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COURT OF APPEALS

Higginbotham v. Public Service Commission, et al., No. 155, September Term, 2008, filed December 30, 2009. Opinion by Murphy, J.

http://mdcourts.gov/opinions/coa/2009/155a08.pdf

CIVIL PROCEDURE – STATUTE OF LIMITATIONS – COURTS & JUDICIAL PROCEEDINGS § 5-105

TORT – MARYLAND TORT CLAIMS ACT – STATUTE OF LIMITATIONS –STATE GOVERNMENT §12-106(B)

Facts: This case arose out of a defamation claim filed with the Treasurer after Petitioner's photograph along with four other Public Service Commission employees was posted in the lobby of the William Donald Schaefer Tower at the direction of then chairman Kenneth Schisler. The Treasurer denied the claim. After Petitioner filed suit in the Circuit Court for Baltimore City, that court entered summary judgment in favor of the Commission (and individual members of the Commission) on the ground that Petitioner had not filed suit before expiration of the one-year statute of limitations set forth in Section 5-105 of the Courts and Judicial Proceedings Article. In doing so, the circuit court rejected Petitioner's argument that the action against the Commission was timely filed in conformity with the three-year statute of limitations set forth in the Maryland Tort Claims Act, Section 12-106(b) of the State Government Article.

Held: A majority of the Court of Appeals held that Section 5-105 of the Courts and Judicial Proceedings Article, which requires that a defamation action "be filed within one year from the date it accrues," does not operate to bar a defamation action asserted against the Commission in compliance with the requirements of Section 12-106(b) of the State Government Article, which is both a statute of limitations and a condition precedent to the State's waiver of sovereign immunity.

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CSR, Limited v. Andrea Taylor, et al., No. 129, September Term 2008, filed November 16,2009, Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2009/129a08.pdf

COURTS - PERSONAL JURISDICTION – DUE PROCESS SUFFICIENT MINIMUM CONTACTS

Facts: Decedents, Alfred B. Smith and Joseph Anzulis worked as stevedores at the Baltimore City Port ("Port") from 1942 through 1983, and 1937 through 1973, respectively. Respondents were personal representatives of the decedents estates. Each man died from mesothelioma, which respondents contend was caused by exposure to asbestos while working at the Port. Respondents sued numerous entities involved in the manufacture, supply, sale and distribution of asbestos-containing products, alleging that decedents became sick from the offloading of raw asbestos or products containing asbestos from ships docked at the Port. One of the entities Respondents sued was CSR, a corporation organized under Australia law.

The Circuit Court for Baltimore City held that CSR lacked sufficient minimum contacts with Maryland to satisfy the due process clause and granted CSR's motion to dismiss for lack of personal jurisdiction. Respondents appealed to the Court of Special Appeals, which reversed the Circuit Court's judgment. Court of Special Appeals held that CSRs packaging and shipping of asbestos to the Port had sufficient minimum contacts with Maryland so as to establish personal jurisdiction in Baltimore City. CSR appealed to the Court of Appeals.

Held: CSR has not, in the course of any of its contacts with Maryland, satisfied the purposeful availment requirement, and thus failed to attain sufficient minimum contacts with the State. Accordingly, the Court of Special Appeals holding is reversed and Baltimore City Circuit Court failed to establish personal jurisdiction over CSR.

This Court concluded that the Court of Special Appeals improperly held that CSR had sufficient minimum contacts with Maryland so as to establish personal jurisdiction because it incorrectly relied on *Kopke v. A. Hartrodt S.R.L.* In this case, the Wisconsin Court found sufficient minimum contacts when an Italian companys negligent loading of a truck injured a Wisconsin truck driver. This Court disagrees with the Wisconsin Court in

Kopke because cargo "introduced into the stream of commerce with the expectation that it will arrive in the forum [state], 629 N.W.2d at 675, is not sufficient to constitute purposeful availment in Maryland. Mere foreseeability that a defendant's products will enter the State and cause injury is insufficient. *Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

CSRs shipments of raw asbestos do not satisfy the purposeful availment requirement because CSR did not engage in significant activities in Maryland. CSR did not maintain a place of business in Maryland, nor was the company licensed to do business in the State. Further, respondents have not demonstrated that any agents of CSR conducted activities in Maryland; instead, CSR used the Maryland Port as a conduit in shipping asbestos to consumers located outside of the State. Additionally, CSR did not create continuing obligations with Maryland residents.

CSR's shipment of sugar did not satisfy the purposeful availment requirement. Respondents have not demonstrated that CSR shipped sugar to, or engaged in business with, any consumers in Maryland. Moreover, the Australian government controlled all facets of production and distribution. The role of the Australian government is tantamount to the unilateral activity of a third party, which does not suffice to demonstrate a defendant's purposeful availment.

Further, CSR's advertisements do not meet the standard of purposeful availment because CSR did not target its advertising efforts toward potential consumers in Maryland. CSR advertised in a general trade publication, and although it was foreseeable that such advertisements would be viewed in Maryland, that fact alone is not sufficient to establish jurisdiction. *Camelback Ski Corp. v. Behning*, 312 Md. 330 (1988).

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State of Maryland v. Isa Manuel Santiago, No. 14, September Term 2009, filed December 21, 2009, Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2009/14a09.pdf

CRIMINAL LAW & PROCEDURE - JURY VERDICTS - HEARKENING THE VERDICT

Facts: Isa Manuel Santiago was tried and convicted by a jury in the Circuit Court for Charles County for second degree murder and the use of a handgun in the commission of a crime of violence. The Court did not poll or hearken the jury, and Santiago failed to object to such action. Even though polling or hearkening of the jury never occurred, the trial judge accepted the jury's verdict and imposed a sentence of thirty years for second degree murder, twenty years consecutive for use of a handgun in the commission of a crime of violence, and five years consecutive for being a felon in possession of a regulated firearm.

Santiago appealed to the Maryland Court of Special Appeals. The Court of Special Appeals reversed the judgment of the Circuit Court, holding that a "criminal defendant has an absolute unwaivable right to have the jury polled, if requested, or if not, hearkened."

Held: This Court affirmed the Court of Special Appeals decision, holding that if the jury is not polled and the verdict is not hearkened, the jury's verdict is not properly recorded, and therefore, it is a nullity. The verdict does not become properly recorded until after the jury has expressed their assent either through harkening or polling.

The reason that hearkening, in the absence of polling, is required lies in the defendant's constitutional right to a unanimous verdict, and the concept of finality with respect to jury verdicts. To ensure the certainty and accuracy of a unanimous verdict, either polling the jury or hearkening the verdict is essential. Failure to comply with one of the two essential requirements is a reversible error. In the *Santiago* case, the jury was neither polled nor hearkened, and therefore, a new trial is warranted.

The State argues that the circumstances do not warrant a reversal because Santiago failed to request that the Court poll or hearken the jury. The State relies upon *Glickman v. State*,

190 Md. 516 (1948), which held that the defendant waived his right to claim that the jury was not properly hearkened because, at the time of the trial, the defendant made no objection to the failure to hearken. This Court expressly overrules *Glickman*. Thus, if a jury is not polled, the right to hearken the verdict cannot be waived.

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Thompson v. State, No. 126, September Term 2008, filed February 17, 2009. Opinion by Murphy, J.

http://mdcourts.gov/opinions/coa/2010/126a08.pdf

CRIMINAL PROCEDURE; EVIDENCE OF UNCHARGED CRIMINAL CONDUCT ENGAGED IN BY A DEFENDANT WHEN THE DEFENDANT WAS A JUVENILE; MARYLAND RULE 4-204; AMENDMENT TO A CHARGING DOCUMENT

Facts: Karl Lamont Thompson (Petitioner) was convicted in the Circuit Court for Baltimore City of second-degree rape and related offenses. Over Petitioner's objection, the Circuit Court permitted the victim to testify that she had been sexually abused as early as 1978, when she was "approximately five" and Petitioner was fourteen years old. Petitioner was never charged with any offenses stemming from this incident, either as a juvenile or an adult. The Circuit Court ruled that, because the 1978 incident involved acts by the defendant against the same victim and were of the same general nature, testimony about that "uncharged" juvenile misconduct was admissible under Md. Rule 5-404(b) as proof of "motive, opportunity, intent, common scheme, plan and absence of mistake or accident." The Circuit Court also amended the indictment at the close of the State's case on its own initiative, changing the period of time within which and the location at which the crimes occurred.

The Court of Special Appeals affirmed, rejecting Petitioner's argument that (1) CJ § 3-8A-23 prohibits the State from introducing evidence of criminal acts or wrongs committed by an adult defendant when he or she was a juvenile, and (2) that the amendments at issue changed "the character of the offenses charged" in violation of Md. Rule 4-204. The Court of Appeals issued a writ of certiorari to address two questions: (I) May evidence of the Petitioner's uncharged juvenile conduct be admitted in a criminal prosecution given that juvenile adjudications and the evidence therein are inadmissible; and (II) Does amending the indictment to charge that a crime occurred during a different time-frame and different location change the character of the sexual offense when multiple offenses are alleged?

Held: The Court of Appeals affirmed, holding that the evidence was properly admitted under Md. Rule 5-404(b), which codified the "sexual propensity" exception to the general rule excluding "other crimes" evidence. Pursuant to this exception,

the Court found that the record shows the Circuit Court was not clearly erroneous in finding that the offenses committed by Petitioner against the same victim had been proven by clear and convincing evidence and had special probative value, nor did the Circuit Court abuse its discretion in admitting that evidence on the ground that its probative value outweighed the danger of unfair "bad actor" prejudice. Further, the Court agreed with the Court of Special Appeals that "the purpose and plain language of § 3-8A-23 does not provide a basis for extending its application to the uncharged juvenile misconduct in this case," which was never "given" in a juvenile proceeding. Regarding the amendments, the Court held that they did not change the character of the offense. Date and location amendments do not substitute a different offense for any of the offenses charged in the indictment. Moreover, the record shows that the discovery provided to Petitioner by the State made it clear that the offenses occurred as later amended, resulting in no unfair prejudice.

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University of Maryland Medical System Corporation, et Al. V. Rebecca Marie Waldt, et Al., No. 130, September Term, 2008, filed November 10, 2009, opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2009/130a08.pdf

MEDICAL MALPRACTICE – STANDARD OF CARE – EXPERT WITNESS – INFORMED CONSENT – OFFER OF PROOF

Facts: When Rebecca Marie Waldt underwent a procedure to treat an aneurysm in her brain the procedure caused bleeding in her brain, resulting in a stroke and extensive physical and mental impairment. The Waldts argue that Petitioners, Dr. Gregg Zoarski and the University of Maryland Medical System's ("UMMS") care and treatment of Mrs. Waldt did not conform to the proper standard of care and the medical providers did not properly obtain Mrs. Waldt's informed consent before performing the procedure.

The trial judge excluded testimony on the standard of care and informed consent by the Waldts' expert witness, Dr. Debrun, finding that Dr. Debrun did not meet the minimum requirements for an expert witness as set forth by Md. Code (1974, 2006 Repl. Vol.), § 3-2A-04(b)(4) of the Courts & Judicial Proceedings Article ("the 20 Percent Rule"). Dr. Debrun was also prevented from giving expert testimony on the informed consent claim because the trial judge determined that the witness did not have sufficient experience with the specific procedure to be qualified as an expert.

The intermediate appellate court reversed the trial court's finding that Dr. Debrun did not meet the requirements for an expert witness. Dr. Zoarski and UMMS filed a petition for writ of certiorari for this Court to review the intermediate appellate court's decision concerning Dr. Debrun's qualification as an expert on the standard of care. The Waldts filed a cross-petition for review of the Court of Special Appeals' decision on Dr. Debrun's exclusion as an expert on the informed consent claim.

The relevant portion of § 3-2A-04(b)(4) of the Courts & Judicial Proceedings Article states that an expert "may not devote annually more than 20 percent of the expert's professional

activities to activities that directly involve testimony in personal injury claims." To determine whether an expert is qualified to testify under this requirement we must identify those activities that "directly involve testimony in personal injury claims" and then divide it by those activities that comprise the body of "professional activities" in general.

The "20 Percent Rule" itself does not state the set of activities that qualify as "professional" and no other provision in the code provides a definition. We hold that, for an individual's activities to qualify as "professional activity," the activity must contribute to or advance the profession to which the individual belongs or involve the individual's active participation in that profession. In classifying "professional activities," a distinction must be drawn between the hours spent furthering one's profession versus the hours spent on personal or leisurely pursuits. Further, § 3-2A-02(c)(2)(ii)(A) of the Courts & Judicial Proceedings Article requires expert witnesses in medical malpractice cases to have gained this "professional activity" *within 5 years* of the date of the alleged act or omission giving rise to the cause of action in which testimony is given. This "Five Year Rule" demonstrates that *current* clinical or education work is not required — the witness merely must have had such experience within five years of the incident in question.

The Waldts were unable to offer information beyond Dr. Debrun's limited experience with similar procedures and Dr. Debrun's knowledge about the material risks of the neuroform stent coiling procedure. The only proffer by the Waldts regarding substantive testimony of Dr. Debrun was that the neuroform stent device was not approved for use on Mrs. Waldt's type of aneurysm.

Held: This Court's analysis shows Dr. Debrun devoting 20.66% of his professional time to activities directly involving testimony. Dr. Debrun therefore does not satisfy the 20 Percent Rule and was properly prevented from giving testimony regarding the standard of care. We, therefore, reverse the judgment of the intermediate appellate court and hold that Dr. Debrun was not qualified to testify as to the standard of care pursuant to the 20 percent rule.

Maryland Rule 5-702 makes it within the discretion of the trial judge to qualify witnesses as experts and the trial judge

ruled that Dr. Debrun’s proposed testimony did not satisfy the foundational requirements to render an opinion on informed consent. Dr. Debrun’s intended testimony concerning the approved uses of the neuroform stent did not address the issue of informed consent because it did not include testimony concerning the material risks of the procedure. We, therefore, agree with the intermediate appellate court that no testimony was proffered concerning the material risks of the procedure that would make out a *prima facie* case for informed consent.

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Maryland-National Capital Park and Planning Commission, et al. v. Greater Baden-Aquasco Citizens Association, et al., No. 19, September Term 2009, filed 23 December 2009. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2009/19a09.pdf

ZONING - PLANNING - SUBDIVISION - WHERE THE LOCAL SUBDIVISION REGULATIONS REQUIRE THAT A DETERMINATION BE MADE AT THE TIME OF APPROVAL OF A PRELIMINARY SUBDIVISION PLAN APPLICATION PROPOSING DWELLING UNITS THAT IT CONFORMS TO THE APPLICABLE MASTER PLAN (AND THE MASTER PLAN STATES THAT IT IS IN ACCORDANCE WITH THE GENERAL PLAN), THE PLANNING BOARD MUST CONSIDER THE NUMERIC RESIDENTIAL GROWTH OBJECTIVE STATED IN THE APPLICABLE PLAN WHEN ACTING ON THE APPLICATION.

Facts: A developer applied to the Prince George's County Planning Board of the Maryland-National Capital Park and Planning Commission (the "Planning Board" or the "Commission") for approval of a preliminary subdivision plan ("the Preliminary Plan") proposing 20 single-family detached residential lots on 118.30 acres located east of Md. Rte. 301 in southern Prince George's County ("the County"). The subject property is located in a portion of the County designated as the Rural Tier, as defined by the 2002 Approved Countywide General Plan (the "General Plan"). The General Plan contains a growth objective for the Rural Tier, in addition to the remaining parts of the County designated either as being in the Developed Tier, or the Developing Tier. The growth objective of the General Plan provides that 33 percent of the county's residential growth over the next 25 years should be located in the Developed Tier, 66 percent in the Developing Tier, and one percent in the Rural Tier.

The Planning Board held a public hearing to consider the Preliminary Plan. Initially, the Board heard testimony from two members of the Commission's Subdivision Section Technical Staff, who recommended approval of the Preliminary Plan, but without making reference to (or analyzing the potential impact of the Preliminary Plan on) the General Plan's growth objective in the Rural Tier. A neighbor to the subject property, Joanne Flynn, next testified (in opposition to approval of the Preliminary Plan), in individual and representative capacities, with regard to the General Plan's restrictive numeric residential growth objective as it relates to the alleged "excessive" current

residential growth experienced in the Rural Tier and its relation to the Preliminary Plan.

The Planning Board approved the Preliminary Plan in a Resolution, which mentioned the 2002 General Plan, but did not address its numeric growth objective. The Resolution stated "[t]his application is not inconsistent with the 2002 General Plan Development Pattern Policies for the Rural Tier."

The Greater Baden-Aquasco Citizens Association and eight individual area residents (collectively, the "Citizens") sought judicial review in the Circuit Court for Prince George's County. The Circuit Court, finding that the Planning Board did not articulate findings of fact with regard to conformance with all relevant recommendations of the General Plan and the applicable Area Master Plan and that there was not substantial evidence in the record to support the Planning Board's conclusion that the Preliminary Plan conformed with the General and Master Plans, remanded the case to the Planning Board for further consideration of the General Plan numeric growth objective.

The Planning Board and the Developer filed a timely appeal to the Court of Special Appeals, complaining about the remand because consideration by the Planning Board of the pertinent land use planning issue, a numeric residential growth objective, was not required. The Court of Special Appeals affirmed the judgment of the Circuit Court in an unreported opinion. The intermediate appellate court interpreted its opinion in *Archers Glen Partners, Inc. v. Garner*, 176 Md. App. 292, 933 A.2d 405 (2007), *aff'd on other grounds*, 405 Md. 43, 949 A.2d 639 (2008), a case involving a different preliminary subdivision plan application for residential development within the Rural Tier of the County, to hold that the General Plan's numeric residential growth objective was "binding" on the Planning Board. Because the Planning Board did not consider the numeric growth objective in the present case in its Resolution or in its deliberations, the court concluded that there was not substantial evidence that the application conformed with the Master Plan and the General Plan. The court also concluded that Flynn's testimony generated a material issue as to the proposed subdivision's conformance with the numeric growth objective. As additional grounds for affirmance of the Circuit Court, the court opined that the Planning Board's "verbatim recitation" of the written Technical Staff Report and recommendation in the Board's Resolution was the functional equivalent of stating 'the Planning Board agrees with everything

in the Staff Report' and concluding the matter at that point. The intermediate appellate court found that such an approach did not constitute meaningful fact-finding where the Staff Report does not articulate clearly the requisite relationship between the facts and the law. The Court of Appeals granted the Commission's Petition for a Writ of Certiorari, 407 Md. 529, 967 A.2d 182 (2009).

Held: Affirmed. The Court of Appeals held that the Planning Board must consider the numeric residential growth objective when determining whether to approve or reject a preliminary subdivision plan. The Court first reviewed the role of land use plans generally in the land use approval processes. The terms "Master Plan" and "General Plan" do not possess universal meanings and often are used interchangeably and are frequently conflated in the broad term "comprehensive plan." Generally, a comprehensive plan is described as a general plan to control and direct the use and development of property in a locality, or a large part thereof, by dividing it into districts according to the present and potential use of the properties. Many states, including Maryland, require that zoning and land development be accomplished, to one degree or another, in accordance with a comprehensive plan.

The Court then reviewed the statutory framework for the role of comprehensive plans in Montgomery and Prince George's counties. The Commission is authorized, at the discretion of the District Council of each county, to create a general plan for the entire Regional District.[1] Art. 28, § 7-108(a)(1)(i). The District Council may also direct the Commission to prepare a master plan for each planning area in the district. *Id.* 7-108(b)(1)(iii). Master plans differ from General Plans in that master plans govern a specific, smaller portion of the County (or a discrete element of land use, such as historic sites) and are often more detailed in their recommendations than the countywide General Plan as to that same area or topic. The District Council for Prince George's County and the Commission, in reliance on the applicable statutory provisions, have created both local or special element master plans and a general plan.

[1]The Regional District is those areas of Montgomery and Prince George's counties subject to the Commission's authority. Art. 28, § 7-102.

The Court next reviewed the various land use plans that bear on the subject property of the Preliminary Plan in this case. The Court first described the 2000 Biennial Plan (the "Biennial Plan"), which had as its fundamental recommendation the creation of the growth tier development pattern designations. With regard to the Rural Tier, the objective was to slow dwelling unit growth to 0.75 percent of total Countywide dwelling unit growth over the next 20 years. The 2002 General Plan superceded the Biennial Plan. The General Plan adopted the growth structure of the Biennial Plan, but increased the numeric growth objective from less than 0.75 percent to a goal of capturing less than 1 percent of the County's dwelling unit growth in the Rural Tier.

The subject property is located in the Subregion VI Study Area of the County. The Subregion VI Study Area is subject to an area master plan adopted and approved by the District Council in 1993. Unlike the General Plan, the Master Plan does not contain expressly a textual objective or goal expressed as a percentage of countywide residential growth that should occur within the Rural Tier within Subregion VI. The Master Plan, however, states that its provisions are meant to be "generally" consistent with the General Plan. The goal of the Subregion VI Master Plan (the "Master Plan") is to preserve the rural character of the Subregion VI Study Area.

Article 28, § 7-115(a)(1) of the Maryland Code, (1957, 2003 Repl. Vol.) requires that any subdivision of land within the regional district be approved by the Commission. Sections 7-116 and 7-117 require the Commission to apply the subdivision regulations enacted by the District Council (as the County Council is called when making zoning and land use planning decisions pursuant to § 8-110). Section 24-121(a)(5) of the County's subdivision regulations provide that a proposed subdivision plat shall conform to the area master plan.

In the context of subdivision matters, it is well established that the recommendations of a master plan may be binding to the extent there is a statute, regulation, or ordinance requiring that a proposed subdivision conform to the master plan. In *Coffey v. Md.-Nat'l Capital Park and Planning Comm'n*, 293 Md. 24, 441 A.2d 1041 (1982), the Court held that when subdivision regulations require that a proposed subdivision comply with the master plan, an application for approval of a preliminary subdivision plan that fails to so comply must be rejected.

The Court found persuasive the reasoning of the Court of Special Appeals's opinion in *Archers Glen Partners, Inc. v. Garner*, 176 Md. App. 292, 933 A.2d 405 (2007), *aff'd on other grounds*, 405 Md. 43, 949 A.2d 639 (2008), where a member of the Planning Board's Technical Staff made specific mention of the numeric growth objective (and the Preliminary Plan's consistency with it) at the hearing on a preliminary subdivision plan application. The intermediate appellate court resolved that the General Plan's countywide goals, policies, plans, objectives, and strategies, including growth objectives, amended partially the relevant Master Plan in that case. Specifically, the court found that, based on the fact that the Master Plan states that it is intended to be in accordance with the General Plan, the Master Plan must be consistent and compatible, and to the extent it is not, the General Plan prevails. The court concluded that the evidence presented at the Planning Board hearing was sufficient to support the Board's approval of the preliminary subdivision plan. In the present case, the Court of Appeals agreed generally with the Court of Special Appeal's reasoning in *Archers Glen* and held that the numeric residential growth objective regarding the Rural Tier in the General Plan amended and was incorporated into the Master Plan. Pursuant to the County's subdivision regulations, before the Planning Board approves a preliminary subdivision plan, it must conclude that the application conforms to the applicable Master Plan. In reaching that conclusion, the Planning Board must consider the numeric residential growth objective of the General Plan.

The Commission argued that approval of a preliminary subdivision plan is not tantamount to final approval of dwelling unit growth or that actual construction pursuant to an approved subdivision plan is inevitable. The Court agreed, but determined that subdivision approval, however, is a necessary and critical step towards approval and construction of a residential subdivision. A final plan of a subdivision, once approved and recorded, usually determines the maximum number and type of dwelling units that may be allowed to be erected on a subject property. Therefore, it is necessary that the Planning Board at least account for how, if at all, the proposed subdivision might affect the residential growth objective in the Rural Tier.

The Planning Board, after balancing and considering all elements, is in the best position to determine whether the preliminary subdivision plan conformed to the County's plans. Unlike what the Planning Board did in considering the numeric

growth objective in its second hearing in *Archers Glen*, the Planning Board here did not consider any bearing the Preliminary Plan might have on the growth objective in the Rural Tier. Although the Court typically accords deference to the administrative body that interprets regularly the regulations applicable to the task before it, here the Planning Board did not even consider in its conformity analysis a relevant and applicable provision of the Master Plan/General Plan, as required by the County Subdivision Regulations. The Court determined that the Board's conclusion that the application was "not inconsistent with the 2002 General Plan Development Pattern policies for the Rural Tier" was a broad conclusory statement and not based on sufficient facts in the record. Therefore, it was not entitled to deferential review.

Although the Court affirmed the Court of Special Appeals's judgment in the present case, its holding was more narrow than that expressed in the intermediate appellate court's opinion. The Court of Appeals did not subscribe to the view that the Planning Board did not engage in otherwise meaningful fact-finding because its Resolution approving the Preliminary Plan was a "rote repetition" of the Technical Staff Report. It is not unreasonable for the Planning Board to rely on a Staff Report, as the Planning Board did in this case, if the Staff Report is thorough, well conceived, and contains adequate findings of fact.

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COURT OF SPECIAL APPEALS

Michelle Parham v. Department of Labor, Licensing & Registration, et al., No. 986, September Term, 2008. Opinion filed on December 30, 2009 by Kenney, J. (retired, specially assigned).

http://mdcourts.gov/opinions/cosa/2009/986s08.pdf

ADMINISTRATIVE LAW – EVIDENCE

Facts: A hearing examiner for the Department of Labor, Licensing & Regulation ("DLLR") found that appellant had left her employment voluntarily and, therefore, was not entitled to unemployment benefits. Appellant appealed to the DLLR Board of Appeals ("the Board"), which adopted the hearing examiner's findings of fact and affirmed his decision to deny her benefits. The Circuit Court for Baltimore City affirmed the decision of the Board on July 1, 2008. Appellant appealed that decision to this Court, asking whether the hearing examiner's finding and conclusion that she had voluntarily quit her job, which was adopted by the Board, was supported by competent, material, and substantial record evidence.

Held: The hearsay evidence relied upon by the hearing examiner directly contradicted an employee disciplinary form, submitted to the hearing examiner by the employer, which indicated that appellant was terminated and had not voluntarily left her employment. Hearsay evidence is admissible in administrative hearings, but, when it is relied upon to support the administrative decision, it must be competent, material, and substantial" evidence in light of the record as a whole. The judgment was reversed and remanded to the circuit court with instructions to remand further to the Board with directions to reverse the denial of unemployment benefits to appellant.

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Ross v. Mr. Lucky, LLC, No. 518, September Term, 2008, filed December 29, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/518s08.pdf

ADMINISTRATIVE LAW - ZONING AND PLANNING - CONSTITUTIONAL LAW - DUE PROCESS - RIGHT OF CROSS-EXAMINATION.

Facts: Mr. Lucky, LLC, the appellee, filed a site plan application with the Calvert County Department of Planning and Zoning ("DPZ") reflecting planned improvements to commercial real property it owned in Calvert County. The property, known as the "Tiki Bar," includes an outdoor tavern, a restaurant building, a former motel, as well as retail buildings. The proposed improvements to the property focused on developing its "Tiki Village" theme by adding features that would create a tropical beach setting in the outdoor patron area. The DPZ denied the application, prompting Mr. Lucky to appeal to the Calvert County Board of Appeals ("Board").

The Board bifurcated the matter and held *de novo* hearings in each case. This appeal arose from the Board's decision in the second of the two cases, which approved a substantial portion of Mr. Lucky's site plan application.

Ross, the appellant, and an owner of property bordering the Tiki Bar, appeared at the hearing in the second case and sought to intervene as a party. Ross also asked to cross-examine Mr. Lucky's witnesses. The Board denied both requests.

After Mr. Lucky called its first witness, Ross again asked for permission to conduct cross-examination. The Board Chairman denied the request and made it clear that no cross-examination would be permitted. Ross was allowed to give testimony and enter documents into evidence, and he was subject to cross-examination by counsel for Mr. Lucky.

Ross petitioned for judicial review on the ground that he was constitutionally entitled to cross-examine Mr. Lucky's witnesses.

Held: Reversed. In an adjudicative proceeding before an administrative agency such as the Board, due process affords interested parties a reasonable right to cross-examine witnesses upon request. Ross was made a party to the proceeding by his

appearance and testimony at the hearing, and he was therefore entitled to cross-examine Mr. Lucky’s witnesses upon his timely request to do so. The alternative procedure provided by the Board, which allowed protestants to call the applicant and the applicant’s witnesses and examine them, was not the equivalent of cross-examination. The Board erred and abused its discretion by denying the protestant’s request to cross-examine in an adjudicatory hearing.

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James Riffin v. Circuit Court for Baltimore County, et al., Sept. Term, 2008, No. 2939, filed January 5, 2010. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2010/2939s08.pdf

APPEAL AND ERROR - INJUNCTIONS - PRE-FILING ORDER

INJUNCTIONS - VEXATIOUS OR FRIVOLOUS LITIGANT - PRE-FILING ORDER

CONSTITUTIONAL LAW - DUE PROCESS - VEXATIOUS OF FRIVOLOUS LITIGANT - PRE-FILING ORDER

Facts: In response to a letter from Baltimore County's Office of Law, the Circuit Court for Baltimore County declared appellant to be a "frivolous" or "vexatious" litigant, who must seek leave from the administrative judge before filing "any pleadings." The circuit court did so without affording appellant an opportunity to respond to the letter.

Held: Order vacated. Case remanded for further proceedings. Appellees argued that the order was not presently appealable. The Court of Special Appeals concluded that the order was a sua sponte injunction authorized by Md. Rule 16-602(b) and thus, appealable under Md. Code (1973, 2006 Repl. Vol.), § 12-303(3)(i) of the Courts and Judicial Proceedings Article. The Court went on to agree with the unanimous holdings of federal and state authorities that due process requires notice to the alleged frivolous or vexatious litigant and an opportunity for him to be heard before the issuance of a pre-filing order. However, the Court declined to decide whether such an order is warranted in this case. The Court left that issue for the circuit court to decide after satisfying due process.

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Michael A. Freedman v. Comcast Corp., et al., No.'s 435 & 2102, filed January 28, 2010. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2010/435s08.pdf

ARBITRATION – WAIVER OF ARBITRATION – UNCONSCIONABLE AGREEMENT

Facts: Appellant, Michael A. Freedman ("Freedman") was a longtime customer of appellees (collectively, "Comcast"). Freedman claimed that on several occasions before and after becoming a customer, he dialed Comcast's toll-free number and did not hear the well-known warning that his phone call might be recorded for security or training purposes. According to Freedman, Comcast recorded these conversations in violation of the Maryland Wiretapping and Electronic Surveillance Act. In May 2007, Freedman received a bill insert that notified him of changes to the Comcast service agreement, including notice of a new arbitration provision. Freedman paid the bill containing this insert and did not choose to opt out within the allotted time. Freedman filed his original complaint and moved for a temporary restraining order ("TRO"). Comcast opposed the TRO and noted its right and intent to arbitrate, but acknowledged that the Arbitration Provision may allow Freedman to seek injunctive relief to maintain the status quo. The circuit court denied Freedman's TRO motion. Comcast then filed a motion to compel arbitration and stay or dismiss the complaint, as well as a separate motion to dismiss or for summary judgment, which reasserted Comcast's right and intent to arbitrate the dispute. That day, Comcast also filed notice of removal to federal court, which effort later failed. On remand, the circuit court granted Comcast's motion to dismiss for failure to state a claim and denied Comcast's motion to compel arbitration. Freedman twice amended his complaint, and each time Comcast moved to dismiss and to compel arbitration, maintaining its right and intent to arbitrate the dispute. Comcast did not seek summary judgment in these subsequent motions. The circuit court ultimately denied Comcast's motion to dismiss but granted Comcast's motion to compel arbitration and stayed the case. Freedman then timely noted this appeal.

Held: Affirmed. The parties agreed to arbitrate all disputes arising from their "relationship." Although at least one call Freedman made as a non-customer allegedly subjected him to illegal activity, it was part of the parties' relationship and subject to their arbitration agreement. Comcast did not waive

arbitration by: 1) opposing Freedman's motion for a temporary restraining order; 2) filing an alternative motion for summary judgment in conjunction with one of three motions to dismiss; 3) asking the court to instruct the arbitrator to hear Freedman's claims on an individual, rather than class, basis; and 4) seeking to remove the case to federal court. The arbitration agreement was not substantively unconscionable where it: 1) required that the arbitrator decide the "validity, enforceability and scope" of the agreement; 2) required that the arbitrator apply the rules of the agreement where they conflict with the arbitrator's rules; 3) required the arbitrator to enforce the agreement as written; 4) required one party to reimburse the other's fees and expenses in the case of an overturned award; 5) acknowledged that the arbitration may include only limited discovery; and 6) was enforceable only if a class action waiver clause was also legal and enforceable.

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Keith Allen Washington v. State of Maryland, Nos. 00663 & 02470, September Term 2008, filed January 29, 2010, Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2010/663s08.pdf

CRIMINAL LAW - EVIDENCE - FAILURE TO REGISTER AS A SEX OFFENDER AS PROBATIVE OF CHARACTER FOR TRUTHFULNESS & PRESENT SENSE IMPRESSION

Facts: On January 24, 2007, Keith Washington shot Brandon Clark and Robert White, while they attempting to deliver furniture to his home. Clark died approximately two weeks later from complications due to the gunshot wounds. Washington was indicted on numerous charges arising out of the shooting and, after a jury trial, was convicted of involuntary manslaughter - unlawful act, two counts of first degree assault, two counts of use of a handgun in commission of a felony or crime of violence, and attempted second degree murder. Washington's defense at trial was that he shot Clark and White in self-defense after they attacked him in his home.

The State's key witness was White, a convicted sex offender in the state of South Carolina. Although Mr. White did not live in Maryland, he worked in Maryland and, thus, was required to register as a sex offender with the State of Maryland within 14 days of commencing employment within the State. *See* MD. CODE ANN. CRIM. PROC. § 11-705(b)(3)(i) (2008). White had been delivering furniture in Maryland for approximately three weeks prior to the events at appellant's residence and had not registered as a sexual offender in Maryland at the time of the shootings. At the time of Washington's trial, White had not been charged with failure to register as a sex offender. At an *in limine* hearing on the matter White testified that he had no expectations regarding how the State might treat his failure to register in light of his testimony at Washington's trial. The trial court prohibited Washington from cross-examining White regarding his failure to register as a sex offender.

Prior to White's taking the stand, the State requested that the trial court rule whether a statement made by Brandon Clark to White to the effect that appellant was "looking for a fight" was admissible under Maryland Rule 5-803(b)(1) as a statement of Clark's present sense impression. The trial court indicated the statement was admissible under as a present sense impression.

Held: The Court of Special Appeals affirmed the convictions. Maryland Rule 5-608(b) provides for impeachment of a witness by examination regarding the witness's own prior conduct not resulting in convictions. Even if impeachment evidence is otherwise admissible, the trial court must also exercise its discretion to determine if the probative value of the evidence outweighs its prejudicial effect. In light of the facts of this case, the trial court did not abuse its discretion in excluding the evidence.

Maryland Rule 5-803(b)(1) excepts present sense impressions from the hearsay rule, allowing admission of statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Md. Rule* 5-803(b)(1). A statement of present sense impression is admissible if (1) the time interval between observation and utterance is very short or the statement is accompanied by a "special corroborative circumstance;" (2) there must be proof that the declarant spoke with personal knowledge and (3) the statement must be factual or may be a shorthand rendition of the facts, but must not be an opinion.

In this case, the trial court did not err in admitting the statement of the deceased victim, to the surviving victim, that Washington was "looking for a fight," uttered moments after a conversation between Clark and Washington. While there was a brief delay between Clark's conversation with Washington and Clark's statement to White, White's own testimony regarding his first-hand observations of Washington's behavior prior to the shootings constituted a "special corroborative circumstance." The statement was unquestionably based upon Clark's personal knowledge and the phrase "looking for a fight" was held to be a short- hand description of Washington's demeanor.

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State v. Faulkner, No. 862, September Term, 2009, filed January 5, 2010. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2010/862s09.pdf

CRIMINAL LAW - FOURTH AMENDMENT – CRIMINAL PROCEDURE – SUPPRESSION OF EVIDENCE OBTAINED PURSUANT TO A SEARCH WARRANT – STATE'S APPEAL FROM SUPPRESSION ORDER – SUBSTANTIAL BASIS FOR ISSUING JUDGE'S FINDING OF PROBABLE CAUSE – EVIDENCE ESTABLISHING NEXUS BETWEEN SUSPECT'S HOME AND DRUG TRAFFICKING ACTIVITY – GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

Facts: Baltimore City police detectives received information from a confidential informant that the appellant was selling drugs out of a store he operated in the city. During the ensuing month-long investigation, police observed the appellant engage in three drug transactions, two of which were controlled buys. The appellant was seen using two different vehicles over the course of the three drug sales. Police also discovered that the appellant maintained two residences in the city, one of which he listed on his driver's license, and a second for which he paid the gas and electric bill and frequently returned to at night.

The appellant's pattern of travel, as observed by police during their investigation, took him from his store, to the drug sales, back to the store, and to his second house using the same vehicles he used for the drug sales. Detectives seeking a search warrant for the second house opined in their application that drug dealers will often maintain evidence of their illegal activity in their homes and will often use more than one address to facilitate their drug trafficking activities.

The circuit court granted the appellant's motion to suppress evidence recovered from the second home. The circuit court reasoned that there was no basis for a finding of probable cause or to conclude that the detectives acted in good faith in executing the warrant because the affidavit supporting the warrant application presented no link between the appellant's drug dealing and his second residence.

Held: Order vacated and case remanded for further proceedings. Nexus between the appellant's drug dealing activity and his second house was sufficient to give the issuing judge a substantial basis for his finding of probable cause to search the home. Although a suspect's mere status as a drug dealer will not

by itself support the issuance of a warrant to search the home in Maryland, the observations documented by the detectives in this case sufficiently linked the appellant’s drug dealing to his second home. Thus, it was reasonable for the issuing judge to infer that drug-related evidence would be found at that location.

In the alternative, the warrant for the second house was executed in good faith. The detectives could reasonably have believed the warrant was validly issued based on the information they supplied in the affidavit.

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Stokeling v. State, No. 1126, September Term, 2008, filed December 30, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/1126s08.pdf

<u>CRIMINAL LAW - FOURTH AMENDMENT – PROCEDURE – CANINE SNIFF OF LAWFULLY STOPPED VEHICLE – *TERRY* FRISK OF PASSENGER – PROBABLE CAUSE TO ARREST FOR POSSESSION OF ILLEGAL DRUGS.</u>

<u>Facts</u>: The appellant was the front seat passenger in a vehicle lawfully stopped for a traffic violation. The officer who initiated the stop immediately called for a K-9 unit, which arrived within minutes. (There was no contention of any delay). The canine sniff was conducted with the driver and the two passengers still in the car. The dog alerted to the presence of drugs in the vehicle. The occupants were then removed from the car. The dog was not used to sniff the occupants individually because of the risk the dog might inadvertently harm them if it were to detect concealed contraband.

The appellant appeared very nervous during the course of the stop. When an officer asked why he was shaking, he said he was cold even though it was a hot August night. An officer conducted a *Terry* frisk of the appellant for weapons, during which the appellant refused to take a wide stance to allow a full pat-down of his crotch area. The officer felt "a bag of something" in the appellant's crotch area. The contents of the bag was not immediately identifiable as contraband.

After patting down the remaining occupants, officers searched the interior of the vehicle and found drug residue in two locations. The appellant was placed under arrest and transported to the police station for a strip search. Before the search was conducted, he informed the officers that he was carrying a bag of marijuana in his crotch area, and he reached into his pants and removed the bag.

The appellant subsequently moved to suppress the evidence. His motion was denied, and he was later convicted of possession of marijuana.

<u>Held</u>: Affirmed. Considering the totality of the circumstances, there was probable cause to believe the appellant was in possession of illegal drugs and therefore to arrest him after the *Terry* frisk. Those circumstances were that a drug

sniffing dog alerted to the car the appellant was traveling in; the appellant's explanation for his nervousness was not believable; the appellant was not cooperative in allowing the pat-down of his crotch area; a bag containing something was felt in his crotch area; and the *Carroll* doctrine search of the car uncovered drug residue near where the appellant had been seated. It was not necessary to answer the appellant's argument that the K-9 alert by itself did not supply probable cause to arrest and search him, as a non-owner passenger of the vehicle.

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Larry Livingston Joseph v. State of Maryland, No. 1477, September Term, 2008. Opinion filed on February 1, 2010 by Kenney, J. (retired, specially assigned).

http://mdcourts.gov/opinions/cosa/2010/1477s08.pdf

CRIMINAL LAW – TRIAL Rule 4-215(e)

Facts: At a motions hearing, on the eve of appellant's murder trial, the prosecutor informed the Circuit Court for Baltimore City that appellant had "stated something to [him] about the release of his counsel." The court immediately responded: "That's not going to happen." Then, without asking appellant if or why he wanted to release his counsel, the court told appellant that, if he did so, he would have to represent himself or retain a new attorney by the next morning because the trial was not going to be postponed. Appellant elected to retain his counsel. At the end of the motions hearing the issue was raised again, this time by defense counsel. The court again stated that if appellant wanted to release his counsel, he would have to retain new counsel by the next morning. At no time did the court inquire as to appellant's reasons for wanting to release his counsel.

Appellant contended that his convictions "must be reversed because the trial judge violated the explicit requirements of Maryland Rule 4-215(e)," regarding the possible discharge of his defense counsel. In support of that contention, he argued that the prosecutor's statement to the court,"albeit somewhat indirect, was certainly sufficient to" invoke the requirements of Rule 4-215(e) and that the circuit court violated the rule because it failed to ask "his reasons for wanting to discharge counsel."

Held: A prosecutor's pre-trial statement to the court relating to a defendant's possible desire to discharge counsel was sufficient to invoke the protections afforded by Rule 4-215(e), which is "designed to protect both the right to counsel and the right to self-representation and ensures that decisions to waive counsel would pass constitutional muster." *State v. Campbell*, 385 Md. 616, 629 (2005). The State's position that Rule 4-215 could only be triggered by a defendant himself or by his counsel indicating a defendant's desire to discharge defense counsel was rejected. The case law suggests that all that is required to invoke the rule and the concomitant inquiry from the court is that the court be put on notice of a defendant's desire to possibly discharge counsel, which clearly happened here. The circuit

court’s immediate and negative reaction to even the suggestion that appellant might want to discharge his counsel, excused appellant for not pressing the issue further.

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Scapa Dryer Fabrics, Inc., et al. v. Carl L. Saville, No. 540, September Term, 2008, filed December 29, 2009. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2009/540s08.pdf

TORTS - SUBSTANTIAL CONTRIBUTING FACTOR CAUSATION—ADMISSIONS—JUDGMENT NOTWITHSTANDING THE VERDICT—MARYLAND RULE 2-532—JOINT TORT-FEASORS—MARYLAND RULE 2-419—PREDECESSOR IN INTEREST—DUTY TO WARN

Facts: Appellee Carl L. Saville brought suit in the Circuit Court for Baltimore City against several asbestos manufacturers, alleging that his exposure to their asbestos-containing products caused his mesothelioma and carcinoma and that they negligently failed to warn him of their dangerous products. Saville worked at a paper mill as a "broke hustler" responsible for cleaning dryer felts. Appellant Scapa Dryer Fabrics supplied dryer felts, some of which contained asbestos and were in use for approximately 13 months between 1968 and 1970, on the machine where Saville was stationed. Appellant Wallace & Gale installed and repaired asbestos insulation in Saville's vicinity. Saville provided expert medical testimony that the dust was a substantial contributing factor to his later-diagnosed mesothelioma and lung cancer. Saville also introduced expert testimony that manufacturers of products containing asbestos had reason to know of the material's hazards by the 1950's. Saville settled with three defendants and proceeded to trial against Scapa and Wallace & Gale, who brought cross-claims against the settling defendants and alleged that they were joint tort-feasors. After a jury trial of the claims and cross-claims, the jury found Scapa and Wallace & Gale liable to Saville and found the settling defendants not liable. Wallace & Gale moved for judgment notwithstanding the verdict on Saville's original claims, and both Wallace & Gale and Scapa moved for judgment notwithstanding the verdict on their cross-claims. The trial court denied these motions.

Held: The Court of Special Appeals affirmed the judgment of the Circuit Court for Baltimore City. The evidence, taken in a light most favorable to Saville, was sufficient to support a jury verdict under the frequency, regularity, and proximity of exposure test of substantial contributing factor causation. This verdict did not contradict the jury's cross-claims verdict because much of the cross-claim evidence came from Saville's admissions and answers to interrogatories, which were not

binding on the cross-defendants. Scapa and Wallace & Gale did not meet the JNOV prerequisites of Maryland Rule 2-532 because they did not move for judgment during trial, even though this was by agreement with Saville. Scapa failed to prove that payments from asbestos settlement trusts were contributions from joint-tortfeasors where there was no evidence of the trusts' distribution procedures or that Saville actually received the payments alleged. Wallace & Gale's notice that deposition testimony would be introduced was not "due notice" under Maryland Rule 2-419(a)(3), which requires notice of the deposition's taking. Deposition testimony was also inadmissible against Wallace & Gale under Rule 2-419(c) because other "insulation-contractor defendants" present at the deposition had different motives to develop testimony and therefore were not predecessors in interest. Whether the duty to warn extended beyond the time of Saville's exposure to Scapa's product is a question of fact, and post-exposure documents were relevant to establish that duty.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated February 1, 2010, the following attorney has been disbarred by consent from the further practice of law in this State:

ISAIAH DIXON, III

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By a Per Curiam Order of the Court of Appeals of Maryland dated February 9, 2010, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

FRANK M. COSTANZO

*

By an Opinion and an Order of the Court of Appeals of Maryland dated February 17, 2010, the following attorney has been indefinitely suspended from the further practice of law in this State:

RICHARD J. HAAS

*

JUDICIAL APPOINTMENTS

On January 28, 2010, the Governor announced the appointment of the HON. VIDETTA A. BROWN to the Circuit Court for Baltimore City. Judge Brown was sworn in on February 16, 2010 and fills the newly created position by the General Assembly.

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On January 28, 2010, the Governor announced the appaointment of KENDRA Y. AUSBY to the Circuit Court for Baltimore City. Judge Ausby was sworn in on February 17, 2010 and fills the vacancy created by the retirement of the Hon. John C. Themelis.

*

On January 28, 2010, the Governor announced the appointment of CHARLES J. PETERS to the Circuit Court for Baltimore City. Judge Peters was sworn in on February 17, 2010 and fills the vacancy created by the retirement of the Hon. Charles G. Bernstein.

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On January 28, 2010, the Governor announced the appointment of STEPHEN J. SFEKAS to the Circuit Court for Baltimore City. Judge Sfekas was sworn in on February 19, 2010 and fills the vacancy created by the retirement of the Hon. John M. Glynn.

*

On January 28, 2010, the Governor announced the appointment of LAURA S. KIESSLING, to the Circuit Court for Anne Arundel County. Judge Kiessling was sworn in on February 19, 2010 and fills the vacancy created by the retirement of the Hon. Michael E. Loney.

*

On January 28, 2010, the Governor announced the appointment of RONALD H. JARASHOW to the Circuit Court for Anne Arundel County. Judge Jarashow was sworn in on February 27, 2010 and fills the newly created position by the General Assembly.

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