Amicus Curiarum

VOLUME 23
ISSUE 4 APRIL 2006

a publication of the office of the state reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

ADMINISTRATIVE LAW – REASONABLE GROUNDS TO DETAIN

Facts: On October 30, 2003, Maryland Transportation Authority Police Officer J. Marll was in a marked patrol car parked on the shoulder of Route 170 in Anne Arundel County operating a stationary radar unit when a Saturn pulled up approximately ten feet behind him and sat idling for a few minutes. After approaching the passenger side window of the Saturn, Officer Marll asked the driver, Carmelina Illiano, why she had stopped on the shoulder to which she replied that she should not be driving because she had consumed one beer and one mixed drink. Observing that her eyes were bloodshot and glassy and that her speech was slurred, the officer requested Ms. Illiano's driver's license and asked her to perform various field sobriety tests.

After Ms. Illiano failed the field sobriety tests, Officer Marll placed her under arrest for Driving Under the Influence and read to her from the DR-15 Form. Initially, Ms. Illiano agreed to take a chemical breath test and was taken to the Maryland State Police Barracks where the test was to be administered. When Ms. Illiano arrived, however, she changed her mind, refused to submit to the test and, thereafter, pursuant to Section 16-205.1(b)(3) of the Transportation Article, Officer Marll confiscated Ms. Illiano's driver's license, served her with an order of suspension for one year, issued her a temporary license, and informed her of her right to a hearing and the required administrative sanctions.

The Administrative Law Judge upheld the one-year suspension of Ms. Illiano's driver's license at an administrative show cause hearing on March 9, 2004. Ms. Illiano subsequently filed a Petition for Judicial Review of the Administrative Law Judge's decision in the Circuit Court where the suspension was reversed. The Circuit Court ruled that Section 16-205.1 (b)(2) of the Transportation Article "clearly requires that an officer have reasonable grounds for detaining someone for driving under the influence of alcohol," and therefore the results of the field sobriety tests were irrelevant in determining whether the officer had reasonable grounds to detain Ms. Illiano to perform the tests. Based on that logic, the trial court found that there was no substantial evidence to conclude that the officer had reasonable grounds to detain Ms. Illiano. The Motor Vehicle Administration then filed a petition for writ of certiorari to the Court of Appeals.

Held: Based upon the plain meaning of Section 16-205.1 (b)(2)'s use of the conjunction "or" in the provision that if a police officer "stops or detains" an individual who the officer has reasonable grounds to believe is driving under the influence, the officer may request that the person submit to a breath test, the Administrative Law Judge's determination that Section 16-205.1 (b)(2) permits reasonable grounds to arise *post-stop* to justify the detention and request for a breath test was not clearly erroneous. Furthermore, based upon the evidence in the record, which included the officer's detection of a strong odor of alcohol emanating from Ms. Illiano's vehicle, Ms. Illiano's statement that she stopped because she should not be driving, her admission to having consumed two alcoholic drinks, her bloodshot and glassy eyes, her slurred speech, and her failure of the field sobriety tests, a reasoning mind reasonably could have reached the factual conclusion of the Administrative Law Judge. Therefore, the Court held that the decision of the Administrative Law Judge upholding the suspension of Ms. Illiano's license was supported by substantial evidence and was not premised upon an error of law.

Motor Vehicle Administration v. Carmelina Illiano, No. 28, September Term, 2005, Opinion by Battaglia, J.

***

ADMINISTRATIVE LAW – MARYLAND WHISTLEBLOWER ACT

Facts: On October 18, 1998, James Heller was hired as the manager of the Somers Cove Marina ("Somers Cove") in Crisfield, Maryland and was informed by his direct supervisor, Joseph Ward, Park Service Supervisor, and Ward's supervisor, Daryl DeCesare, Regional Manager for the Eastern Region, Department of Natural Resources, that the marina had posted a loss the previous fiscal year and that some of his responsibilities were to identify the reasons for the loss and to make the marina profitable.

From November 1998 through April 2001, Heller, Ward, and DeCesare exchanged numerous memoranda concerning the Somers Cove

budget and the use of funds generated by the marina.

On January, 18, 1999, Mary Taylor was hired by DNR to work at Somers Cove as an office secretary to report directly to Heller. On April 9, 2001, Taylor met with Ward and expressed that she felt threatened and intimidated and that she was being sexually harassed by Heller. Ward forwarded her concerns to DeCesare who ultimately forwarded them to DNR's Equal Employment Opportunity Office ("EEO Office").

On April 14, 2001, DeCesare and Ward met with Heller and informed him that he could not work in the same office as Taylor and that he was being temporarily reassigned to Pocomoke River State Park.

William Bias, Chief of the Office of Fair Practice, DNR, investigated Taylor's claims of sexual harassment and issued a report on May, 30, 2001, concluding that there was probable cause to find that Taylor had been discriminated against because of her gender. He recommended the following actions be taken by management: (1) transfer Heller to another location; (2) issue Heller a written reprimand for his actions emphasizing the seriousness of the offense and DNR's zero tolerance policy with respect to sexual harassment; (3) require Heller to attend sexual harassment training; and (4) advise Heller not to retaliate against Taylor, all of which were put into effect. Heller was not demoted in grade and did not incur any loss of pay.

Heller filed an administrative appeal of the disciplinary action pursuant to Sections 11-109 and 11-110 of the State Personnel and Pensions Article which he settled prior to it being heard by the Office of Administrative Hearings ("OAH"). Pursuant to that settlement, Heller could pursue a whistleblower action against the DNR.

In his "whistleblower" action under Section 5-301 *et seq.* of the State Personnel and Pensions Article ("Whistleblower Act"), Heller alleged that the June 21, 2001 disciplinary action was not a consequence of the probable cause finding of sexual harassment, but was retaliatory for the protected disclosures that Heller alleged that he made regarding purported fiscal irregularities in the Somers Cove's operating budget.

The DBM denied his whistleblower claim; Heller appealed to the Office of Administrative Hearings ("OAH"). An evidentiary hearing was held by an Administrative Law Judge ("ALJ"), who found that Heller had failed to meet his burden of proof that he was transferred in reprisal for his disclosure that funds were being

improperly diverted from Somers Cove and that DNR did not violate Section 5-305 of Maryland's Whistleblower Statute.

Heller filed a petition for judicial review in the Circuit Court where the judge concluded that the ALJ had not erroneously precluded Heller from litigating the merits of the sexual harassment claim. Heller then filed a notice of appeal to the Court of Special Appeals which reversed the decision of the ALJ and the Circuit Court's affirmance of that decision. On April 11, 2005, DNR filed a petition for writ of certiorari to the Court of Appeals.

Held: Reversed. The ALJ's determination that Heller's allegations regarding alleged fiscal impropriety did not constitute protected disclosures under the Maryland Whistleblower Act, was supported by substantial evidence and was not premised on an erroneous interpretation of the law. The Court also held that the ALJ did not erroneously exclude Heller's proffered evidence relating to the merits of the underlying sexual harassment claim because the ALJ did not preclude Heller from challenging testimony about the motive for his disciplinary action, and also permitted Heller to introduce evidence that the decision was in fact based on the allegedly protected disclosures,.

Department of Natural Resources v. James Heller, No. 23, September Term 2005, Opinion by Battaglia, J.

***

APPEALS – SCOPE – ARGUMENT NOT PRESENTED BELOW

Facts: On April 19, 2003, events transpired involving Kaleb K., then sixteen years old and a nineteen-year-old Brandon Goldschmitt, which culminated in Kaleb K. allegedly threatening Brandon by lifting up his shirt as if reaching for a gun. The State subsequently charged Kaleb K. as an adult with first degree assault. At a preliminary hearing held on June 6, 2003, the charges were dismissed by the District Court Judge.

Thereafter, the State filed a Delinquency Petition against Kaleb K. in the Circuit Court. Kaleb K. was charged with four misdemeanor counts: second degree assault (Count 1), harassment (Count 2), malicious destruction over $500 (Count 3), and malicious destruction under $500 (Count 4).

The Circuit Court, sitting as a juvenile court, held a hearing on December 5, 2003 at which time Kaleb K.'s counsel moved for dismissal of the delinquency petition based upon the State's failure to prosecute in a timely fashion under Section 3-8A-10 of the Courts and Judicial Proceedings Article. As grounds for the motion to dismiss, counsel argued that because the State had not filed the petition alleging delinquency in the Circuit Court until September 16, 2003, over three months after the criminal case was dismissed and approximately five months after the underlying events, Kaleb suffered prejudice. The judge denied Kaleb K.'s motion to dismiss and Kaleb K. noted a timely appeal to the Court of Special Appeals where he argued that Section 3-8A-13(b) of the Courts and Judicial Proceedings Article, a different section, was really the controlling section with respect to the dismissal of the petition; that section does not require a showing of actual prejudice. The Court of Special Appeals held that Kaleb K. had not properly preserved the issue for appeal under Maryland Rule 8-131 (a).

Held: The Court of Appeals affirmed and held that, pursuant to Maryland Rule 8-131 (a), which governs the scope of the Court's review of trial courts' decisions, the Court can only review the ruling that was actually asked and made at the trial level. Thus, because Kaleb K. relied solely on the language of Section 3-8A-10 (c)(4) as the basis for his motion to dismiss the petition, and at no time made any reference to Section 3-8A-13 (b), although Kaleb K. preserved his right to appeal from the denial of his motion to dismiss, he did not preserve his argument that Section 3-8A-13 of the Courts and Judicial Proceedings Article mandated dismissal of the petition and the Court of Special Appeal's judgment was affirmed.

In re Kaleb K., No. 43, September Term, 2005, Opinion by Battaglia, J.

***

ATTORNEYS - MISCONDUCT - DISCIPLINARY ACTION - CONDUCT OF DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION - MITIGATION OF SANCTION DUE TO UNINTENTIONAL CONDUCT

Facts: The disciplinary action against Candace K. Calhoun ("Respondent") arose out of her representation of Mr. Paul E. Schell in a sexual harassment action in the United States District Court for Maryland. The Attorney Grievance Commission of Maryland ("Commission") charged respondent with violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15 (Safekeeping Property), 8.1 (Bar Admission and Disciplinary Matters), 8.4(a), 8.4(c), 8.4(d) (Misconduct) of the Maryland Rules of Professional Conduct ("MRPC"); and Maryland Rule 16-609 (Prohibited Transactions).

Respondent committed numerous violation of the MRPC: (1) she received an initial $5,000.00 retainer fee, which was deposited into an improperly designated bank account; (2) she failed to provide adequately detailed monthly statements to her client; (3) she was not diligent in the pursuit of the litigation; (4) she advised settlement for $8,000.00 without properly advising her client that his accrued fees were $10,000.00 to $15,000.00; and (5) most importantly, she deposited the $8,000.00 settlement fee into her personal bank account and did not properly notify her client that she had received the fee. The Commission sought disbarment and respondent requested that the action be dismissed. The hearing judge found that respondent had violated all of the charges except for MRPC 8.1, however, that respondent's conduct was not intentionally fraudulent. Respondent took numerous exceptions to the hearing judge's findings of fact and conclusions of law.

Held: Indefinite suspension. The Court of Appeals found that indefinite suspension was warranted where respondent had violated MRPC 1.1, 1.3, 1.4, 1.5, 1.15, 8.4(a), (c), (d) and Maryland Rule 16-609. Focusing, in particular, on respondent's violation of MRPC 8.4(c), the Court found that, while intentionally fraudulent conduct often constitutes grounds for disbarment, the facts in this case demonstrated that respondent's conduct was not intentionally fraudulent. Thus, the Court imposed a lesser sanction.

Attorney Grievance Commission of Maryland v. Candace K. Calhoun, Misc. Docket AG No. 57 September Term, 2004, filed March 9, 2006. Opinion by Cathell, J.

***

CONTRACTS - CHOICE OF LAW

Facts: Allied Irish Bank ("AIB"), a company incorporated under the laws of Ireland, wholly owned Allfirst Financial, a Delaware corporation with its headquarters in Baltimore, which in turn was the sole owner of several subsidiaries, including Allfirst Bank, a financial institution with its principal place of business in Baltimore. On February 6, 2002, Allfirst Bank revealed that one of its foreign currency traders, John Rusnak, had systematically falsified bank records and other documents which resulted in nearly $700 million in losses to the Bank.

Tomran, Inc., a Maryland corporation, was a depositor in Allfirst Bank and a holder of American Depositary Receipts ("ADRs") of stock in AIB worth over $100,000.00. After Allfirst Bank announced its earnings restatement resulting from the Rusnak fraud, Tomran made a demand on the boards of directors of AIB and Allfirst Bank that they take action to recoup the losses. The boards denied Tomran's demand.

On May 13, 2002, Tomran filed a derivative suit for money damages and declaratory and injunctive relief against the directors and senior officers of Allfirst Bank and nominal defendants, AIB, Allfirst Bank, and Allfirst Financial. On August 14, 2002, Tomran amended its complaint to state the action as a "triple derivative" suit for the direct benefit of Allfirst Bank, and indirectly, for the benefit of its parent companies, Allfirst Financial and AIB, alleging that Respondents were negligent and grossly negligent in their oversight of Rusnak's foreign currency dealings, which directly caused Allfirst Bank's loss. Additionally, because Allfirst Bank had changed its charter from a national banking association to a commercial bank, and its officers and directors were therefore no longer personally liable to the Bank or its shareholders for money damages, Tomran sought a declaratory judgment confirming that the change was not retroactive so as to cover the Bank's $40 million in losses as of December 1998.

The Circuit Court determined that the complaint failed to state a claim upon which relief could be granted because, under the internal affairs doctrine, Irish law applied, and Irish law did not permit a beneficial owner of shares, such as Tomran, to maintain derivative suits. The Circuit Court also ruled that Tomran's amended complaint failed to set forth sufficient allegations to constitute a "fraud on the minority" exception to the general rule that, under Irish law, even registered shareholders may not maintain an action on behalf the company, nor would Irish law permit a triple derivative action.

Tomran unsuccessfully filed a motion to amend the complaint and two motions to amend or alter the judgment, and noted a timely appeal to the Court of Special Appeals, which held that the choice of law provision in the Deposit Agreement did not encompass the right to maintain a derivative suit and affirmed the trial court's decision.

Held: The Court of Appeals affirmed and held that, based on its analysis of the choice of law clause in the Deposit Agreement, the phrase "hereunder and thereunder" limited the scope of the choice of law provisions to the rights enumerated in the Deposit Agreement, ADR Receipts, and matters of contract enforceability, none of which provided the right to bring a derivative action. Thus, the issue of whether Tomran had a cause of action to sue derivatively was not governed by the Deposit Agreement or the ADR, but instead was governed by the internal affairs doctrine which mandated the employment of Irish law. Under Irish law a beneficial shareholder was not entitled to pursue a derivative action

Tomran, Inc. v. William M. Passano, Jr. et al., No. 3, September Term, 2005, Opinion by Battaglia, J.

***

CRIMINAL LAW – CONSTITUTIONAL LAW – DEATH PENALTY

Facts: Vernon Evans, Jr. and Anthony Grandison entered into an agreement whereby Evans would kill David Scott Piechowicz and his wife, Cheryl, because the couple were scheduled to testify against Grandison in a case pending in the United States District Court for the District of Maryland. Evans was to receive $9,000.00 from Grandison for performing the murders.

David Scott Piechowicz and Cheryl Piechowicz were employed at the Warren House Motel in Baltimore County. On April 28, 1983, Susan Kennedy, the sister of Cheryl Piechowicz, was working in place of Ms. Piechowicz at the Warren House Motel. On April 28th, Evans went to the motel and, not knowing the Piechowiczs, shot

David Scott Piechowicz and Susan Kennedy with a MAC-11 machine pistol. Nineteen bullets were fired at the victims, who died from the multiple gunshot wounds.

In May of 1984, Grandison was tried in the Circuit Court on two charges of first degree murder, one count of conspiracy to commit murder, and one count of the use of a handgun in the commission of a felony or crime of violence. On May 22, 1984, the jury returned guilty verdicts on all counts. Grandison was sentenced to death on June 6, 1984 on both murder counts.

On November 1, 1990, Grandison filed a petition for post conviction relief. On July 31, 1992, the Circuit Court granted such relief, ordering a new capital sentencing proceeding on Grandison's convictions of first degree murder. In 1993, Grandison filed a number of motions in the Circuit Court to bar his re-sentencing on double jeopardy grounds. The Circuit Court denied these motions and Grandison's subsequent request for a stay of the re-sentencing proceeding pending an appeal of the Circuit Court's ruling on his motions. Grandison then applied to the Court of Special Appeals for a stay of the re-sentencing.

On May 11, 1994, the matter was transferred to the Court of Appeals which issued an order denying the stay. Grandison's re-sentencing proceeding began on May 24, 1994 and lasted eight days. On June 3, 1994, a jury imposed two death sentences. The Court of Appeals affirmed the death sentences.

On November 15, 1999, Grandison filed a motion for a new trial, pursuant to Maryland Rule 3-441. On January 18, 2000, he filed a Motion to Correct Illegal Sentence, and approximately three months later, filed a *pro se* Motion to Reopen Original Guilt/Innocence Post Conviction.

The Circuit Court held two days of evidentiary hearings on May 20-21, 2004, during which Grandison introduced a number of pieces of allegedly exculpatory or impeaching evidence that he asserted had been suppressed by the prosecution and that, according to Grandison, significantly undermined the confidence in the verdicts rendered against him at both his 1983 trial and 1994 re-sentencing proceeding such that the evidence was "material" for the purpose of establishing a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 LED.2d 215 (1963). On February 25, 2005, the trial judge denied all of Grandison's motions in a written opinion. Grandison then noted an appeal to the Court of Appeals.

Held: The Court of Appeals affirmed and held that the evidence presented by Grandison as *Brady* evidence failed to

satisfy *Brady*'s materiality requirement that the evidence present a reasonable probability that, had it been disclosed, the result of the proceeding would have been different. Therefore, the State did not violate Grandison's *Brady* due process rights with respect to both his 1983 guilt/innocence trial and his 1994 re-sentencing. The Court also reaffirmed its prior conclusion that Maryland's death penalty statute does not violate the Supreme Court's rulings in *Apprendi v. New Jersey* and *Ring v. Arizona*. Furthermore, the Court also held that Grandison was eligible for the death penalty as an accessory before the fact to murder where contractual murder constituted the aggravating circumstance forming the basis for the imposition of the death penalty. Therefore, the denial of Grandison's motion was affirmed.

Anthony Grandison v. State of Maryland, No. 16, September Term, 2005, Opinion by Battaglia, J.

***

CRIMINAL LAW - CREDIT FOR TIME SERVED & NOLLE PROSEQUI

Facts: On September 1, 2002, Anthony Gilmer was in pretrial detention at the Baltimore City Detention Center on a charge of attempted murder and had been at the Center since July 2, 2001, a period of 426 days. On September 1, 2002, Gilmer had an altercation with a fellow detainee, Jonathon Blue, during which Gilmer repeatedly stabbed Blue. Gilmer was then charged with first degree murder, first degree assault, openly wearing and carrying a dangerous and deadly weapon with the intent of causing injury in an unlawful manner, reckless endangerment, second-degree assault, and attempted second-degree murder.

At sentencing on June 13, 2003, a jury found Gilmer guilty of first and second-degree assault; the second-degree assault conviction was merged into the first-degree conviction, and Gilmer was sentenced to fifteen years incarceration. The judge, however, refused to credit Gilmer with the 426 days of confinement that Gilmer had already served on the attempted murder charges because

those charges had been nolle prossed by the State prior to sentencing.

Gilmer filed an unsuccessful motion for a new trial and noted an appeal to the Court of Special Appeals. The Court of Special Appeals affirmed the trial court's denial of the time served credit, held that a nolle prosequi was not a dismissal under the plain meaning of Section 6-218 (b)(2) of the Criminal Procedure Article and applied Section 6-218 (b)(3) of the Criminal Procedure Article, which allows the court to exercise its discretion in determining whether to grant credit.

Held: The Court of Appeals reversed and held that Section 6-218 (b)(2) was ambiguous because the Legislature did not provide a definition for the word "dismissal,"which had more than one meaning depending on whether it was entered with or without prejudice. The Court noted that, under circumstances where conditions have been attached to the nolle prosequi requiring actions by the defendant, and those conditions have been met, the nolle prosequi has the same effect as a dismissal with prejudice. Moreover, a nolle prosequi could also function as an acquittal if jeopardy had attached. Where, however, jeopardy had not attached, nor had any conditions been met, a nolle prosequi would not bar future prosecution and is therefore the equivalent of a dismissal without prejudice. Thus, in light of the statute's purpose, to ensure that defendants receive as much credit as possible for time spent in custody, the term dismissal, as used in Section 6-218 (b)(2), must be interpreted to include dismissal with or without prejudice, including disposition by nolle prosequi. Accordingly, the trial court erred in denying Gilmer credit for the time served for the nolle prossed charge.

Anthony Gilmer v. State of Maryland, No. 14, September Term, 2005, Opinion by Battaglia, J.

***

CRIMINAL LAW - SEARCH AND SEIZURE - TRAFFIC STOPS - DURATION - MAY ONLY LAST AS LONG AS NECESSARY TO EFFECTUATE THE PURPOSE OF THE TRAFFIC STOP - RECORDS CHECK OF REGISTRATION, LICENSE, AND OUTSTANDING WARRANTS IS A PROCEDURE INCIDENT TO THE TRAFFIC STOP AND IS NECESSARY TO EFFECTUATE THE PURPOSE OF THE TRAFFIC STOP

Facts: On November 19, 2003, at 10:58 a.m. a motor vehicle was stopped by a State trooper for having its rear registration plate obscured by a plastic cover, a violation of Md. Code (1977, 2002 Repl. Vol.), §§ 13-411 and 13-411.1 of the Transportation Article. The trooper called in the stop to the College Park barrack and was advised that the computer systems through which licenses, vehicle registrations, and outstanding warrants are checked were down. During the call, the trooper was not given any indication of how long the systems would be down.

At 10:59 a.m. the trooper approached the vehicle and obtained the driver's (Ms. Joan Henry Malone) license and registration, as well as the passenger's (Mr. Orlando Byndloss, "Petitioner") license. At 11:02 a.m. the trooper returned to his vehicle.

The trooper sat in his vehicle, called for a K-9 unit, and then proceeded to write out a warning for the license plate cover. He did not immediately call the barrack to check the driver's and passenger's information because he had initially been informed that the systems were down. At 11:08 a.m., when he had finished writing out the warning, the trooper called back the College Park barrack and was informed that the systems were still down, but that the problem was only affecting that particular barrack. He was advised to contact another barrack. At this point, the trooper decided to hold off on issuing the warning because he had not been able to run the licenses and registration through the system.

At 11:09 a.m. the trooper switched to another channel and called the barrack closest to his location, the Waterloo barrack. Upon receiving the call, the Waterloo dispatcher advised the trooper that he could not hear him due to background noise or interference. At 11:10 a.m. the trooper called back the Waterloo dispatcher using his cell phone. The trooper requested license and outstanding warrant checks and was advised that he would be called back with the information.

While waiting for this information the trooper got out of his vehicle and approached the driver's vehicle. He explained to the driver that he was waiting for a license and warrant check. He then asked her to step out of the car and proceeded to explain again what the delay was and ask her some questions about her trip and where she was going.

At 11:19 a.m. the trooper called back the Waterloo barrack and was told to stand by. At 11:23 a.m. the trooper called back the Waterloo barrack again, using his cell phone, and spoke with the duty officer. The duty officer informed him that the communications officer was very busy and would get back to him.

At 11:26 a.m. the K-9 handler arrived and the trooper asked him to conduct a scan of the vehicle. At 11:27 a.m. the Waterloo barrack communications officer called the trooper and notified him that the passenger had an extensive criminal background, but did not provide any further information. At 11:30 a.m. the K-9 alerted to the presence of narcotics in the vehicle. The trooper and the K-9 handler conducted a search of the vehicle from 11:30 a.m. to 11:40 a.m. and found, within a suitcase in the trunk, approximately two kilograms of cocaine. The trooper then arrested both the driver and the passenger of the vehicle.

Prior to trial, petitioner moved to suppress the items found in the vehicle. The motion was denied. At the subsequent bench trial, before the Circuit Court for Prince George's County, petitioner was convicted on four counts: (1) importation of 28 or more grams of cocaine; (2) possession of 448 or more grams of cocaine with intent to distribute; (3) possession of cocaine with intent to distribute; and (4) possession of cocaine. The convictions were affirmed by the Court of Special Appeals. Petitioner presented one question to the Court of Appeals: "During a routine traffic stop, may a State trooper withhold the issuance of a written warning and continue to detain the occupants of a vehicle after the driver and passenger have both provided driver's licenses and registration for the vehicle and the trooper has written a warning for the traffic infraction, but he has not issued it to the driver because the computer system, through which records are checked, is inoperable, preventing the trooper from confirming the validity of the licenses and registration and checking for outstanding warrants?"

Held: Affirmed. The Court of Appeals found that, under the particular facts and circumstances of the case, the initial stop by the trooper was not concluded at the time the K-9 alerted to the presence of narcotics. The trooper was, with sufficient diligence, pursuing the acquisition of the records check and had not yet completed it. The detention lasted only long enough to complete the procedures incident to the traffic stop.

Orlando Byndloss v. State of Maryland, No. 54 September Term, 2005, filed March 8, 2006. Opinion by Cathell, J.

***

TAXATION - SALE OF LAND FOR NONPAYMENT OF TAX - REDEMPTION FROM TAX SALE - TIME FOR REDEMPTION - PAYMENT OR TENDER - FAILURE TO REDEEM - OPERATION AND EFFECT

TAXATION - TAX TITLES - TITLE AND RIGHTS OF PURCHASER AT TAX SALE - TAX DEEDS

Facts: Canaj, Inc., appellant, was the owner of fourteen properties located in Baltimore City ("City"). Appellant failed to pay property taxes on those properties for over seven years. As a result of appellant's failure to pay taxes, the City sold the properties at a tax sale held on August 8, 2001, to Baker and Division III ("Baker"). Baker filed timely complaints to foreclose appellant's right of redemption on November 5, 2001. The Circuit Court for Baltimore City issued judgments foreclosing appellants right of redemption on March 14, 2003; April 27, 2004; May 11, 2004; June 11, 2004; and June 29, 2004. Forty-one days after the last judgment was entered, appellant filed motions seeking, in essence, vacation of the foreclosure judgments. Appellant argued that the tax sale was void because the properties were sold for less than the amount owed in taxes and the City failed to cite the properties as vacant or abandoned. The Circuit Court denied the motions and appellant filed an appeal with the Court of Special Appeals. Before the intermediate appellate court heard arguments on the case, the Court of Appeals granted certiorari. *Canaj, Inc. v. Baker and Division III*, 389 Md. 398, 885 A.2d 823 (2005). Appellant never tendered or payed any of the taxes due on the properties.

Held: In order to maintain an action to void a judgment foreclosing a delinquent tax payer's right of redemption, the delinquent tax payer must pay all taxes, interest and expenses due or deposit that amount into court. Appellant waived its right to appeal the city's failure to cite the properties as vacant or abandoned because it waited until after the judgments of foreclosure were entered to raise that issue. Maryland Code (1985, 2001 Repl. Vol., 2005 Supp.), § 14-817 of the Tax-Property Article allows the City to sell properties for an amount less than that owed in taxes, interest and expenses. Under that section, if the City properly cites the properties as vacant or abandoned, the City can seek to recover from the delinquent tax payer the difference between the sale price and the amount owed. On the other hand, if the City fails to adequately cite the properties, the City will be precluded from collecting the difference. The City's failure to cite the properties, however, does not invalidate the tax sale.

Canaj, Inc. v. Baker and Division Phase III, et al., No 72, September Term, 2005, filed March 6, 2006. Opinion by Cathell, J.

COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW — AGENCY'S REJECTION OF ADMINISTRATIVE LAW JUDGE'S FINDINGS — DEMEANOR-BASED CREDIBILITY DETERMINATIONS.

Facts: The Maryland Board of Physicians ("Board"), the appellant, brought charges against Steven Bernstein, M.D., the appellee, under § 14-104(a)(22) of the Health Occupations Article, for failure to meet the standard of care. Bernstein is a Board-certified anesthesiologist who was working at Union Memorial Hospital in Baltimore when an elderly patient with a history of heart problems and colon cancer was admitted with a fractured hip and scheduled for hip replacement surgery. Prior to the surgery, a certified registered nurse anesthetist ("CRNA") examined the patient. Bernstein, who was the anesthesiologist of record during the surgery, did not examine the patient or review her chart. Immediately before the surgery, he spoke briefly with the CRNA about the patient's anesthesia plan, but he was not present when the CRNA administered the anesthesia. The patient experienced complications, but Bernstein, who had been down the hallway, was not present when the complications arose and did not arrive in the operating room until two hours after the surgery began.

An Administrative Law Judge ("ALJ") held a contested case hearing. The Board's experts testified that Bernstein had breached the standard of care, in part by failing to properly supervise the CRNA. Bernstein's experts disagreed. The ALJ issued a proposed decision recommending a determination in favor of Bernstein. She found the Board's experts not credible because they lacked experience with CRNAs, based their opinions on improper grounds, or were biased.

The Board rejected the ALJ's proposed decision, found that Bernstein did not meet the standard of care, and reprimanded him. It relied on the testimony of the Board's experts and its own medical expertise. It found Bernstein's experts' testimony ambiguous.

The Circuit Court for Baltimore County reversed the Board's decision and the Board appealed.

Held: The Court of Special Appeals reversed the judgment of the circuit court and remanded the case to the Board for further proceedings. It held that, under substantial evidence review, an agency's decision carries a presumption of validity and is given considerable weight. Although an agency ordinarily owes the ALJ no

deference, it must give significant weight to the ALJ's demeanor-based credibility findings. The agency may reject those findings only when it states strong reasons for doing so.

In this case, the ALJ's credibility findings were not demeanor-based, but were based on the experts' past experience, their objectivity, and the logic of their opinions. The experts were not testifying about first-level facts that are susceptible of truth or falsity, but were offering opinions based on assumed facts. As the ALJ's findings were based on factors that appear on a cold record, the Board could reweigh the evidence and draw its own credibility conclusions.

The Court held that the case must be remanded to the Board, however. One of the Board's experts had an adequate foundation for opining that Bernstein had breached the standard of care, but the other did not. Because there is substantial doubt as to whether the Board would have reached the same result absent the invalid opinion testimony of one of the Board's experts, the matter must be reconsidered by the Board without that opinion testimony.

State Board of Physicians v. Bernstein, No. 1594, September Term 2004, filed March 8, 2006. Opinion by Eyler, Deborah S., J.

***

CRIMINAL LAW - DNA EVIDENCE - COURTS & JUDICIAL PROCEEDINGS ARTICLE SECTION 10-915 - 45-DAY NOTICE REQUIREMENT

Facts: Following an attempted armed robbery investigation of the Gourmet Grog, the Montgomery County Police Department (MCPD) submitted the gun used in the attempted robbery for DNA analysis. The MCPD received the analysis report on February 10, 2004. That report excluded the DNA of the appellant, John Paul Thompson, from being on the gun. The MCPD turned the report over to the prosecutor on July 31, 2004. Defense counsel received the report on August 2, 2004. Defense counsel then notified the prosecutor by a letter dated August 19, 2004, of its intent to introduce the DNA

evidence at the appellant's trial. The prosecutor did not respond.

The trial commenced on September 7, 2004. On the fifth day of trial, after calling its last witness and before the close of its case, the prosecutor moved *in limine* to preclude the defense from calling the forensic chemist that performed the DNA analysis and from introducing the DNA analysis report into evidence for failure to comply with the 45-days notice requirement under CJP section 10-915. The Circuit Court for Montgomery County granted the State's motion, stating that it lacked the discretion to admit the evidence under section 10-915 because the defense did not comply with the 45-days notice requirement. Thereafter, the appellant was convicted.

Held: Reversed and remanded. The trial court erred in ruling that it had no discretion to admit the DNA evidence. The 45-days notice requirement is a condition precedent to the admissibility of DNA evidence. When the party seeking admission of DNA evidence cannot comply with the 45-days notice condition, due to no fault of his own, substantial compliance is sufficient. The appellant substantially complied with the notice condition because the State furnished the DNA evidence to him less than 45 days before trial and his defense counsel did notify the State of its intention to use the evidence at trial. In addition, the State waived its right to move to preclude the DNA evidence by making its motion at a time when the court could not exercise its discretion to grant a continuance, which is the remedy the statute provides.

Thompson v. State, No. 2783, September Term, 2004, filed March 2, 2006. Opinion by Eyler, D.S., J.

***

CONTRACTS - THIRD PARTY CERTIFICATES - REASONABLE ASSURANCES - CONTRACT CONSTRUCTION - ASSUMPTIONS.

Facts: Phoenix Services Limited Partnership ("Phoenix"), appellant, and Johns Hopkins Hospital ("Hopkins"), appellee, were

involved in a contract dispute pertaining to the removal by Phoenix of medical and other waste generated by Hopkins. Claiming that it had grounds to terminate the contract for cause, Hopkins refused to pay a multimillion dollar early termination fee to Phoenix. Therefore, Phoenix brought suit in the Circuit Court for Baltimore City, alleging that Hopkins unlawfully terminated the long term contract. At trial, Phoenix argued, among other things, that Hopkins was not entitled to reject the Certificate of Reasonable Assurance provided by an Independent Engineer pursuant to the contract.

Following a bench trial, the trial court ruled that Hopkins lawfully terminated the contract for cause because Phoenix missed several waste pick ups at Hopkins. Among other things, the court was of the view that it had the right to review the Certificate to determine whether it was facially valid. It concluded that the Certificate was facially defective because of two "assumptions" in the Certificate. Conversely, the court agreed with Phoenix that, if the Certificate had been facially valid, Hopkins would not have had the right to challenge the opinion of the Independent Engineer that the underlying cause of the Major Backup had been rectified, even though Hopkins disputed that claim.

Held: Vacated and remanded. The Court of Special Appeals recognized that parties to a contract may delegate to a third party the right to determine adequacy of performance under a contract. However, in order for the contract to foreclose the right of a party to challenge or litigate the third party's determination, the contract must expressly make clear that the third party's decision is final, binding, and conclusive.

The contract in issue did not satisfy that standard, according to the Court of Special Appeals. Therefore, the Court determined that Hopkins had the right to contest both the facial validity of the Certificate as well as its substantive content.

However, the Court of Special Appeals disagreed with the trial court and Hopkins that the form of the Certificate was facially defective merely because of the two assumptions. In its view, they were merely common sense, standard disclaimers. But, the Court agreed with Hopkins that, under the terms of the contract, the parties did not agree that the determination of the Independent Engineer was final, binding, conclusive, and otherwise not subject to challenge in court. In analyzing cases delegating to third parties the right to assess the quality of performance, the Court was of the view that "clarity is the key in any contract purporting to remove a case from the judicial process by rendering binding and conclusive the decision of the third party." As the parties did

not use the requisite clear and unequivocal contractual language, the determination of the Independent Engineer was not binding and final.

Phoenix Services Limited Partnership v. Johns Hopkins Hospital, No. 1050, September Term, 2004, filed February 27, 2006. Opinion by Hollander, J.

***

INSURANCE- BUSINESS AUTOMOBILE POLICIES- FELLOW EMPLOYEE EXCLUSIONS.

Facts: Allegheny Industries, Inc., maintained a business automobile policy with Nationwide Mutual Insurance Company. The policy provided for $1,000,000 in liability coverage. A standard endorsement for business automobile policies issued in Maryland limited coverage for claims by fellow employees of the insured for bodily injury arising out of, and in the course of, the fellow employee's employment, to the statutorily mandated minimum.

On June 20, 2002, Taylor Wilson and Daniel McFarland, employees of Allegheny, were returning in a vehicle owned by Allegheny and insured under the Nationwide policy, after being dispatched to perform field work. Wilson, the passenger, suffered serious injuries when McFarland, the driver, struck another vehicle.

Wilson incurred medical bills in excess of $100,000 and filed a workers' compensation claim with Allegheny. He also made demand upon McFarland and Nationwide, as the insurer of the vehicle, for personal injury damages sustained as a result of the accident. Nationwide offered to settle Wilson's claim for $20,000, asserting that Wilson's claim was controlled by the fellow employee exclusion, and therefore, personal injury liability coverage under the policy was limited to $20,000, the minimum amount required by Maryland Code (1977, 2002 Repl. Vol.), § 17-103(b)(1) of the Transportation Article ("Trans.").

Thereafter, Wilson filed a complaint for declaratory judgment in the Circuit Court for Carroll County, naming Nationwide, McFarland, and Allegheny as defendants. Wilson sought a judgment declaring the fellow employee exclusion in the policy invalid under Maryland law. The parties filed opposing motions for summary judgment.

Following a hearing, the circuit court determined that there were no disputes of material fact and that the fellow employee provision was indistinguishable from the invalid fellow employee exclusion in *Larimore v. American Ins. Co.*, 314 Md. 617, 552 A.2d 889 (1989). The court issued a judgment declaring the fellow employee exclusion invalid and requiring Nationwide to fully indemnify Allegheny and McFarland for any sums that McFarland, as an Allegheny employee, became legally obligated to pay Wilson as a result of the June 20, 2002 accident.

Held: Reversed. The circuit court erred in declaring the fellow employee provision in the Nationwide policy invalid because it specifically provides for personal injury coverage of at least "20,000 for any one person and up to $40,000 for any two or more persons" as required by Trans. § 17-103(b)(1). Therefore, the fellow employee provision does not contravene public policy and is distinguishable from the invalid exclusion in *Larimore*. Although the policy provides different coverage amounts for different categories of claimants, as explained in *Stearman v. State Farm Mut. Ins. Co.*, 381 Md. 435, 849 A.2d 539 (2004), Maryland's compulsory automobile insurance law does not require uniform coverage beyond the statutory minimum for all claimants.

The fellow employee provision recognizes an employer's statutory duty to insure employees under both workers' compensation and business automobile policies. As a result of the exclusion, the employer is able to minimize the costs associated with providing coverage under two separate policies, while, at the same time, provide a claimant with the statutorily mandated coverage in addition to any workers' compensation benefits. The employer, presumably a sophisticated business entity, was capable of understanding the terms of its contract. There is no reason to believe that the premium paid under the business automobile policy does not reflect the reduced coverage amount for fellow employee liability.

Nationwide Mutual Insurance Company v. Taylor, No. 100, September Term 2005, filed March 3, 2006. Opinion by Kenney, J.

***

INSURANCE - SPLIT-DOLLAR ENDORSEMENTS TO INSURANCE POLICIES - NO REQUIREMENT TO TRANSFER "SUB-OWNERSHIP" INTEREST IN SPLIT DOLLAR ENDORSEMENT PURSUANT TO SETTLEMENT AGREEMENT REQUIRING TRANSFER OF ALL ASSETS

Facts: Appellant, Walter L. Bennett, IV, sought to enforce the terms of a judgment of divorce, into which a property settlement agreement with appellee, Melanie Wright, was incorporated. The agreement required appellee to transfer her ownership of all assets in what previously was a jointly-held corporation, Hartley Marine, Inc. ("HMI") to appellant. One such asset was a life insurance policy, naming appellee as the insured party, owned by HMI, which contained a split-dollar endorsement designating appellee as "sub-owner."

The Circuit Court for Anne Arundel County declared that appellee was not required to transfer her "sub-ownership" interest in the split-dollar endorsement to the policy owned by HMI, pursuant to the terms of the agreement.

Held: Affirmed. The circuit court correctly held that appellee's remaining "sub-ownership" interest in the split-dollar endorsement to the policy was not required to be transferred under the terms of the agreement. The fundamental nature of a split-dollar endorsement counsels against finding a "sub-ownership" interest in a split-dollar endorsement as equivalent to ownership of the insurance policy itself. Split-dollar endorsements are not insurance policies in and of themselves, but funding arrangements often used by companies to attract and retain key personnel. Thus, the nature of the policy, and the HMI's ownership of it, was not altered by the agreement or by appellee's continued "sub-ownership" interest in the endorsement.

Bennett v. Wright, No. 128, September Term, 2004, filed February 24, 2006. Opinion by Sharer, J.

***

INSURANCE - UNINSURED/UNDERINSURED MOTORIST COVERAGE - REQUIREMENT OF RESIDENCE IN HOME OF POLICYHOLDER FOR PURPOSES OF UNDERINSURED COVERAGE

Facts: Appellant, who was seriously injured as a result of an underinsured motorist's negligence, sought to recover under the UIM coverage of his parents' automobile insurance policy, which provided benefits to residents of their home. The parents' policy defined "resident" as:

> a person who physically lives with you in your household. Your unmarried, unemancipated children under age 24 attending school full-time, living away from home will be considered residents of your household.

At the time of the accident, appellant, who was not a full-time student living away from home, had been living with his grandmother for nearly one year because his parents had excluded him from their home, which he only occasionally visited.

The Circuit Court for Prince George's County declared that appellant was not a resident of his parents' home and, thus, was not covered under the UIM portion of their policy.

Held: Affirmed. Giving effect to the policy's plain meaning, appellant failed to meet the definition of "resident" because he neither physically lived in his parents' home nor attended college.

The policy language restricting the definition of "resident" was not contrary to public policy. Policy provisions narrowing liability are permissible, so long as they are consistent with minimum statutory requirements. *Lord v. Maryland Auto. Ins. Fund,* 38 Md. App. 374 (1977).

Mundey v. Erie Ins. Group, No. 2069, September Term, 2004, filed March, 1, 2006. Opinion by Sharer, J.

***

JUDGMENTS - COLLATERAL ESTOPPEL - LOCAL GOVERNMENT TORT CLAIMS ACT - SCOPE OF EMPLOYMENT

Facts: Baltimore City Police Officer Rodney Price pleaded guilty to the first-degree murder of one Tristin Little, Sr. Little's relatives obtained a judgment of nearly $27 million against Price in a wrongful death/survival action. Price "assigned" to Little's relatives his rights under the Local Government Tort Claims Act ("LGTCA") and a Memorandum of Understanding ("MOU") between the Baltimore City Police Department and the Fraternal Order of Police. As Price's assignees, the relatives sought to recover the $27 million judgment in an "indemnity" action against the City of Baltimore and the Police Department. The Circuit Court for Baltimore City granted summary judgment in favor of the City and Police Department.

Held: Affirmed. The Court of Special Appeals held that, in order for the City or Police Department to be liable for the judgment, under either the LGTCA or the MOU, Price must have been acting within the scope of his employment when he shot Little, and he clearly was not.

The Court held that there was no genuine dispute of material fact as to whether Price was acting within the scope of his employment. The facts showed that Price believed his wife had been having an affair with Little; that he was off-duty when he approached his wife and Little outside of Little's home; that he shot Little seventeen times, including twice in the back; and that he pled guilty to first-degree murder. As a matter of law, his actions fell outside the scope of his employment. Furthermore, as Price's assignees, Little's relatives were barred by the doctrine of judicial estoppel from taking a position contrary to Price's plea of guilty to first-degree murder.

The Court also held that the circuit court was not bound by any decision in the wrongful death/survival action. The Police Department's decision to represent Price in that case was not a binding determination that he was acting within the scope of employment. Also, partial summary judgment on the issue of scope of employment in that case had no collateral estoppel effect on the instant case because the City and Police Department had been dismissed from the wrongful death case when the partial summary judgment was entered, and thus were not parties who had a "full and fair opportunity" to litigate the issue. Moreover, determination of the scope of employment issue was not necessary in that case, and the issue was not actually litigated or finally adjudicated, as the motion was filed by Little's relatives and unopposed by Price.

Brown v. Mayor & City Council of Baltimore, No. 2734, September Term, 2004, filed February 24, 2006. Opinion by Eyler, Deborah S., J.

***

MECHANIC'S LIEN - EFFECT OF ARBITRATION - MD. CODE, (2003 REPL. VOL, 2005 SUPP.), REAL PROP., §§ 9-106 (a)-(b)(1); *DISTRICT HEIGHTS APARTMENTS, SECTION D-E, INC. v. NOLAND CO., INC.*, 202 MD. 43, 50-51 (1953); PRESUMPTION THAT MATERIALS UPON WHICH MATERIALMAN BASES CLAIM FOR MECHANIC'S LIEN WERE DULY DELIVERED PERTAINS IN THE ABSENCE OF SOME DIRECT EVIDENCE TO THE CONTRARY; TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION BY ENTERING A FINAL ORDER ESTABLISHING A MECHANIC'S LIEN AGAINST PROPERTY OF APPELLANT WHERE IT HAD OPPORTUNITY TO CONTEST ESTABLISHMENT OF THE LIEN, NOTWITHSTANDING THAT APPELLANT WAS NOT A PARTY TO ARBITRATION PROCEEDINGS.

Facts: Appellee trucking corporation agreed to subcontract certain services under a prime contract to construct a church building for appellant on appellant's property. After problems arose among appellant, appellee and the prime contractor, appellee filed a mechanic's lien action against appellant in the Circuit Court for Prince George's County. Appellant and appellee agreed to stay the mechanic's lien action pending the outcome of appellee's arbitration claim against the prime contractor. Upon appellee prevailing at arbitration, appellee moved to have a mechanic's lien entered in its favor and against appellant. Appellant appealed from the court's establishment of a mechanic's lien in appellee's favor.

Held: Judgment ordering the establishment of mechanic's lien affirmed. Despite the fact that appellant was not a party to the underlying arbitration proceeding, court properly entered a mechanic's lien against appellant where it failed to contradict appellee's evidence, which favored entry of order establishing mechanic's lien. The court also did not abuse its discretion in ordering the mechanic's lien against appellant where the court

found appellant did not file an answer as required by the mechanic's lien statute, nor did it abuse its discretion in upholding the parties' agreement that the outcome of the arbitration claim would determine the merits of appellee's lien action.

Cottage City Mennonite Church, Inc. v. JAS Trucking, Inc., No. 618, September Term, 2005, decided March 6, 2006. Opinion by Davis, J.

***

PARTNERSHIPS - WITHDRAWAL OF PARTNERS - SECTIONS 10-603 AND 10-604 OF THE REVISED UNIFORM LIMITED PARTNERSHIP ACT — "FAIR VALUE" OF WITHDRAWING PARTNER'S INTEREST — JUDGMENTS — PREJUDGMENT INTEREST

Facts: The appellees and cross-appellants, four limited partners of East Park Limited Partnership, properly exercised their statutory right under § 10-603 of the Corporations and Associations Article to withdraw from East Park, the appellant and cross-appellee. Pursuant to § 10-604 of the Corporations & Associations Article, they sought payment of the "fair value" of their partnership interests.

The Circuit Court for Anne Arundel County found the fair market value of East Park's only asset, a shopping center, to be $19,500,000. It added East Park's cash on hand and subtracted its liabilities, and concluded that the partnership's going concern value was $14,643,606. The court then multiplied that amount by the withdrawing partners' aggregate percentage interest — 20.797% — to arrive at a "fair value" of $3,045,431. The court declined to award the withdrawing partners prejudgment interest.

On appeal, East Park contended that the court should have applied minority and lack of marketability discounts to the final amount, because the withdrawing partners held a minority interest that could not readily be sold on the open market. It also argued that the court erred in excluding certain testimony. The

withdrawing partners argued that the court erred or abused its discretion in declining to award them prejudgment interest.

Held: Affirmed in part and vacated in part. The Court of Special Appeals held that determination of "fair value" under § 10-604 is a question of fact for the trier of fact. The circuit court properly could find in this case that discounts were not appropriate because the withdrawing partners' interests were not being sold in an open market transaction; rather, they were absorbed by the partnership entity. Such a conclusion is in line with cases interpreting the meaning of "fair value" in dissenting shareholder statutes.

The Court further held that the circuit court did not commit reversible error in excluding testimony regarding events that took place after the valuation date, *i.e.*, the date of withdrawal.

Finally, the Court held that the circuit court erred in refusing to award prejudgment interest on part of the judgment. Once it was established that the withdrawing partners had properly withdrawn, East Park had to concede that it owed them at least some amount for their partnership interests. From that date forward, the amount that East Park argued was the "fair value" of their interests — $969,022 — was fixed and certain. Thus, the withdrawing partners were entitled to prejudgment interest on that amount. The court did not abuse its discretion in declining to award prejudgment interest on the remaining amount of the judgment.

East Park Limited Partnership v. Larkin, No. 289, September Term, 2005, filed March 6, 2006. Opinion by Eyler, Deborah S., J.

***

STATE PERSONNEL - TERMINATION OF EMPLOYMENT - MD. CODE (1997 REPL. VOL., 2005 SUPP.), STATE PERS. & PENS. § 11-110 (d); *WESTERN CORR. INST. v. GEIGER*, 371 MD. 125 (2002); CIRCUIT COURT ERRED IN ITS INTERPRETATION OF § 11-110 (D) THAT THE LEGISLATURE INTENDED TO INCLUDE BENEFITS AS AN INCIDENT OF THE REINSTATEMENT OF TERMINATED

EMPLOYEES RECEIVING FULL BACK PAY.

Facts: Appellee David Reier was a tax assessor, employed by appellant, State Department of Assessments and Taxation, (SDAT), since 1990. The quality of appellee's work came into question in August-September of 1996, which ultimately led to appellee's supervisors terminating his employment on October 7, 1996. The parties appeared before the Office of Administrative Hearings (OAH) where appellee challenged his termination of employment. The administrative law judge (ALJ) affirmed the termination. Upon appellee's petition to the Circuit Court for Baltimore County for judicial review, the court, pursuant to our decision in *Western Corr. Inst. v. Geiger*, 130 Md. App. 562 (2000), remanded the case for further factual findings. The ALJ upheld the termination, which was affirmed by the circuit court. Appellee appealed to this Court, *Reier v. State Dep't of Assessments and Taxation*, No. 2456, September Term 2001, (filed December 19, 2002), where, pursuant to the Court of Appeals' decision in *Western Corr. Inst. v. Geiger*, 371 Md. 125 (2002), we ordered that the case be remanded to OAH for reconsideration under a different legal standard. On remand, ALJ Spencer rescinded appellee's termination, ordered he be reinstated to his position with full back pay, but did not award restoration of benefits. The court, on judicial review, affirmed appellee's rescission of termination, reinstatement and full back pay, and supplemented appellee's award with restoration of benefits that ALJ Spencer disallowed. Appeal to this Court followed.

Held: Judgment of Circuit Court for Baltimore County affirmed in part and reversed in part. In light of the Court of Appeals' decision in *Geiger*, ALJ Spencer was required to review the evidence to determine when SDAT acquired sufficient information to launch an investigation into appellee's work, as opposed to determine when SDAT should have acquired sufficient knowledge to justify the imposition of a disciplinary sanction. In applying the "sufficient information" legal standard, we held that ALJ Spencer did not err in her factual findings or abuse her discretion in not hearing further testimony upon remand from this Court. The circuit court thus acted properly in affirming this part of the decision. The court, however, erred in its interpretation of § 11-110 (d) and in restoring appellee's benefits. The unambiguous statutory language, read in conjunction with legislative history, compels the conclusion that reinstatement of employment under (d)(1)(iii)(3) does not include restoration of employee benefits.

State Department of Assessments and Taxation v. David Reier, No. 273, September, Term, 2005, decided March 3, 2006. Opinion by

Davis, J.

***

TORTS – NEGLIGENCE – PREMISES LIABILITY – UNDER THE IMPLIED INVITATION THEORY, THE CIRCUMSTANCES CONTROL, SUCH AS CUSTOM, HABITUAL ACQUIESCENCE OF THE OWNER, THE APPARENT HOLDING OUT OF THE PREMISES FOR A PARTICULAR USE BY THE PUBLIC, OR THE GENERAL ARRANGEMENT OR DESIGN OF THE PREMISES.

Facts: On March 2, 2004, Margaret Ruth DeBoy, appellant, filed a complaint in the Circuit Court for Somerset County against the City of Crisfield (City), Shore Stop of Crisfield/FAS Mart #226 (Shore Stop), and GPM 1, LLC (GPM), appellees.

Appellant alleged that on or about April 18, 2003, she was walking her dogs on property owned by GPM and improved by a convenience store, operated by Shore Stop, when she stepped on a water meter housing cover maintained by the City of Crisfield. The cover moved, causing appellant to fall and injure her left leg and knee. Appellant asserted that appellees had negligently failed to maintain the water meter housing and cover.

In February, 2005, appellees filed motions for summary judgment on several grounds, including an assertion that appellant was a bare licensee and thus was not owed a duty to keep the premises reasonably safe. Appellant filed an opposition and a motion for partial summary judgment against the City on February 16, 2005. In the motion, appellant sought a determination of liability, relying in part on the doctrine of res ipsa loquitur. All parties relied heavily on appellant's deposition testimony.

In her deposition, appellant testified that prior to the day of the occurrence, she drove to Crisfield daily with her two dogs, parked and took the dogs for a walk. She generally walked the same route which included walking across the Shore Stop property. On occasion, appellant purchased newspapers or cigarettes. On the day in question, appellant did not intend to enter the store. While walking across the property, appellant stepped on a water meter cover, the cover came off, and her left leg went into the water meter housing.

By orders dated March 8, 2005, the circuit court denied appellant's motion and granted appellees' motions. The basis of the ruling was that appellant was at most a bare licensee, and that appellees' conduct, based on the facts not in dispute, did not amount to wanton or willful misconduct.

Held: Affirmed. In negligence actions, the duty of care an owner or occupier of land owes a visitor depends on whether the entrant is an invitee, licensee, or trespasser. The duty owed to an invitee is the duty to use reasonable and ordinary care. By contrast, a landowner merely owes a licensee the duty to abstain from willful or wanton misconduct.

Invitee status can be established under one of two doctrines: mutual benefit or implied invitation. Under the implied invitation theory, the circumstances control, such as custom, habitual acquiescence of the owner, the apparent holding out of the premises for a particular use by the public, or the general arrangement or design of the premises. In this case, where appellant testified that she entered the premises for the sole purpose of walking her dog and did not intend on entering the store, appellant was not an implied invitee, but merely a licensee. Therefore, summary judgment in favor of appellees was proper.

Margaret Ruth Deboy v. City of Crisfield, et al., No. 244, September Term, 2005, filed March 3, 2006. Opinion by Eyler, James R., J.

***

ZONING - LAND USE - WAIVER OF SPECIAL EXCEPTION REQUIREMENTS - AUTHORITY OF THE MONTGOMERY COUNTY DEPARTMENT OF PERMITTING SERVICES

Facts: Pursuant to a special exception, Appellee, Dr. Graciano P. Gancayco, operated a medical office from a unit he owned in a residential condominium complex. Desiring to add an additional practitioner at that location, he sought a change in the terms of his special exception from the Montgomery County Board of Appeals (the Board). Section 59-G-2.36(b)(5) of the County's zoning ordinance requires that, to obtain a special exception, the

parking requirements in § 59-E-3.7 be satisfied. Section 59-E-3.7 requires that, for a medical practitioner's office, there be at least four parking spaces per practitioner using the office. Dr. Gancayco first obtained, from the Montgomery County Department of Parking Services (DPS), a waiver of the parking requirement of § 59-E-3.7. But, the Board stated that DPS had no authority to waive the parking requirements of § 59-G-2.36(b)(5) and denied Dr. Gancayco's request to modify his special exception. The Circuit Court for Montgomery County reversed the Board and ordered it to grant the special exception modification requested by Dr. Gancayco.

Held: Reversed. DPS can waive the parking requirements of § 59-E-3.7, but such a waiver does not waive the requirements of § 59-G-2.36(b)(5). The Montgomery County zoning ordinance vests the Board with the power to grant special exceptions. No such power was granted to DPS. But the zoning ordinance does give DPS authority to grant waivers of certain parking requirements. Section 59-E-3.7 provides a schedule of parking requirements for various land uses. Specifically, it provides that, for a medical office, there must be at least four parking spaces for each doctor practicing there. That requirement is applicable to medical offices generally, whether that medical office is in an office park or in a residential zone, and may be waived by DPS under § 59-E-4.5. But the language of the zoning ordinance clearly indicates that DPS's authority to waive parking requirements extends only to the requirements of Article 59-E. Obviously, § 59-G-2.36(b)(5) is located in Article 59-G, not Article 59-E. Thus, DPS can waive the parking requirements of § 59-E-3.7, but not those of § 59-G-2.36(b)(5).

Furthermore, while § 59-G-2.36(b)(5) does incorporate the parking requirements of Article 59-E, it creates separate and distinct parking requirements for medical offices in residential zones, which are independent of the Article 59-E parking requirements. Not only do those requirements mandate four parking spaces per practitioner, as § 59-E-3.7 does, but they also mandate that those spaces be in addition to the spaces needed for residential purposes and that they be "specifically designated" for patient use.

Grand Bel Manor Condominium v. Graciano P. Gancayco et al., No. 2529, September Term, 2004, filed March 2, 2006. Opinion by Krauser, J.

***

ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals of Maryland dated March 9, 2006 the following attorney has been indefinitely suspended from the further practice of law in this State:

CANDACE K. CALHOUN

*

By an Opinion and Order of the Court of Appeals of Maryland dated March 16, 2006, the following attorney has been indefinitely suspended from the further practice of law in this State:

LESLIE BLISH HOLT

*

By an Order of the Court of Appeals of Maryland dated March 20, 2006, the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

RONALD A. WRIGHT

*

JUDICIAL APPOINTMENTS

On February 10, 2006, the Governor announced the appointment of **H. PATRICK STRINGER, JR.** to the Circuit Court for Baltimore County. Judge Stringer was sworn in on March 10, 2006 and fills the vacancy created by the retirement of the Hon. Christian M. Kahl.

*