Amicus Curiarum

VOLUME 26
ISSUE 3 MARCH 2009

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

120 West Fayette Street LLLP v. Mayor and City Council of Baltimore et al., No. 49, September Term, 2008, filed February 9, 2009, opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2009/49a08.pdf

CONSTITUTIONAL LAW - TAXPAYER STANDING - MARYLAND RULE 2-322(c)– PROPERTY OWNER STANDING – DECLARATORY JUDGMENT

Facts: 120 West Fayette Street LLP ("120 West Fayette"), seeking a declaratory judgment, filed a complaint in the Circuit Court for Baltimore City against the Mayor and City Council of Baltimore et al. ("the City"). The complaint alleged that the City violated its Charter and laws by entering into an illegal Land Disposition Agreement ("LDA") with an entity seeking to purchase and develop an area in Baltimore's westside, known as the "Superblock." The City made a motion to dismiss the complaint and the Circuit Court granted that motion.

The Circuit Court concluded that it was appropriate to dismiss the complaint because, 120 West Fayette "failed to establish standing as a taxpayer plaintiff and failed to establish an actual or potential pecuniary loss, increase of taxes, special damages, the City's illegal expenditure of public funds or ultra vires acts in the selection of a developer for the Superblock." In making these determinations, the Circuit Court relied on material outside of the pleadings and treated the City's motion to dismiss as a motion for summary judgment, as permissible under Maryland Rule 2-322(c). 120 West Fayette filed a timely appeal to the Court of Special Appeals, but before the intermediate appellate court could consider the case, this Court issued a writ of certiorari.

Held: Reversed and remanded. When a motions court relies on material outside of the pleadings to treat a motion to dismiss as a motion for summary judgment as permissible under Maryland Rule 2-322(c), the court must provide all parties "reasonable opportunity to present all material made pertinent" to a motion for summary judgment as required by the Rule. In this case, the Circuit Court's failure to provide all parties such opportunity was error. The Circuit Court also erred in concluding that 120 West Fayette lacked standing to bring its claim as a taxpayer and adjacent property owner and in failing to render a declaratory judgment.

The legal principles that confer standing upon an adjoining property owner to seek judicial review of land use decisions, logically extend to an adjoining property owner challenging a municipalities' allegedly illegal avoidance of urban renewal and procurement ordinances. Moreover, to establish taxpayer standing in Maryland, a taxpayer need only allege: 1) an action by a municipal corporation or public official that is illegal or ultra vires, and 2) that such action may reasonably result in a pecuniary loss to the taxpayer or an increase in taxes. When a matter before the court is appropriate for declaratory relief, the court should enter a declaration defining the rights of the parties under the issues made.

***

State of Maryland v. Dennis Lamont Lucas, No. 30, September Term, 2008. Opinion filed on February 19, 2009 by Adkins, J.

http://mdcourts.gov/opinions/coa/2009/30a08.pdf

CRIMINAL LAW – EVIDENCE – RIGHT OF ACCUSED TO CONFRONT WITNESSES – OUT-OF-COURT STATEMENTS – TESTIMONIAL HEARSAY.

Facts: Respondent Dennis Lamont Lucas was convicted after a bench trial for second degree assault. Lucas was alleged to have assaulted Emily Mulligan, his girlfriend, during a domestic dispute. On the night of the alleged assault, two Anne Arundel County police officers received a "[d]omestic call" and arrived at Mulligan's apartment building a couple of minutes after receiving the call. Officer Fowler observed Lucas sitting on some steps outside of the apartment. He descended four or five stairs to get to Mulligan's lower level apartment while Officer Dalton stayed with Lucas outside of the apartment.

Fowler encountered Mulligan at her apartment "threshold" and observed that she was crying, her face was pretty red, her "eyes were kind of swollen and she had red marks on her neck." Fowler questioned Mulligan "about why [they] were called to the residence and why she was crying." According to Fowler, Mulligan responded that she and Lucas "were in a verbal argument" about "breaking up" and "that it became physical after that." Fowler testified that she told him she was "kicked in the leg" by Lucas and that "he grabbed her around the neck." She also told Fowler she sustained an abrasion or laceration on her back.

Mulligan did not testify at trial. The Circuit Court permitted Officer Fowler to testify about Mulligan's statements over Lucas's objection. Lucas contended that the statements' admission violated his right of confrontation under the Sixth Amendment and the Maryland Declaration of Rights. The Circuit Court was satisfied, however, that the statements were admissible as an excited utterance and allowable under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

Lucas appealed to the Court of Special Appeals and that court reversed and remanded for a new trial, concluding that the statements were made under official interrogation, an obvious substitute for live testimony, and admitted in violation of Lucas's right to confront his accuser. The State petitioned for a writ of certiorari to the Court of Appeals and the Court issued a writ to decide "whether responsive statements made by a visibly upset woman, while standing in her apartment doorway, to a police officer responding to a 'domestic' call, were testimonial and

therefore inadmissible under the Sixth Amendment's Confrontation Clause."

Held: Affirmed. Mulligan's responsive statements made to Officer Fowler when asked "what happened" and "where she got the marks" while standing in her apartment doorway were "testimonial" under *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006). The primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution and not to enable police assistance to meet an ongoing emergency. Although Mulligan was visibly upset and had a red face, eyes that were "kind of swollen[,]" and "red marks on her neck[,]" her statements were testimonial because the emergency had ended when the interrogation took place. Mulligan spoke of past events, was protected by the police from Lucas at the time, and was no longer under any imminent danger. Officer Dalton stayed with Lucas outside of the apartment while Fowler questioned the alleged victim. Fowler told the alleged victim that they were there for an investigation.

Fowler did not indicate that he heard arguments or crashing or saw anyone throw or break anything inside the apartment. Thus, Fowler did not observe or detect anything suggesting that there was another potential assailant inside the apartment. Having already encountered Lucas outside of the apartment, Fowler's initial inquires were not necessary to "know whom they [were] dealing with in order to assess the situation, the threat to their own safety, and possible danger to" Mulligan. *See Davis*, 547 U.S. at 832, 126 S. Ct. at 2279.

***

Todd Tyrone Taylor v. State of Maryland, No. 06, September Term 2008, filed January 5, 2009. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2009/6a08.pdf

CRIMINAL LAW - EVIDENCE – MARYLAND RULES 5-608 (b) and 5-806

Facts: Todd Tyrone Taylor was indicted by a grand jury on two counts of sexual offense in the third degree for engaging in anal penetration and fellatio with a minor, and one count of sexual offense in the fourth degree. At trial, the State did not call the victim, B.D., to testify, instead relying on the testimony from the boy's father and that of the detective in the case, to present B.D.'s version of events. After the boy's version of events was presented, Taylor sought to impeach the boy's veracity by eliciting from the father and detective that the boy's story was inconsistent and that he had lied on prior occasions about his sexual experience, but the trial judge sustained the State's objections to these questions.

The jury convicted Taylor of one count of sexual offense in the third degree for engaging in anal intercourse, but acquitted him of the count involving fellatio. The trial judge then sentenced Taylor to five years in prison, suspending all but 10 days, and to 18 months of probation, during which Taylor was required to register as a sex offender and to submit to mandatory blood testing, and was prohibited from contacting any minors, B.D. or his family. Taylor did not file a motion to alter or amend his sentence or to challenge the sentence as illegal under Maryland Rule 4-345 (a), but noted his appeal to the Court of Special Appeals.

In the Court of Special Appeals, Taylor argued that the trial judge erred when he curtailed the cross-examination of the father and the detective, that the probation conditions were "overbroad," and that the trial judge should not have required him to register as a sex offender. The Court of Special Appeals affirmed Taylor's conviction in an unreported opinion, holding that the trial judge did not err, but even if he erred, the error was harmless, that the probation conditions were not illegal nor preserved for appeal, and that the trial judge properly required Taylor to register as a sex offender.

Held: Affirmed. The Court of Appeals held that the trial judge erred in sustaining the State's objection to questions posed to the father and detective. Under Rule 5-608 (b) of the Maryland Rules of Evidence, if B.D. had testified, Taylor could have asked him the questions, so that counsel should have been able to ask the

witnesses the same questions to impeach B.D.'s version under Rule 5-806 of the Maryland Rules of Evidence. In addressing the State's contention that questioning other witnesses about prior acts of the declarant violated the extrinsic evidence limitation of Rule 5-608 (b), the Court determined that the questions were permissible because they were offered to impeach the boy's veracity, not to prove the prior conduct. The Court also noted that to apply the extrinsic evidence limitation would be to permit the State to insulate key statements from impeachment by presenting those statements through other witnesses, instead of calling the declarant to the stand. The Court affirmed the conviction, nevertheless, holding that the error was harmless, because there was substantial physical evidence to support the jury's conviction for third degree sexual assault for engaging in anal intercourse.

***

Oscar A. Cruz v. State of Maryland, No. 10, September Term, 2008
Opinion filed on January 23, 2009 by Adkins, J.

http://mdcourts.gov/opinions/coa/2009/10a08.pdf

CRIMINAL LAW – TRIAL – ISSUE RELATING TO JURY TRIAL – INSTRUCTIONS AFTER SUBMISSION OF CAUSE

Facts: Petitioner Oscar A. Cruz was convicted by a jury of second degree assault. At trial, the jury heard testimony that Cruz had an altercation with two individuals, Meza and Martinez, one afternoon in the parking lot of an apartment complex. Meza and Martinez testified that Cruz took a baseball bat from a friend, Ricky. When Cruz approached Meza and swung the bat at him, Meza jumped back, dodged it, and started running away from Cruz. According to Meza, Cruz chased Martinez first, and then started chasing Meza. Meza testified that when Cruz swung the bat at him again, Meza jumped back, slipped on the snow, and fell down. Cruz then hit Meza on the head with the bat. Martinez testified that he saw Cruz strike Meza.

Herrera-Flores, a defense witness and friend of Cruz, testified that he saw the altercation and that Ricky grabbed a baseball bat as Meza and Martinez approached. Cruz then grabbed the bat and chased the two away. According to Herrera-Flores, one of the individuals fell down during the chase, but Cruz did not hit either one with the bat.

At the close of evidence, the trial court agreed that it would only instruct the jury on battery, the sole second degree assault theory elected by the State. Defense counsel argued in closing that Cruz was put in fear and that he "went after" Meza and Martinez with the bat, but did not hit Meza with it. During deliberations, the jury sent a note asking, "[I]s Y falling on a sidewalk & hitting head while being chased by a bat by X, an assault by X on Y?" In response, the court gave a supplemental instruction, over Cruz's objection, on the attempted battery theory of assault.

Cruz appealed to the Court of Special Appeals contending that the supplemental jury instruction was an abuse of discretion. The intermediate appellate court affirmed the judgment, holding that the instruction was supported by the evidence and that Cruz was not prejudiced by its having been given during jury deliberations. The Court of Appeals granted a writ of certiorari to consider whether a supplemental jury instruction on a new theory of culpability that is supported by the evidence given during jury deliberations can result in

prejudice to a defendant that merits a new trial.

Held: Reversed and remanded. It was improper for the court to give a supplemental instruction on attempted battery during jury deliberations after the court, at the close of evidence, agreed that it would only instruct the jury on battery, the sole second degree assault theory elected by the State. The court's supplemental instruction, though generated by the evidence, was not appropriate under Maryland Rule 4-325 because defense counsel's reliance on the court's pre-closing argument instructions resulted in prejudice to Cruz.

Defense counsel tailored her argument to address the battery theory of assault the State elected to pursue. In stating that Cruz "went after" Meza, defense counsel essentially conceded Cruz's intent to make contact and walked into an attempted battery verdict. Had Cruz known that the jury would be instructed on this assault theory, his counsel would likely not have hinged his defense on the contact element of battery and, instead, would have emphasized that Cruz never intended to bring about harmful physical contact when he grabbed the bat and chased Meza.

***

F.D.R. Srour Partnership, et al. v. Montgomery County, Maryland, No. 47, September Term 2008, filed 9 February 2009, Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2009/47a08.pdf

TAXATION – DEVELOPMENT IMPACT TAX FOR TRANSPORTATION IMPROVEMENTS – APPLICABILITY OF AMENDMENTS TO IMPACT TAX TO ON-GOING DEVELOPMENTS UNDER TEMPORAL PHASE-IN PROVISION – IMPACT TAX APPLICABLE, DESPITE APPLICATION FOR CONSTRUCTION OF NECESSARY RETAINING WALLS (BUT NO BUILDING AREA) BEFORE AMENDMENT EFFECTIVE DATE, WHEN BUILDING PERMIT APPLICATIONS WERE FILED FOR WAREHOUSE BUILDINGS, AFTER EFFECTIVE DATE OF AMENDMENTS, BECAUSE ONLY THE PERMIT AND CONSTRUCTION PROCESS FOR THE BUILDINGS CONSTITUTED COVERED BUILDING ACTIVITY WHICH REQUIRED ISSUANCE OF A BUILDING PERMIT AND INCREASED THE GROSS FLOOR AREA OF NON-RESIDENTIAL DEVELOPMENT

Facts: In 2002, Montgomery County decided to amend its pre-existing, but geographically limited, development impact tax for transportation improvements by enacting Chapter 4 of the Montgomery County Laws of 2002, codified at Montgomery County Code ("County Code"), § 52-47 *et seq.* (2004). The Impact Tax is a tax on "development," which is defined specifically in County Code § 52-47 as

> the carrying out of any building activity or the making of any material change in the use of any structure or land which requires issuance of a building permit and:
> (1) Increases the number of dwelling units; or
> (2) Increases the gross floor area of nonresidential development.

Under the procedures provided in the Code, the Impact Tax is calculated and assessed when a developer submits a building permit application, County Code § 52-51, and must be collected by the Department of Permitting Services before the issuance of the permit, County Code § 52-50(c). The 2002 amendment expanded the previous geographically-specific Impact Tax structure in Montgomery County by applying the Tax county-wide, providing, i.e., "[the Tax] applies to any development for which an application for a building permit is filed on or after [1 July 2002]." 2002 Laws of Montgomery County, Ch. 4, sec. 2(a).

In 1988, Petitioners acquired, for the purpose of building two warehouse structures, an undeveloped parcel of industrially-

zoned real property ("Property") located just outside the city limits of Rockville. Petitioners struggled, however, to design the warehouse development to accommodate the somewhat disparate split-zoning (I-2 and I-4) standards applicable to the Property and to overcome the Property's unique physical characteristics. In particular, the Property presented considerable challenges because elevation ranged from 360 to 444 feet, with the grade at some points on the Property as steep as 25%.

On 6 June 2002, some twenty-five days before the 1 July 2002 effective date of the amended Impact Tax, Petitioners filed with the County Department of Permitting Services a building permit application ("Permit 1"), accompanied by a plan view indicating conceptually the two warehouse buildings to be constructed, but not seeking permission to construct them at the time. Permit No. 1 was issued by the Department on 1 December 2003. Subsequently, Permit No. 1 was revised and another application, No. 326449, submitted on 1 December 2003 ("Permit 2"). Permit 2 was issued on 23 January 2004.

Permits 1 and 2 together sought authorization to construct only three reinforced concrete retaining walls and two Gabion Walls on the Property. According to Petitioners, the five walls (Walls 1-3 and the two Gabion Walls) were all essential elements of the ultimately-completed industrial buildings because they were needed to stabilize the soil on the site after the grading of the steep topography to accommodate the building pads, the vehicular access to Southlawn Lane, and the stormwater pond. Petitioners urged that, without these improvements, the Property would remain generally "undevelopable." No assessment or demand for payment of the amended Impact Tax was made by the Department upon the issuance of either Permit 1 or 2.

Subsequent to the construction of the walls, Petitioners submitted additional building permit applications to complete the construction of both the structural supports for the warehouses needed to stabilize the difficult topography ("Permit 3"), and, eventually, the warehouses themselves. In July 2004, Petitioners filed applications specifically for the two warehouses on the Property, No. 352990 ("Permit 4") and No. 352996 ("Permit 5"). Permit 4 was for construction of Building A, an enclosed building of 38,374 square feet, and Permit 5 for Building B, with a building area of 79,875 square feet. In June 2005, prior to the issuance of Permits 4 and 5, the Department informed Petitioners that an Impact Tax payment would be required before the issuance of the permits. The Department calculated, under the formula in the County Code, that Permit 4 required an Impact Tax payment of $95,935 and Permit 5 required a payment of $199,687.50, for a

total of $295,622.50.

Petitioners contested the Department's determination and assessment of the Impact Tax, and asked its Director to reconsider. The Director found against them. Pursuant to County Code § 52-56 and Md. Code, Tax-General Article § 3-103 (2004 Repl. Vol. & Supp. 2008), Petitioners, on 14 September 2005, filed an appeal with the Maryland Tax Court challenging the Director's determination. The Tax Court upheld the Director's determination. Thereafter, pursuant to Md. Code, Tax-General § 13-532 and State Government Article § 10-222 (2004 Repl. Vol. & Supp. 2008), Petitioners, on 7 April 2006, filed a Petition for Judicial Review in the Circuit Court. On 18 October 2006, the Circuit Court for Montgomery County issued a written Order affirming the judgment of the Tax Court. Petitioners then pursued an appeal in the Court of Special Appeals and, in a reported opinion, *F.D.R. Srour P'ship v. Montgomery County*, 179 Md. App. 109, 944 A.2d 1149 (2008), the intermediate appellate court affirmed. The Court of Appeals granted a writ of certiorari upon Petitioners' petition. *Srour v. Montgomery County*, 405 Md. 290, 950 A.2d 828 (Table) (2008).

Held: Judgment affirmed. Petitioners' contended that the intention of the Montgomery County Council in enacting the transitional phase-in provision in the 2002 amendment was to exclude generally building plans and development activity begun before the 1 July 2002 effective date of the county-wide Impact Tax. Thus, because the transitional phase-in provision provided that the "[the Tax] applies to any development for which an application for a building permit is filed on or after [1 July 2002]," the Petitioners argued that the statutory definition of "development" should be interpreted as the exclusive of either "the carrying out of any building activity," or "the making of any material change in the use of any structure or land which requires issuance of a building permit and [i]ncreases the number of dwelling units . . . or [i]ncreases the gross floor area of nonresidential development." Petitioners asserted that because they filed a permit application for Permit 1 before the 1 July 2002 effective date, that activity constituted sufficiently "building activity" prior to the phase-in of the Tax, and therefore all of their subsequent permit applications were exempt from the Impact Tax.

The Court rejected Petitioners' position. The Court found that Petitioners' position contradicted directly the manner in which the Impact Tax is to be calculated and assessed on construction projects. Under the County Code, applicants for building permits must "supply to the Department of Permitting

Services for *each requested building permit* . . . [t]he gross floor area and type of development for nonresidential development." County Code, § 52-50(b) (emphasis added). The Impact Tax is calculated for each permit by "multiplying the applicable tax by . . . the gross floor area of nonresidential development." County Code, § 52-51. Under this statutory scheme, the Court found that the prevailing intent of the County Council was to distribute costs for all building permit applications filed on or after 1 July 2002 based on the relationship between the size and intended use of buildings and the estimated pro rata costs for the transportation improvements to support those buildings, as estimated by the statutory rates provided, on a per square foot basis, for different nonresidential buildings. County Code, § 52-57 (Table). To effectuate this intent, the Court found that the definition of "development" should be interpreted as (1) the carrying out of any building activity or the making of any material change in the use of any structure or land (2) which requires issuance of a building permit and (3) increases the number of dwelling units or increases the gross floor area of nonresidential development. The decision of the Maryland Tax Court was consistent with this interpretation.

***

COURT OF SPECIAL APPEALS

Fidelity and Deposit Co. of Maryland v. Gladwynne, et al., No. 2725, September Term, 2007, filed February 5, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/2725s07.pdf

CONTRACTS - UNIFORM COMMERCIAL CODE - NEGOTIABLE INSTRUMENTS - LOST UNCERTIFIED CHECK - LIABILITY ON UNDERLYING OBLIGATION.

Facts: In 1995, Fidelity and Deposit Co. of Maryland ("F&D"), a commercial surety, entered into a written indemnity agreement with Gladwynne Construction Company ("Gladwynne"), Wynnewood Enterprises Limited Partnership ("Wynnewood"), and Thomas Behrle, an officer and owner of both companies. In the Agreement, F&D was the indemnitee, and Gladwynne, Wynnewood, and Behrle, appellees, were the indemnitors. Appellees agreed to pay F&D any sum that F&D paid out on a payment or performance bond in good faith and under the belief that it was liable for the sums and amounts so disbursed.

In 1998, F&D issued performance and payment bonds ("the Bond") for a project between Gladwynne, as general contractor, and the United States Department of Veteran Affairs, as owner ("the Project"). F&D's claims counsel for the Project directed that F&D pay two claims made against the Bond: one for $57,800 and one for $3,840. Subsequently, F&D demanded reimbursement from appellees for the sums paid on the two claims. Gladwynne sent F&D two uncertified checks for the combined total of $61,640 in full payment of the two paid claims. F&D concedes that it received these checks, but later lost the checks before they were negotiated. F&D sued appellees in the Circuit Court for Baltimore City for breach of contract. At the close of F&D's case-in-chief, appellees moved for judgment, the court granted the motion, and F&D appealed, claiming that, although Gladwynne sent it two checks equaling the total reimbursement amount owed to F&D under the Agreement, and F&D received the checks, appellees still owe the underlying obligation because F&D never presented the checks for payment and the checks are lost.

Held: Judgment affirmed. The Court of Special Appeals held that, under the applicable law as set forth in the Negotiable Instruments Title of the Maryland Uniform Commercial Code, Md. Code (1975, 1997 Repl. Vol.), sections 3-101, *et seq.* of the Commercial Law Article, appellees were entitled to judgment in

their favor on F&D's breach of contract claim. Generally, when a check is taken for an obligation, the obligation is suspended, and the suspension continues until the check is dishonored or paid. If a check taken for an obligation is lost, stolen, or destroyed, the payee can still enforce the check, and the debt is suspended up to the amount payable on the check. When Gladwynne issued the checks to F&D, its obligation was not discharged, but was merely suspended. This obligation remained suspended until the checks were presented and dishonored, at which time the obligation would have been taken off suspension, or presented and honored, and payment would have been made and the obligation discharged. Hence, although F&D misplaced the checks, F&D should have attempted to "present" the lost checks, and the obligation would have been discharged had the drawee bank "honored" the lost checks, or taken off suspension had the drawee bank "dishonored" the lost checks. Until the checks were presented and either dishonored or honored, however, the obligation remained suspended. Thus, when F&D sued appellees for breach of contract based on the underlying obligation (the liability of appellees to reimburse F&D for $61,640), any obligation was in a state of suspension, and therefore could not be enforced. This obligation was not subject to enforcement until F&D attempted to "present" the lost checks for payment to the drawee bank, and the drawee bank "dishonored" payment. Since the obligation was suspended, appellees could not be liable on the obligation, and the trial court was correct in granting their motion for judgment.

***

J. Michael Stouffer, Commissioner of Correction v. Troy Reid, No. 243, September Term, 2008, decided February 6, 2009. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2009/243s08.pdf

CORRECTIONAL SERVICES - RIGHT OF INMATE TO REFUSE MEDICAL TREATMENT: *Mack v. Mack*, 329 Md. 188 (1993). The right to refuse treatment is not absolute; rather, it is subject to "at least four countervailing State interests: (1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession."

Facts: Appellant, Commissioner of Correction of Maryland, filed a complaint for declaratory and injunctive relief against appellee, an inmate in appellant's custody, seeking to compel appellee, who was suffering from human immunodeficiency virus (HIV) condition, high blood pressure, anemia and end-stage renal disease, to submit to kidney dialysis and medical treatment. The circuit court adjudged that appellee could refuse dialysis and medical treatment. Appellant appealed.

Held: Affirmed. Appellee's personal decision to refuse treatment, not made in protest of any prison policies or an attempt to manipulate prison officials and not subject to replication by other inmates, did not involve any significant *"ripple effect"* on fellow inmates or prison staff, *Turner v. Safley*, 482 U.S. 78, 91 (1987), nor was the preservation of life, the prevention of suicide or the maintenance of the ethical integrity of the medical profession implicated by appellee's refusal of medical treatment.

The circuit court properly issued a Declaratory Judgment, adjudging that appellee who, in 1995, was sentenced to a forty-year term of imprisonment, could not be compelled by the Commissioner of Correction, over appellee's objection, to submit to kidney dialysis and medical treatment for the aforementioned conditions, diagnosed in July 2007.

Appellant failed to demonstrate a legitimate penological interest in forcing appellee to submit to dialysis or the necessity to divest appellee, a competent adult, of his right to refuse medical treatment, based on appellant's belief as to appellee's misunderstanding of the seriousness of his condition.

***

Nationwide Mutual Insurance Co. v. Regency Furniture, Inc., No. 2420, September Term, 2007, filed January 6, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/2420s07.pdf

INSURANCE - LANDLORD-TENANT - BREACH OF CONTRACT - VANDALISM - RENT OWED - ENTRY ONTO TENANT'S PREMISES.

Facts: In this commercial landlord-tenant dispute, the tenant, Regency Furniture, Inc., alleged breach of contract by its landlord, DDRM, Inc., formerly known as Inland). The primary issues concerned vandalism to roof-mounted HVAC units, a dispute about the calculation of rent owed, and DDRM's entry onto the tenant's premises because of a dispute over the storage and removal of trash and debris.

Nationwide Mutual Insurance Co. was a third party to the case. Because DDRM, based on its lease with Regency, denied liability for the expenses incurred to replace the damaged HVAC units, Regency filed a claim with Nationwide, which denied the claim based on the insurance policy held by Regency.

In the Circuit Court for Prince George's County, the court ruled that Nationwide was liable for Regency's insurance claim. Because DDRM and Regency had settled the rent dispute just before trial, and because Regency failed to prove that DDRM's entry onto the premises constituted a breach, the trial court ruled that it was unnecessary to determine whether Regency was a prevailing party under its lease, and consequently denied Regency's claim for attorneys' fees.

Nationwide filed an appeal to the Court of Special Appeals 15days after entry of judgment, alleging the trial court erred in its interpretation of the insurance policy. Regency filed a timely cross-appeal nine days later, opposing Nationwide's arguments and also alleging error by the trial court in its refusal to find that Regency was a prevailing party under the lease. DDRM filed a cross-appeal eight days after Regency's cross-appeal, and more than 30 days after entry of judgment.

Held: DDRM's untimely cross-appeal was dismissed. Under the plain language of Rule 8-202(e), "[i]f one party files a timely notice of appeal, any other party may file a notice of appeal within ten days after the date on which the first notice of appeal was filed or within any longer time otherwise allowed by this Rule." Under the circumstances of this case, the "longer time otherwise allowed" controlled; under Rule 8-202(a), DDRM was

required to file its notice of appeal within 30 days after entry of judgment, but failed to do so. Moreover, DDRM failed to show that its untimeliness fit under the narrow exception to Rule 8-202 set forth in *Maxwell v. Ingerman*, 107 Md. App. 677 (1996).

The Court of Special Appeals reversed the judgment as to Nationwide, because the trial court failed to consider the Declarations page in interpreting coverage under the insurance policy. Under the correct reading of the policy, Regency was not entitled to coverage because its policy did not cover damage to buildings or fixtures.

As to the points of error alleged by Regency, the Court affirmed the judgment. Because the trial court did not decide whether DDRM was liable for the expenses incurred to replace the damaged HVAC units, the case was remanded so that the circuit court could make that determination, leaving open the possibility of fees and costs limited to that issue.

***

Matthew A. Egeli, Substitute Trustee v. Wachovia Bank, N.A., No. 2976, September Term, 2007, filed Feb. 6, 2009. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2009/2976s07.pdf

REAL PROPERTY – FORECLOSURE SALES – LIEN PRIORITY - MERE PAYMENT BY THIRD PARTY OF ENTIRE BALANCE OF HOME EQUITY CREDIT LINE ACCOUNT INSUFFICIENT T0 ASSUME SUPERIOR LIEN PRIORITY

Facts: Husband and wife ("owners") purchased a house ("the Property"), and simultaneously executed a note with SunTrust Mortgage, Inc., secured by a deed of trust on the Property, which was promptly recorded. Owners thereafter opened a credit line account with SunTrust Bank, a separate legal entity, evidenced by an Equity Line Agreement ("the Agreement"), which provided, *inter alia*, that (1) owners could draw funds and carry any balance up to a limit of $140,000 so long as they paid the monthly minimum payment, and (2) owners could terminate the account by providing written authorization. Owners simultaneously executed a deed of trust in favor of SunTrust Bank, which stated on its first page "**REVOLVING LINE OF CREDIT** . . . This Deed of Trust secures a revolving line of credit, which obligates Lender to make advances to Grantor so long as Grantor complies with all the terms of the Credit Agreement. Such advances shall be made, repaid, and remade from time to time, subject to the limitation that the total outstanding balance owing at any one time . . . shall not exceed the Credit Limit as provided in the Credit Agreement." Owners thereafter nearly exhausted their credit line, and had Wachovia contact SunTrust Bank regarding satisfying owners' obligation to SunTrust Bank. Owners opened two credit accounts with Wachovia, and Wachovia paid the entire balance on owners' SunTrust Bank credit line account. Owners continued to draw funds from their SunTrust Bank account, and eventually defaulted. SunTrust Bank foreclosed on the Property, and Wachovia purchased the property subject to SunTrust Mortgage's first priority lien. The auditor's report indicated that SunTrust Bank enjoyed superior lien priority to Wachovia's liens, and Wachovia filed exceptions. The Circuit Court for Baltimore County granted Wachovia's exceptions, finding that Wachovia assumed superior lien priority to SunTrust Bank when it paid owners' entire credit account balance.

Held: Reversed. Although Wachovia was not privy to the terms of the Agreement when it made its payment, the terms of SunTrust Bank's deed of trust put Wachovia on constructive notice that the SunTrust Bank account was an open-ended equity credit account potentially possessing additional requirements for

termination beyond mere payment of the balance. There was no evidence that owners provided SunTrust Bank with written authorization to terminate the account, and therefore SunTrust Bank was both obligated by contract to continue to make advances to owners, and not obligated under Md. Code (1974, 2003 Repl. Vol., 2008 Supp.), § 3-105.1(c) of the Real Property Article to release its lien upon acceptance of Wachovia's payment. Furthermore, Wachovia was barred from equitable relief by the doctrine of laches insofar as it waited several years to assert its rights and demonstrated a lack of attention to detail in its dealings with SunTrust Bank.

***

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated February 3, 2009, the following attorney has been disbarred from the further practice of law in this State:

NATHAN HAROLD WASSER

*

Return to TOC

JUDICIAL APPOINTMENTS

On January 7, 2009, the Governor announced the appointment of PAULA A. PRICE to the District Court for Somerset County. Judge Price was sworn in on February 6, 2009 and fills the vacancy created by the retirement of the Hon. R. Patrick Hayman.

*

Return to TOC

RULES REPORT

The **160th Rules Report** was filed on February 10, 2009.

http://www.mdcourts.gov/rules/rodocs/ro160.pdf