Court for Baltimore City against a Calvert County pediatrician and a Baltimore City hospital. The plaintiffs alleged that the pediatrician and the hospital's staff had failed to diagnose the child with kernicterus in the months following his birth such that the child developed chronic seizures and was permanently compromised cognitively and physically.

The plaintiffs resided in Calvert County. The defendant pediatrician treated the child, resided, and maintained an office in Calvert County. The defendant hospital was located in Baltimore City and the alleged negligence by the hospital's agents took place in Baltimore City.

Both defendants moved to transfer the case from Baltimore City to the Circuit Court for Calvert County on the ground of *forum non conveniens* pursuant to Md. Rule 2-327(c). The defendant hospital agreed to make its allegedly negligent agents available for court proceedings in Calvert County.

The circuit court granted the defendants' motion and transferred the case to Calvert County. The court relied on the facts that the plaintiffs' interest in having the case tried in Baltimore City was diminished because they did not live there; the majority of the allegedly negligent conduct took place in Calvert County; and the Baltimore City hospital consented to the transfer.

The plaintiffs appealed the circuit court's transfer decision to the Court of Special Appeals.

Held: Reversed and remanded.

This case presents the unusual situation wherein the plaintiffs assert liability on the part of two defendants, who are independent of each other and domiciled in different counties, based on their separate, allegedly negligent conduct, taking place at different times but causing a single harm.

Although a plaintiff's choice of venue is entitled to less weight if the plaintiff does not reside in the chosen venue, that is not entirely the case where, as here, the chosen venue has meaningful

ties to the controversy. As the factors regarding transfer weigh in near equipoise in this case, the somewhat reduced weight to be given to the plaintiffs' choice of a foreign forum is insufficient to support a finding that the balance weighs strongly in favor of Calvert County.

The fact that the Calvert County pediatrician had more contact with the injured child than the Baltimore City hospital is irrelevant. The plaintiffs alleged only ordinary negligence and, in a contributory negligence regime, if the plaintiffs can prove substantial legal causation as to each defendant, the result is joint and several liability for the total harm. There is no basis at this stage to say that, at trial, the plaintiffs will emphasize the liability of the pediatrician over the liability of the hospital. Jurors in both Baltimore City and Calvert County have an equal interest in the quality of medical care rendered in their jurisdiction. Calvert County courts were not considerably less congested than Baltimore City courts; on the contrary, the quotient of court filings per resident judge was higher in Calvert County.

By accepting the defendant hospital's agreement to transfer the case away from its home jurisdiction, the court allowed the hospital to "put its thumb on the scale" in favor of Calvert County and ignored the indicia of convenience that pointed to Baltimore City. This was an abuse of discretion.

Marilyn Clark, et al. v. Prince George's County, Maryland, et al., No. 2372, September Term 2011, filed May 2, 2013. Opinion by Eyler, D., J.

http://mdcourts.gov/opinions/cosa/2013/2372s11.pdf

COMMON LAW AND MARYLAND CONSTITUTIONAL TORTS AGAINST A COUNTY BASED ON ACTIONS OF A POLICE OFFICER – SCOPE OF EMPLOYMENT GOVERNMENTAL IMMUNITY – COLLATERAL ESTOPPEL.

Facts:

Keith Washington, a police officer holding a management position with the County, took part of the day off work to be at his house when new bed rails were delivered to replace defective ones. Brandon Clark and Robert White, the delivery men, arrived several hours late. Washington accompanied the men while they took the rails to the master bedroom to assemble them and remove the defective rails. According to Washington, White went into his daughter's bedroom (she was downstairs) and, upon emerging, hit him; then both men attacked him physically. Washington shot the men with his service weapon, which he was wearing, to stop them from beating him as, in his words, "any homeowner would do." Clark was killed and White was seriously injured. According to White, Washington was furious that he and Clark were late. He and Clark were in the bedroom removing the new bed rails from the box and, when Clark asked Washington why the defective bed rails were still on the bed, Washington became enraged, ordered them to leave, and, before they could get out of Washington's house, shot them.

Washington was convicted of voluntary manslaughter and two counts each of first-degree assault and use of a handgun in the commission of a felony or crime of violence.

Clark's survivors and White brought a civil action for damages against the County and Washington (whom they later dismissed), alleging that the County was liable in common law tort for negligent hiring, retention, and entrustment (of a weapon); that it was vicariously liable for Washington's common law torts; and that it was liable for Maryland constitutional torts, for acting with deliberate indifference to the rights of Clark and White to safety as members of the general public.

The negligence claims against the County were dismissed on the ground of governmental immunity, and the vicarious liability and constitutional tort claims were tried separately. In the trial against the County for vicarious liability, the court granted judgment in the County's favor because the evidence could not support a reasonable jury finding that Washington was acting within the scope of his employment when he shot Clark and White. In the constitutional tort trial, the court ruled inadmissible evidence that Washington had experienced certain mental health problems more than ten years before the shootings and had acted unruly at homeowners' association meetings three years before the shooting, because the evidence was too attenuated to be probative of whether the County had acted with deliberate indifference to the rights of Clark

and White, and therefore was not relevant. The plaintiffs acknowledged that they could not prove their constitutional tort claim without that evidence, so summary judgment was granted in the County's favor on that claim.

Held: Affirmed.

On the direct negligence claims against the County, absent a waiver, a county enjoys immunity against common law tort liability arising out of acts that are governmental, not proprietary. The operation of a police department is governmental, therefore the County was protected by governmental immunity against liability for negligence in hiring and retaining Washington and in placing him in a position in which he would have a service weapon.

Although a police officer may be "on duty" 24 hours a day, he or she is not always acting within the scope of employment. To be acting within the scope of employment, the officer's actions must be in furtherance of his employer's law enforcement function. Even assuming the truth of Washington's version of events, Washington was at home, after work hours, was not on duty, was not required to have been carrying his weapon, and was not acting out of a motive to serve or protect the public; rather, as he indicated, he was acting solely to protect himself "as any homeowner would do." The only actions Washington took that were consistent with his police duties – calling the police to report a "departmental shooting," putting on his badge, etc., were done after he shot Clark and White. The trial court properly ruled that the evidence did not generate a jury issue on scope of employment.

At the trial on the constitutional tort claim, the trial court's evidentiary rulings were not an abuse of discretion. Evidence of Washington's mental health evaluations and recommendations for treatment for job related stress in 1995 and 1996 was too attenuated to be relevant to whether the County acted with deliberate indifference to the rights of Clark and White to safety as members of the general public by allowing Washington to hold a position that would give him ready access to a firearm. Likewise, evidence of Washington's conduct at the homeowners' association meetings in 2004 was not reasonably predictive that he would act with deliberate indifference to the rights to safety of Clark and White, as members of the public, by shooting them in his home.

Finally, the trial court properly ruled in the constitutional tort claim trial that the doctrine of collateral estoppel did not apply to bar the County from denying that Washington had assaulted Clark and White based on the criminal convictions.

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Alicia Youmans v. Douron, Inc., No. 1981, September Term 2010, filed May 1, 2013. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2013/1981s10.pdf

TORTS – TOLLING OF STATUTE OF LIMITATIONS

Facts:

On December 28, 2005, Douron, Inc., a supplier of office furniture, delivered office furniture pursuant to a supply contract it had with the Montgomery County Department of Environmental Protection ("MC-DEP"), to an MC-DEP office in Rockville, Maryland. Upon delivery, employees of Douron, Inc., assembled that furniture. Nearly fourteen months later, on February 15, 2007, one of those pieces of office furniture, a desk, collapsed when Alicia Youmans, an MC-DEP employee at the Rockville office, in her words, "slightly leaned" against it. The collapse caused her to fall and suffer what she described as "severe personal injuries."

Later that year, Ms. Youmans filed a workers' compensation claim. Then, on February 16, 2010, Ms. Youmans brought an action, in the Circuit Court for Montgomery County, against Douron, Inc., the supplier of the desk, for breach of contract, claiming that she was an intended third-party beneficiary of the furniture procurement contract under which the desk had been provided by that company to the MC-DEP. In response to a motion to dismiss, Ms. Youmans filed an amended complaint, abandoning her breach of contract claim and alleging, instead, that Douron, Inc., had impliedly warranted that the desk it provided was merchantable and fit for a particular purpose; that she was a third-party beneficiary of those implied warranties; and that, as consequence of Douron's breach of warranties, she sustained personal injuries. Then, in response to yet another of Douron's motions to dismiss, on May 28, 2010, Youmans filed a second amended complaint, adding a count for negligence to her suit.

Douron, Inc, again moved to dismiss, on the grounds that Ms. Youmans's claims are barred by limitations. The circuit court agreed, holding that count I of her second amended complaint, alleging breach of warranty, is barred by the four-year statute of limitations in § 2-725 of the Maryland UCC; that count II of her second amended complaint, alleging negligence, does not relate back to her initial complaint; and that therefore, even if given the benefit of the two-month tolling provision, in the Workers' Compensation Act, applicable to third-party actions, her negligence claim is barred by the general three-year statute of limitations for civil actions, § 5-101 of the Courts and Judicial Proceedings Article.

Ms. Youmans noted this appeal, contending that both counts of her second amended complaint were timely filed. As to count I, alleging breach of warranty, she maintains that the two-month tolling provision, in § 9-902 of the Workers' Compensation Act, when applied to that claim, renders it timely, since it relates back to her original complaint, which was filed less than four years and two months after the date the office furniture was delivered. In the alternative, she

contends that, even if the two-month tolling provision applies only to tort and not contract actions, her breach of warranty claim so "closely resembles" an action based on strict liability in tort that no rational distinction can be drawn between implied warranty and strict tort liability for limitations purposes, or, in other words, her warranty action is not a contract claim but, rather, a tort claim or, at minimum, a "hybrid tort-contract action"; that therefore, the statute of limitations applicable to her warranty action is Courts & Judicial Proceedings Article § 5-101, which, although shorter by a year than the four-year statute of limitations of § 2-725 of the Maryland UCC, would, if applicable, have given her an additional fourteen months in which to file her suit, because the three-year limitations period for her "tort" claim would have begun to run from the date of her injury, not from the date of delivery of the office furniture; and that finally, because her original complaint was filed less than three years and two months from the date of her injury, and the breach of warranty claim relates back to the original complaint, count I of the second amended complaint was timely.

As to count II, alleging negligence, Ms. Youmans contends that that claim relates back to her original complaint, which alleged breach of contract to which she was an intended third-party beneficiary; that the original complaint was filed less than three years and two months from the date of her injury; and that, when the two-month tolling period is accounted for, count II of the second amended complaint was timely.

Held: Affirmed in part, reversed in part.

Preliminarily, the Court of Special Appeals noted that the two-month tolling provision in § 9-902 of the Workers' Compensation Act applies only to tort and not contract claims. Because, under Maryland law, a breach of warranty claim sounds in contract, the two-month tolling period is inapplicable to count I of the second amended complaint. Since the original complaint was filed more than four years after the date of delivery of the office furniture, the circuit court correctly held that count I is barred by the four-year statute of limitations in § 2-725 of the Maryland UCC.

But the negligence claim in count II of the second amended complaint relates back to the original complaint, since a comparison of the two complaints shows that they both allege essentially the same operative factual situation. And because the original complaint was filed less than three years and two months from the date of her injury, or, in other words, within the limitations period of Courts & Judicial Proceedings Article § 5-101, as augmented by the two-month tolling period in § 9-902 of the Workers' Compensation Act, the Court of Special Appeals held that it was error to dismiss count II on limitations grounds.

The Wallace & Gale Asbestos Settlement Trust v. Sonia Carter, et al., No. 2018, September Term 2011, filed May 2, 2013. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2013/2018s11.pdf

WRONGFUL DEATH ACT – COURTS AND JUDICIAL PROCEEDINGS ARTICLE SECTION 3-904 – MARYLAND RULE 15-1001 – USE PLAINTIFFS – PARTY PLAINTIFFS – STATUTE OF LIMITATIONS – AMENDMENTS – RELATION BACK – APPORTIONMENT OF DAMAGES – RESTATEMENT (SECOND) OF TORTS – COMPARATIVE NEGLIGENCE – JURY INSTRUCTIONS – PREJUDICE – HARMLESS ERROR

Facts:

This case involves verdicts rendered by a jury sitting in the Circuit Court for Baltimore City against appellant, the Wallace & Gale Settlement Trust, as to claims of survival and wrongful death in four cases consolidated for trial, in favor of plaintiffs and use plaintiffs in the *Carter*, *James*, *Lawrence*, and *Hewitt* cases.

Wallace & Gale, Incorporated ("W&G") was a Baltimore-based insulation and roofing contractor that installed asbestos-containing products for various companies. Personal representatives of the decedents filed suit against appellant for survival and wrongful death alleging that the decedents died of lung cancer and had been employed for the companies where W&G installed asbestos-containing products. The case captions on the complaints identified plaintiffs and a total of fifteen use plaintiffs.

The use plaintiffs were, on occasion, referred to as "plaintiffs" during the course of litigation. After the close of all of the evidence, appellant's counsel made a motion for judgment, arguing that, by failing to join the action, the use plaintiffs were barred from recovering for the wrongful death of the decedents. The circuit court denied the motion and permitted the use plaintiffs to be listed on the verdict sheets.

In the *Hewitt* case, in answers to interrogatories, the plaintiff stated that the decedent smoked approximately one-half to one pack of cigarettes per day from approximately 1943 to approximately 2008. Appellant's counsel requested that the circuit court permit apportionment of damages between injury caused by asbestos exposure and cigarette smoking, and argued that its expert would render an opinion that apportionment of damages was possible based on epidemiological studies and other scientific studies. Appellant's counsel filed an offer of proof regarding the expert testimony, indicating that the expert would testify that cigarette smoking contributed 75% to the decedent's development of lung cancer and occupational exposure to asbestos contributed 25%. The circuit court accepted the offer of proof, but excluded the expert's testimony concerning apportionment of damages. The circuit court also rejected

appellant's verdict sheet in the *Hewitt* case, which included questions concerning apportionment, and refused to give a jury instruction concerning apportionment.

The circuit court instructed the jury, in pertinent part, that a "manufacturer supplier or installer is under a duty to use ordinary care to test, analyze, and inspect the products it . . . sells, supplies, or installs." Appellant excepted to the instruction at the end of jury instructions.

The jury returned verdicts in favor of the plaintiffs and use plaintiffs in each of the four cases. Appellant filed a post-trial motion, raising the issue of the use plaintiffs and apportionment in the *Hewitt* case, and issues as to the jury instructions. The circuit court denied the motion. Appellant thereafter noted an appeal.

Held: Reversed.

The Court of Special Appeals reversed and vacated the judgments entered against appellant in favor of the use plaintiffs, concluding that use plaintiffs must join the action and that the use plaintiffs in this case failed to do so. The Court of Special Appeals held that the statute of limitations now bars the use plaintiffs from bringing wrongful death claims. In the *Hewitt* case, the Court of Special Appeals reversed the judgments entered against appellant in favor of the plaintiffs, and remanded for a new trial. The Court of Special Appeals affirmed the judgments entered against appellant in favor of the plaintiffs in the *Carter* case, the *James* case, and the *Lawrence* case.

Section 3-904(f) of the Courts and Judicial Proceedings Article of the Maryland Code provides that only one action for wrongful death may lie with respect to the death of a person. In keeping with this requirement, Maryland Rule 15-1001 requires that all individuals "who are or may be entitled by law to damages by reason of the wrongful death shall be named as plaintiffs whether or not they join in the action. The words 'to the use of' shall precede the name of any person named as a plaintiff who does not join in the action."

The identification of an individual as a use plaintiff in an action for wrongful death does not designate the individual as a party plaintiff with the right to recover damages for the wrongful death of the decedent.

Use plaintiffs are different from party plaintiffs in several key respects: (1) use plaintiffs do not join the action, but rather the action proceeds to their use or benefit; (2) use plaintiffs cannot recover damages in their own names as the action is brought to their use or benefit and not in their own name or on their own behalf; and (3) use plaintiffs' recovery is confined to the methods provided for in Section 3-904(c) of the Courts and Judicial Proceedings Article of the Maryland Code, in that the recovery awarded for the party plaintiffs is for the benefit of all plaintiffs–party plaintiffs and use plaintiffs.

Use plaintiffs who fail to join an action are not parties to the case and, therefore, are unable to recover damages directly.

Whether use plaintiffs are, on occasion, identified by the plaintiffs as "plaintiffs" or participate in pretrial depositions and testify at trial does not convert them to party plaintiffs–*i.e.* the occasional reference to use plaintiffs as "plaintiffs" is not sufficient notice of joinder. Rather, use plaintiffs are required to timely file some type of pleading to identify themselves and join the action as party plaintiffs.

Use plaintiffs who do not join an action and do not timely move to join an action may be barred from doing so if the statute of limitations provided for in Section 3-904(g) of the Courts and Judicial Proceedings Article of the Maryland Code has expired.

The doctrine of relation back is not applicable to wrongful death claims where the claims are barred by the three-year statute of limitations set forth in Section 3-904(g) of the Courts and Judicial Proceedings Article of the Maryland Code, as amending a complaint would involve adding a use plaintiff as a new party plaintiff bringing a new cause of action and increasing the overall amount of damages sought.

Apportionment of damages concerns causation, not comparative negligence. Comparative fault or comparative negligence involves determination of the relative percentages of fault between joint tortfeasors–*i.e.* in a negligence action, comparative negligence involves looking at the respective duties and breaches of the joint tortfeasors. Such a system necessarily requires that a jury consider the actions of the joint tortfeasors leading up to the injury to determine whether both were at fault and, if so, how much of the fault each joint tortfeasor should shoulder.

Apportionment of damages involves instances where there are two or more causes and a reasonable basis exists for determining the contribution of each cause to a single harm–*i.e.* in a negligence action, apportionment of damages involves looking at the causes of the injury, not the duties and breaches of the tortfeasors. Under apportionment, the relative fault of the parties is not considered and the doctrine applies "whenever two or more causes have combined to bring about harm to the plaintiff[.]"

The Court of Special Appeals of Maryland has applied apportionment of damages in certain cases, including a Federal Employers' Liability Act case, an asbestos case involving asbestos industry and cigarette industry defendants, and a medical negligence case.

Under relevant Maryland case law and the Restatement (Second) of Torts, apportionment of damages among several causes of an injury is appropriate in certain circumstances. Pursuant to Restatement (Second) of Torts, Section 433A(1), apportionment of damages between two or more causes is appropriate "where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Multiple causes may include the combination of acts of two or more parties, an innocent act and a negligent act, or an aggravation of a preexisting injury.

A trial court errs in excluding an expert's testimony on apportionment in a case involving the development of lung cancer due to cigarette smoking and asbestos exposure, and errs in refusing, without considering the expert testimony, to instruct on apportionment of damages where the plaintiff alleges a single harm–lung cancer–and where the party's proffer of the expert's testimony is that the expert would have testified as to: (1) the ratio of relative risk for each cause to the development of lung cancer, and (2) the percentage of contribution toward lung cancer of each cause.

When reviewing jury instructions, an appellate court gives the trial court "wide discretion as to the form . . . and, absent a clear abuse of that discretion, an instruction will not be reversed on appeal." "Moreover, when an objection is raised as to a court's instruction, attention should not be focused on a particular portion lifted out of context, but rather its adequacy is determined by viewing it as a whole."

We will not "condemn a charge because of the way in which it is expressed or because an isolated part of it does not seem to do justice to one side or the other." Even in cases where error is found, "[i]t has long been the policy in this State that [an appellate court] will not reverse a lower court judgment if the error is harmless."

On appeal, "a party challenging an erroneous jury instruction in a civil case must demonstrate to the court why the error was prejudicial."

A trial court does not err in instructing the jury on duties owed by manufacturers and nonmanufacturer suppliers/installers–specifically, that the duty of the "non manufacturer supplier to warn plaintiffs is different under some circumstances than the duty of a manufacturer[,]" and that an installer-supplier may be under a duty to discover the products it installed were dangerous if the installer-supplier's employees installed the products and the installer created a danger to other workers–where the evidence adduced at trial demonstrated that the defendant was an installer of asbestos-containing products onsite at other companies and contracted and sold products manufactured by others.

Any error on the trial court's part in instructing the jury was harmless where the instruction was not repeated or elaborated upon, the instruction was referenced only indirectly in closing argument, there were no questions for the jury as to the erroneous instruction or any indication that the jury focused on the erroneous instruction, and, other than the instruction being given, amidst numerous other instructions, the record was devoid of any basis to support a party's contention of prejudice.

Andrew P. Swedo, Jr. v. W.R.Grace & Co., et al., No. 998, September Term, 2011, filed May 1, 2013. Opinion by Salmon, J.

http://mdcourts.gov/opinions/cosa/2013/0998s11.pdf

WORKER'S COMPENSATION – CREDIT ALLOWED WHEN PERCENTAGE OF DISABILITY IS CHANGED ON APPEAL.

Facts:

Andrew Swedo, Jr. was injured on November 3, 2002 when he fell from a ladder and sustained injuries to his right shoulder and left leg. He also suffered psychiatric injuries. He was injured while in the course of employment with W.R. Grace & Co., Inc. The Worker's Compensation Commission filed an order on June 23, 2006 finding that Mr. Swedo had a 70% permanent partial disability under "other cases," industrial loss of use of the body, "40% of which is reasonably attributable to the accidental injury that occurred on November 3, 2002." This computed to a total award of $46,800 ($234 x 200 weeks). Mr. Swedo filed a petition for judicial review in the Circuit Court for Baltimore County and requested a jury trial. The jury found in favor of Mr. Swedo by modifying his permanent partial disability to 70% permanent partial disability under "other cases," 50% of which was due to the November 3, 2002 accident. The change from 40% to 50% disability increased the award to $525 per week for a period of 333 weeks.

The issue the Commission faced concerns how much credit the employer/insurer should receive for the 148 payments it made between the initial award and the time that the Commission passed a new order based on the jury award. The injured worker took the position that the employer/insurer should receive a dollar credit, i.e., a credit for $34,632. ($234 x 148). The employer, W.R. Grace & Co. and its insurer, Hartford Insurance Co. of the Mid West ("the employer"), however, took the position that a credit should be given for the number of weeks payments were made in accordance with the Commission's original order. According to the employer, it was only required to pay $525 for the 185 weeks (333 less 148) that remained and should be given a credit, not in the amount of the dollars paid, but based on the number of weeks payments were made.

Under the dollar credit theory, the claimant, after giving the employee credit for the $34,632 paid, would be entitled to receive "new money" in the amount of $140,193 ($174,825 less $34,632.) Under the weeks credit theory, however, the employer would get credit for the payments made for 148 weeks and would only have to pay $525 per week for 185 weeks. In other words, instead of paying the worker "new money" in the amount of $140, 193 the employer would be required to pay only $97,125 ($525 x 185).

The Maryland General Assembly, in 2001, passed a statute that is now codified as Maryland Code (2008 Repl. Vol.) Labor & Employment Article ("LE") Section 9-633, which read:

> "If an award of permanent partial disability compensation is reversed or modified by a court of appeal, the payment of any new compensation awarded shall be (1) subject to a credit for compensation previously awarded and paid; and (2) otherwise made in accordance with this Part IV of this subtitle."

The Commission ruled against Mr. Swedo and in favor of the employer and allowed the latter a credit based on weeks. Mr. Swedo filed a petition for judicial review in the Circuit Court for Baltimore County to challenge the Commission's ruling. The Circuit Court affirmed the Commission's decision. Mr. Swedo filed an appeal to the Maryland Court of Special Appeals.

Held: Reversed.

Section 9-633 uses the word "compensation" three times and Section LE 9-101(e) defines "compensation" as "the money payable under this title to a covered employee. . . ." The court, after reviewing the legislative history of section 9-633, as well as Maryland case law that concerned the definition of "compensation" interpreted in section 9-633 to mean that the employer was entitled only to a dollar credit for the 148 payments it made prior to the end of the appellate process. The case was remanded to the circuit court with instructions to send the case back to the Commission so that it could amend the order to reflect the fact that the employer was entitled to a dollar credit and not a weeks credit. (Maryland Court of Special Appeals, Salmon, J.).

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated May 2, 2013, the following attorney has been disbarred by consent:

TIFFANY T. ALSTON

*

By a Per Curiam Order of the Court of Appeals dated May 2, 2013, the following attorney has been disbarred:

DEAN CLAYTON KREMER

*

By a Per Curiam Order of the Court of Appeals dated May 2, 2013, the following attorney has been disbarred:

JASON ASHLEY KOBIN

*

By an Opinion and Order of the Court of Appeals dated May 6, 2013, the following attorney has been disbarred:

JOEL JAY FADER

*

By an Order of the Court of Appeals dated May 7, 2013, the following attorney has been disbarred by consent:

NOAH THOMAS LOWERY-CLUGSTON

*

By an Order of the Court of Appeals dated May 16, 2013, the following attorney has been reprimanded by consent:

ROGER NORMAN POWELL

*

By an Order of the Court of Appeals dated May 16, 2013, the following attorney has been indefinitely suspended by consent:

JEWELL ROCHEAL PARKER

*

By an Order of the Court of Appeals dated May 23, 2013, the following attorney has been indefinitely suspended by consent:

HENRY DONALD MCGLADE, JR.

*

By an Order of the Court of Appeals dated May 24, 2013, the following attorney has been reprimanded by consent:

PHILIP M. KLEINSMITH

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Seventy-Sixth Report of the Standing Committee on Rules of Practice and Procedure was filed on May 1, 2013:

http://mdcourts.gov/rules/rodocs/ro176.pdf