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http://mdcourts.gov/opinions/coa/2011/12a10.pdf

CIVIL PROCEDURE – ABUSE OF DISCRETION – CONTINUANCE

The trial court abused its discretion by denying plaintiff's motions to suspend trial for two days during which plaintiff and his attorney were prohibited from attending court, pursuant to plaintiff's religious beliefs and because of religiously mandated abstention from certain conduct. The effective exclusion of plaintiff from court was presumptively prejudicial.

Facts: In July of 2006, Alexander Neustadter brought a medical malpractice action against Holy Cross Hospital, among other defendants who were dismissed prior to the start of trial, after the death of his father, Israel Neustadter. Trial was set to begin on February 11, 2008, but was moved to June 3, 2008 upon a joint-motion made on January 24, 2008. Shortly thereafter, Mr. Neustadter informed his attorney that a Jewish Orthodox Holiday, Shavout, would fall on the fifth and sixth days of the then, ten-day trial. The holiday, as was shown by affidavit, imposed the restrictions and prohibitions of the Sabbath on both Mr. Neustadter and his Counsel, meaning that neither could appear in court on those two days, nor could any legal advocacy at all benefitting Mr. Neustadter take place. Counsel was unsuccessful in his attempt to obtain agreements with opposing counsel to suspend trial for those two days. On May 6, May 16, June 2, and June 3, 2008, Mr. Neustadter moved to suspend trial for those two days. All of those motions were denied.

The rationales given by the trial court for denying Mr. Neustadter's motions included: untimeliness; the inconvenience to jurors, opposing counsel, and the judge; the back-log of cases in the Circuit Court for Montgomery County; the decreased judicial roster because of the unexplained unavailability of two judges; and the imposition on cases set for the subsequent week.

Held: Even though Administrative and trial judges clearly have discretion to manage the trial court's schedule, that discretion is abused when it is exercised on untenable grounds. Here, the rationales for denying Mr. Neustadter's request were

untenable in light of the religiously mandated abstention from trial of both the litigant and his counsel, which was brought to the court's attention within a reasonably sufficient time for an accommodation to have been made. The effect of the repeated denials of Mr. Neustadter's request to continue the trial was to effectively exclude him during his opponent's entire case, which was presumptively prejudicial and required reversal.

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Scapa Dryer Fabrics, Inc. v. Carl L. Saville, No. 39, September Term 2010, filed March xx, 2011, Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/39a10.pdf

CIVIL PROCEDURE – MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

CIVIL PROCEDURE – PARTY ADMISSIONS

TORTS – REDUCTION OF JUDGMENT

Facts: In 2002, Carl and Sharon Saville filed suit against approximately 30 companies claiming negligence, strict liability, loss of consortium, conspiracy and fraud relating to Mr. Saville's asbestosis, lung cancer and mesothelioma. Mr. Saville won a judgment for $3,000,000.00 at trial, but the judgment was overturned by the Court of Special Appeals and a new trial was ordered. Prior to commencement of the new trial, Mr. Saville settled with three of the defendants, namely Viacom, Inc. f/k/a Westinghouse Electric Corp. ("Westinghouse"), AstenJohnson, Inc. ("Asten"), and Albany International Corp. ("Albany"). The new trial began on January 8, 2008 and concluded on January 25, 2008. The jury found Scapa and co-defendant Wallace and Gale Asbestos Settlement Trust ("W & G") to be jointly and severally liable and returned a verdict in the amount of $1,718,000.00. The trial judge subsequently reduced the verdict to account for settlement payments that Mr. Saville had received from certain bankrupt asbestos-containing product manufacturers, namely Celotex Trust, the Johns Manville Personal Injury Settlement Trust, and the H.K. Porter, Inc. Asbestos Trust, resulting in a final verdict of $1,684,415.00. Scapa moved for judgment notwithstanding the verdict ("JNOV") as to Mr. Saville's claims and as to its cross-claims against the settling cross-defendants. Both motions were denied, as was Scapa's request, in the alternative, for a new trial, and for a reduction in the verdict to account for any and all bankruptcy trust payments received by Mr. Saville.

The Court of Special Appeals affirmed the Circuit Court's judgment from the second trial, holding: that there was sufficient evidence that Scapa's product was the proximate cause of Mr. Saville's injuries to support the trial court's denial of Scapa's motions for judgment and for JNOV; that Mr. Saville's "admissions" did not conclusively establish liability against the settling cross-defendants; that the trial judge's denial of Scapa's JNOV motion on its cross-claims would not be disturbed on the basis of procedural defects; and that the trial court had no evidence upon which to base further reduction of the verdict.

Before this Court, Scapa challenged the rulings of the trial that denied its motion for judgment and motion for JNOV on Mr. Saville's claims, by asserting insufficiency of the evidence on causation as a matter of law, and motion for JNOV on its cross-claims against Westinghouse, Asten, and Albany, asserting that there was an inconsistent verdict. Additionally, Scapa sought a reduction of the verdict by the amounts of settlement payments made to Mr. Saville from specially-established bankruptcy trusts.

Held: The Court of Appeals affirmed the Court of Special Appeals's judgment upholding the trial court's rulings on all motions for judgment and for JNOV. The evidence presented by Mr. Saville against Scapa satisfied the *Balbos* evidentiary test for substantial factor causation so that the trial judge did not err by denying Scapa's motions for judgment and for JNOV. Additionally, the jury found that the cross-defendants were not liable and the trial judge denied Scapa's motion for JNOV. That ruling was not in error because even in light of the submission of Mr. Saville's admissions into evidence, which conclusively established certain facts about Mr. Saville's exposure to other asbestos-containing products, the question of liability was properly submitted to the trier of fact for resolution.

Finally, the Court concluded that the issue of off-sets to Mr. Saville's judgment was proper during the post-verdict phase of the litigation. Mr. Saville undoubtedly received settlement payments from certain special bankruptcy trusts created pursuant to federal bankruptcy law. Those Trust payments and accompanying settlement agreements/releases were discoverable at the end of litigation for the purposes of determining whether a (pro tanto or pro rata) reduction of the judgment was contractually required. The Court declined to adopt Scapa's argument that § 524(g) Trusts are joint tort-feasors as a matter of law under the Maryland Uniform Contribution Among Joint Tort-feasors Act, Md. Code (2006 Repl. Vol.), § 3-1401 through 3-1409.

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McLennan v. State, No. 16, September Term, 2009. Filed March 4, 2001 by Murphy, J.

http://mdcourts.gov/opinions/coa/2011/16a09.pdf

CRIMINAL PROCEDURE - "ALIBI" WITNESSES; APPELLATE PROCEDURE - APPELLATE REVIEW OF CIRCUIT COURT'S DECISION TO EXCLUDE ALIBI WITNESSES AS SANCTION FOR FAILURE TO COMPLY WITH "NOTICE OF ALIBI WITNESSES" RULE: An "alibi" witness is a witness whose testimony must tend to prove that it was impossible or highly improbable that the defendant was at the scene of the crime when it was alleged to have occurred. The "clearly erroneous" standard of appellate review is applicable to the circuit court's determination of whether a particular witness is an "alibi witness" whose name should have been provided to the State in conformity with the requirements of Md. Rule 4-263. The "abuse of discretion" standard of appellate review is applicable to the circuit court's decision to exclude the testimony of an alibi witness as a sanction for the defendant's violation of the "notice of alibi witnesses" rule (now Md. Rule 4-263(e)(4)).

Facts: A jury convicted Petitioner of armed robbery. Petitioner conceded that the State's evidence was sufficient to establish that he had committed that crime on November 29, 2005. However, he argued that he was entitled to a new trial on the ground that (in the words of his brief), "the trial court's ruling, excluding the testimony of Mr. [Gordon] Smith and Mr. [Douzoua] Nado, deprived Petitioner of a fair trial." The Court of Special Appeals affirmed the conviction in an unreported opinion, concluding that "[i]n imposing the sanction that [it]did for a serious violation of the discovery rules, [the Circuit Court] did not abuse [its] discretion."

Held: The Court of Appeals held that based on Petitioner's own theory of the case, Mr. Smith and Mr. Nado were "alibi" witnesses. Therefore, Petitioner was required by Md. Rule 4-263(e)(4) to "furnish the name and address of each person other than the defendant whom the defendant intends to call as a witness to show that the defendant was not present at the time, place, and date designated by the State in its request for alibi witnesses."

In this case, Petitioners' counsel, was not made aware of the existence of these witnesses until the day before trial. In light of the numerous changes of trial date, and the circumstances under which these witnesses came to the attention of Petitioner's trial counsel, the Court of Appeals concluded that the Circuit Court (1) was not clearly erroneous in finding

that Mr. Smith and Mr. Nado were “alibi” witnesses, and (2) did not abuse its discretion in excluding their testimony on the ground that the defense had failed to comply with the requirements of Md. Rule 4-263(e)(4).

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Montgomery County Volunteer Fire-Rescue Ass'n and Eric N. Bernard v. Montgomery County Board of Elections and Montgomery County, Maryland, Case No. 86, Sept. Term 2010. Opinion filed on March 22, 2010 by Greene, J.

http://mdcourts.gov/opinions/coa/2011/86a10.pdf

ELECTION LAW - SIGNATURE REQUIREMENTS ON REFERENDUM PETITION - STATUTORY CONSTRUCTION - Legibility of a petition signature is not dispositive within the statutory scheme of validation and verification in Md. Code (2003, 2010 Repl. Vol.) Secs. 6-203 and 6-207.

Facts: The Montgomery County Volunteer Fire-Rescue Association petitioned to place a referendum question on the ballot during the November 2010 general election in order to challenge the validity of Montgomery County Council Bill 13-10, which established a fee for Emergency Medical Services Transport. The Board submitted 30, 640 signatures on or before the first deadline, August 4, 2010, and 18,937 signatures on or before the second deadline, August 19, 2010. 30,733 validated and verified signatures were required to place the question on the ballot. The Board denied certification to the Association's petition because it determined that an insufficient number of valid signatures had been presented by the August 4th deadline. The Association challenged that determination in the Circuit Court for Montgomery County. For purposes of the trial, the parties stipulated to the review of 15, 287 specifically challenged signatures that were rejected based on issues with the signature, including: legible, full name; legible, not full name; partially legible, full name; partially legible, not full name; partially legible, discernible letters; and illegible. The trial court upheld the Election Board's determination finding that at a minimum, the latter two out of the six stipulated categories had not been arbitrarily and capriciously rejected. The Association appealed and we granted certiorari prior to consideration by the Court of Special Appeals. We expedited review in light of the imminent general election and heard arguments on September 29, 2010. By Per Curiam Order, issued that day, this Court directed the Circuit Court for Montgomery County to order that the referendum question be placed on the ballot.

Held: In construing Md. Code (2003, 2010 Repl. Vol.), Sec. 6-203 of the Election Law Article according to a plain meaning analysis we conclude that a signature on a petition fore referendum is but one component of the voter's identity that is to be considered in the validation process, and that if the signer's entire entry is statutorily sufficient under Sec. 6-203,

an illegible signature, on its own, does not preclude validation.

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Sherwood Brands, Inc., et al. v. Great American Insurance Company, No. 62, September Term 2010, filed 24 February 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/62a10.pdf

INSURANCE – POLICY CLAIM NOTICE PROVISIONS – BREACH-PREJUDICE REQUIREMENT

REGARDING CLAIMS-MADE INSURANCE POLICIES, BECAUSE THE EFFECT OF MARYLAND CODE (1997, 2006 REPL. VOL.), INSURANCE ARTICLE, § 19-110, IS TO MAKE POLICY PROVISIONS REQUIRING NOTICE OF CLAIMS TO BE GIVEN THE INSURER COVENANTS AND NOT CONDITIONS, WHERE THE ACT TRIGGERING COVERAGE OCCURS DURING THE POLICY PERIOD, AN INSURED THAT FAILS TO COMPLY STRICTLY WITH THE POLICY'S NOTICE REQUIREMENTS HAS "BREACHED THE POLICY," AND § 19-110 APPLIES TO REQUIRE THE INSURER TO SHOW THAT IT WAS PREJUDICED BY THE LATE-BESTOWED NOTICE.

Facts: Great American Insurance Company ("Great American") issued a series of claims-made liability insurance policies to Sherwood Brands, Inc. ("Sherwood"), the pertinent one of which – effective 1 May 2007 to 1 May 2008 (the "Policy")– required Sherwood, as a "condition precedent to [Sherwood's] rights under th[e] Policy" to give notice of any claim made during the policy period to Great American "as soon as practicable, but in no event later than ninety (90) days after the end of the Policy Period."

In December 2007 and March 2008, one Gerald D. Koelsch filed claims with the Commonwealth of Massachusetts Commission Against Discrimination and the Plymouth County (Massachusetts) Superior Court, respectively, alleging various torts and breach of contract. Both actions were conceded by the parties to be filed and served on Sherwood during the time the Policy was in effect. Sherwood did not notify Great American of the Koelsch claims until 27 October 2008, a date concededly greater than ninety days after the expiration of the Policy. Great American informed Sherwood it would be denying coverage of the claim, citing a failure to give notice to Great American within the ninety-day window following expiration of the Policy.

Meanwhile, in Israel, on 17 October 2007, Plastic Magen Ltd. and Plasto Kit Ltd. filed suit against Sherwood in the Tel-Aviv Jaffo District Court, asserting various torts and breach of contract. The action was conceded by the parties to have been filed and served on Sherwood during the time the Policy was in effect. Sherwood did not notify Great American of the Israeli suit until 6 November 2008, a date conceded again to be greater

than ninety days following the expiration of the Policy. Great American notified Sherwood again, informing Sherwood that it would be denying coverage of the claim, citing again a failure to give notice to Great American within the ninety-day window following expiration of the Policy.

On 10 February 2009, Sherwood filed in the Circuit Court for Montgomery County, a "Complaint for Breach of Contract and Declaratory Relief" against Great American, alleging that Great American breached the Policy by failing to provide coverage for the Massachusetts and Israeli actions. In the complaint, Sherwood alleged that Great American "has not been prejudiced by any alleged delay in the notification." Sherwood filed a motion for summary judgment proffering arguments similar to those it makes before this Court. In its answer, Great American tendered the affirmative defense that coverage for the actions under the Policy was barred due to Sherwood's failure to give timely notice (within ninety days after the expiration of the Policy) to Great American. Great American filed an opposition to Sherwood's motion for summary judgment, and a cross-motion for summary judgment.

On 14 July 2009, after hearing oral argument on the motions, the Circuit Court denied Sherwood's motion for summary judgment and granted Great American's cross-motion for summary judgment, explaining that "the Great American policy in question here is a claims made with reporting period, and therefore . . . the defendant is not required to show actual prejudice to deny coverage for the claims." Sherwood noted a timely appeal to the Court of Special Appeals. On our initiative, we issued a writ of certiorari, *Sherwood Brands v. Great American Ins.*, 415 Md. 114, 999 A.2d 179 (2010), before the intermediate appellate court decided the appeal, to consider "whether the lower court erred by ruling that [Great American] was not required by Section 19-110 of the [Maryland] Insurance Code to show actual prejudice in order to deny coverage based on the [Sherwood]'s failure to comply with the notice condition of the 2007[-08] insurance policy at issue . . . ."

Held: Reversed; case remanded for further proceedings not inconsistent with this opinion. This case presented to the Court the opportunity to track the development of Maryland Code (1997, 2006 Repl. Vol.), Insurance Article § 19-110, which provides currently that:

> An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits

> of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer.

The Court noted first that the former version of § 19-110 was enacted to overrule *United States Fidelity and Guaranty Co. v. Watson*, 231 Md. 266, 189 A.2d 625 (1963), in which we held that an insurer need not show prejudice in order to deny coverage to an insured who breached the notice provision of an insurance policy.

The Court then detailed Chief Judge Murphy's dissent in *St. Paul Fire & Marine Insurance Co.* v. *House*, 315 Md. 328, 554 A.2d 404 (1989). There, regarding whether the former version of § 19-110 applied to that policy, Chief Judge Murphy explained that, although the statute states that it applies to "any policy of liability insurance," the statute only "*potentially* applies to 'any' liability insurer or policy," considering that "the statute [also] requires that the basis for the disclaimer or denial of coverage be that 'the insured has *breached* the policy . . . by not giving the requisite notice to the insurer.'" The dissent framed next the possibly penultimate or even dispositive question as whether the statute applied to the policy in *House*: "The fundamental question now is whether, at the time [House] reported the . . . claim, there existed a contract between the parties, *for one cannot breach a contract which is not in existence* . . . ." Applying those principles to the policy in *House*, Chief Judge Murphy explained that, with respect to policies stating that a claim is "made" when it is reported to the insurer, when the claim is "made" after the reporting period, "[t]he policy could not be breached because there was no longer a policy to be breached," and that "[t]here was no breach . . . [because] there was simply no coverage."

The importance of the dissent in *House* became manifest four years later in *T.H.E. Insurance Co. v. P.T.P. Inc.*, 331 Md. 406, 407, 628 A.2d 223, 223 (1993), in which "we appl[ied], in substance, the analysis presented in Chief Judge Murphy's dissent in *House*." In *T.H.E.*, a patron was injured at the insured's go-kart track, but did not file suit against the insured until after the expiration of the policy and the extended sixty-day reporting period. In holding that the former version of § 19-110 did not apply to the policy in *T.H.E.*, the Court explained that "the

original policy had expired before a claim was asserted against [the insured]. That expiration resulted from the terms of coverage and is not attributed to a 'breach by [the insured].' The problem at which [the statute] is directed is not presented."

In the present case, Sherwood argued that the statute, according to its express language, applies to all liability policies, and that where a claim was not "made" during the policy period – as Sherwood argued was the case in *T.H.E.*, where the injured patron did not make a claim for damages against the insured until after expiration of the relevant policy – then the statute is not involved because the claim was never a covered claim. If a claim was "made" during the policy period – as Sherwood argued is the case at present, where both the Massachusetts and the Israeli actions were filed when the Policy was in effect – and the denial is based on the insured's breach of a notice condition or covenant, then under the statute an insurer must show actual prejudice. In response, Great American argued that Maryland courts have held consistently that the statute does not apply to "claims made plus reporting" policies. Great American's argument continued that the policy here is clearly a claims made plus reporting policy because it stated expressly that, not only must a claim be made during the Policy period, but that notice of claim must be provided to it no later than ninety days after the expiration of the Policy. Such a conclusion, it continued, is "consistent with the overwhelming majority view of courts in other states, which have concluded that the prejudice rule does not apply to claims made plus reporting policies."

The Court applied § 19-110 to the facts of the present case. The Court explained that because § 19-110 states that "[a]n insurer may disclaim coverage . . . on the ground that the insured . . . *has breached the policy*," in order for § 19-110 to be in play, the insured must breach the insurance policy "by failing to cooperate with the insurer or by not giving the insurer required notice." The issue in determining whether § 19-110 applies to require Great American to show that it was prejudiced by Sherwood's late-delivered notice is determining whether, in giving Great American notice more than ninety days after the expiration date of the Policy, Sherwood "breached the policy." If the notice provisions of the Policy are "conditions precedent" to coverage, then Sherwood does not "breach the policy" by failing to obey the notice provisions; the nonoccurrence of a condition precedent does not constitute a breach, it merely relieves the other party from performing under the contract/policy. On the other hand, if the notice provisions are deemed covenants, Sherwood's failure to give Great American

notice no later than ninety days after the expiration date of the Policy constitutes a "breach of the policy," such that § 19-110 would apply to require Great American to show that it was prejudiced by Sherwood's late-delivered notice.

The Court noted that although the express language of the Policy characterizes the notice provisions a "condition precedent to [Sherwood's] rights under the Policy," because the purpose of § 19-110 was to discard the strict condition-precedent approach and make policy provisions requiring notice to in the insurers *covenants* and not *conditions*, notwithstanding that Great American labeled the notice provisions in the Policy as conditions precedent to coverage, § 19-110 mandates that the notice provisions of the Policy be treated as covenants. Accordingly, by not giving notice to Great American within the time frame stated in the notice provisions, Sherwood "breached the policy . . . by not giving the insurer required notice" as provided in § 19-110, and, thus, the statute applies to require Great American to show how it was prejudiced by Sherwood's late-delivered notice in investigating, settling, or defending of the Massachusetts and Israeli actions.

Such a conclusion is consistent entirely with *T.H.E.* There, the claim was not filed and served against the insured until after the expiration of the policy, whereas, in the present case, both the Massachusetts and the Israeli actions were conceded to have been filed and served before the expiration of the Policy. Thus, in *T.H.E.*, the suit not being filed until after the expiration of the policy was not a "breach" of the policy, but rather, the non-occurrence of a condition precedent, *i.e.,* that a claim be "made" during the policy. Because, in the present case, the two suits were filed against, and service made upon, Sherwood before expiration of the Policy, the notice provision – treated, under the statute, as a covenant and not a condition – triggers, and ultimately was breached by Sherwood. Accordingly, Sherwood has "breached the policy" in the present case, invoking § 19-110, and requiring Great American to demonstrate prejudice.

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Fagnani, et. al. v. Fisher, et. al., No. 40, September Term, 2010, filed March 18, 2011. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/40a10.pdf

REAL PROPERTY – CONCURRENT INTERESTS
REAL PROPERTY – FORECLOSURE

Facts: In 2006, Petitioner Carole Fagnani defaulted on a loan for $85,000, which was secured by a promissory note and a deed of trust for the suspect property. In 2008, Respondents instituted a foreclosure action on the property following a default on the promissory note. At the time of the foreclosure sale Respondent Ronald Fagnani held a concurrent interest, as tenant in common with Petitioners Carole and Ricardo Fagnani as tenants by the entirety, in the property sold at auction. In addition, Ronald held the promissory note for the loan. The trustees advertised the property for sale as an undivided one half interest, and sold the property at a public sale.

Prior to the ratification of the foreclosure sale in the Circuit Court for Montgomery County, Petitioners filed exceptions to the sale. The Circuit Court overruled the exceptions and ratified the sale. The Court of Special Appeals affirmed the judgment of the Circuit Court. *Fagnani v. Fisher*, 190 Md. App. 463, 988 A.2d 1134 (2010). That court held that the foreclosure of an undivided half interest was proper, and held that both the advertisement for the sale and the price attained for the property were adequate.

Held: Affirmed. The Court of Appeals held that a trustee may foreclose on an undivided one half interest, rather than the entire property. The Court stated that the trustees acted properly in foreclosing on only Carole and Ricardo's interest, because trustees have discretion to determine the manner and terms of the sale and they acted with prudence, care, and diligence. Further, the trustees were obligated to sell no more of the property than was necessary to satisfy the debt.

The Court also addressed allegations of forgery made by Respondents, who claimed Ronald's signature on the deed of trust was forged. The Court determined that whether or not there was a forgery, the outcome of the case remained the same. If there was a forgery, then the deed of trust only secured Carole and Ricardo's one half interest and the trustees foreclosed on the entire interest that was secured. If there was no forgery, then the deed of trust secured the entire property. Under those circumstances, the trustee would have discretion to foreclose on

an undivided one half interest in the property.

The Court lastly addressed the procedural aspects of the sale, and held that the manner of the sale was proper. First, the advertisement of the property adequately described the property and put the public on notice of the sale. Second, the price attained for the property at the foreclosure sale was not so inadequate as to indicate fraud or deceit.

The Court applied a heightened level of scrutiny in evaluating the sale because Respondent was also the note holder. Despite this heightened standard, Petitioners did not meet their burden of proving any impropriety that would render the sale invalid.

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COURT OF SPECIAL APPEALS

Montgomery Preservation v. Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission, et al., No. 1176, September Term, 2009. Opinion filed on February 25, 2011 by Kenney, J. (retired, specially assigned).

http://mdcourts.gov/opinions/cosa/2011/1176s09.pdf

ADMINISTRATIVE LAW - FINAL ADMINISTRATIVE DECISION

Facts: Appellants nominated a certain building for designation as a historical site by Montgomery County's Historic Preservation Commission ("HPC"). The HPC recommended to the Maryland-National Capital Park and Planning Commission's ("MNCPPC") Planning Board that the proposed building be so designated. The Planning Board staff determined that the proposed building met the criteria for designation and held a public hearing. The Planning Board ultimately voted to recommend against amending Montgomery County's Master Plan for Historic Preservation to designate the building as a historic site.

On July 14, 2008, the Planning Board's Chairman transmitted a "draft amendment" to the Montgomery County District Council ("District Council") which stated that the Planning Board "recommends that [the building] should not be designated on the Master Plan for Historic Preservation, and should not be protected by the County's Historic Preservation Ordinance, Chapter 24A of the Montgomery County Code."

On October 28, 2008, the District Council voted against scheduling a public hearing on the draft amendment, and no further action was taken by the District Council concerning the proposal or the Planning Board's recommendation.

Appellants filed a complaint for a *writ of administrative mandamus* in the Circuit Court for Montgomery County, requesting "judicial review of the Planning Board's decision to not recommend designation" of the building as a historic site, and the Planning Board moved to dismiss. After a hearing on the issue, the circuit court granted the motion to dismiss ruling that the Planning Board's recommendation was not an appealable final administrative decision. Appellants appealed the decision to this Court.

Held: The Planning Board's recommendation to the District

Council not to amend Montgomery County's Master Plan for Historic Preservation was not a final administrative decision. Art. 28, §7-108(d)(2)(ii) authorizes the District Council to make the final decision on a plan amendment recommendation forwarded to it by the Planning Board regarding historic site designations. By taking no action within 180 days on the Planning Board's recommendation not to designate a particular site on Montgomery County's Master Plan for Historic Preservation, the District Council effectively adopted the Planning Board's recommendation. The District Council's adoption of that recommendation, although by inaction, was the final administrative decision for purposes of seeking judicial review.

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Bethesda Title & Escrow, LLC v. Robert Gochnour, Case No. 1576, Sept. Term 2009, filed Feb. 28, 2011. Opinion by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/1576s09.pdf

APPEAL AND ERROR - IN BANC COURTS

Facts: Appellee Robert Gochnour co-signed for the refinancing of a loan on property for "a long time friend," and alleged that he was fraudulently misled to incur loans of $510,000 and to purchase the property himself. Appellant Bethesda Title conducted the closing for the claimed fraudulent transaction. Appellee filed suit in the Circuit Court for Montgomery County, and served the complaint on "Heather Timnko/ OK to sign for Max Etheart"at 9400 Key West Avenue, Rockville, Maryland. Etheart was appellant's resident agent. Appellant did not respond to the complaint. Appellee obtained a default judgment against the title company. The court then issued an order assessing damages in appellee's favor. Meanwhile, appellee's co-plaintiff, First Tennessee Bank National Association (FTBNA), also moved for and obtained an order of default against appellant. However, before FTBNA could lock in its judgment for damages, appellant finally took notice of the suit because a writ of garnishment had been issued in appellee's favor against a bank which maintained an operating and escrow account for appellant. The title company moved to vacate the default judgment obtained by appellee, arguing that it had not been properly served because the address of its resident agent was 7920 Norfolk Avenue, Bethesda, Maryland, not the address where Timko accepted service. Appellant also argued that Timko was not authorized to accept service, and was not an employee of Bethesda Title. The circuit court found that service was proper and denied the motion to vacate the default judgment.

Appellant then noted its appeal to this court, moved to stay execution of the judgment, and moved for reconsideration of the denial of the motion to vacate. The motion for reconsideration was denied by the circuit court. Much later, the stay was granted. Appellant filed a Notice of In Banc Review, seeking review of the denial of the motion for reconsideration. The notice stated that appellant retained the right to appeal the denial of the motion to vacate the default judgment. A three-judge panel held a hearing, and subsequently rejected appellant's arguments. Meanwhile, appellee filed a motion to dismiss the appeal in the Court of Special Appeals, arguing that appellant was not entitled to both a direct appeal and in banc review. Appellant filed a response, stating that the legal questions in the direct appeal were

different than those posed to the in banc panel.

Held: The Court of Special Appeals did not have jurisdiction to hear appellant's direct appeal. First, the default judgment against appellant was not final. The judgment was interlocutory because FTBNA had obtained only an order of default, not a default judgment establishing damages. Because appellant's motion for a stay was granted, the bank had been unable to prove its damages, and has thus been unable to obtain a final default judgment. As in *Quartertime Video & Vending Corp*. v. *Hanna*, 321 Md. 59, 64 (1990), under Rule 2-602(a), the judgment against appellant was not final because the rights and liabilities of fewer than all the parties had been adjudicated. Also, appellee prayed for a declaratory judgment that the deed between him and the prior owner of the property at issue was void and of no further effect. The declaratory judgment did not issue. Unless appellee has abandoned this claim, this was another appellate defect that undercut the finality of the judgment and appellant's right to appeal.

Second, allowing appellant to receive review from an in banc panel, as well as review in an appeal in this Court, would be giving appellant two bites of the appellate apple. Article IV, § 22 of the Maryland Constitution, Rule 2-551(h), and Md. Code (1974, 2006 Repl. Vol.), Courts of Judicial Proceedings Article, § 12-202 (d) all provide that after in banc court review of a case, there is no right to appellate review at the next level. Review by an in banc court is "a substitute or alternative" for an appeal to the Court of Special Appeals. The legal issues raised before the in banc panel were the same as those being made to the appellate court, and thus two separate avenues for appeal were not available to appellant.

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Wantz, et al. v. Afzal, et al., No. 2300, September Term 2009, Filed March 1, 2011. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2011/2300s09.pdf

CIVIL PROCEDURE - EXPERT TESTIMONY - EVIDENCE - MARYLAND RULE 5-702 - WITNESS'S *DE BENE ESSE* DEPOSITION, WHEREIN HE TESTIFIED THAT HE HAD OVER FIFTY YEARS' EXPERIENCE IN NEUROSURGERY AND SPINAL CONDITIONS, INCLUDING EXPERIENCE TREATING PATIENTS WITH FRACTURE SIMILAR TO THAT OF THE DECEDENT, AND THAT HE HAD EXTENSIVELY REVIEWED THE DECEDENT'S MEDICAL RECORDS, RENDERED HIM QUALIFIED TO OFFER EXPERT TESTIMONY ON THE CAUSE OF HER DEATH.

EVIDENCE - MARYLAND RULE 5-702 - WITNESSES' CURRICULUM VITAE AND DISCOVERY DEPOSITIONS WERE SUFFICIENT TO WITHSTAND MOTIONS IN LIMINE TO EXCLUDE THEIR EXPERT TESTIMONY ON CAUSATION ON THE BASIS THAT EACH WAS UNQUALIFIED AND/OR LACKED A SUFFICIENT FACTUAL BASIS TO OPINE ON THE ISSUE OF CAUSATION.

Facts: On March 6, 2007, Evelyn Reynolds, an elderly woman suffering from osteopenia and ankylosing spondylitis, was taken by ambulance to Frederick Memorial Hospital after she had fallen and injured her back. Doctors performed several CT scans to determine the extent of her injury. The second of those scans showed a fracture of the T10 vertebra and a possible fracture of the T9 vertebra with associated hematoma and malalignment. Nevertheless, doctors never ordered that Mrs. Reynolds be immobilized. Within forty-eight hours, Mrs. Reynolds had lost feeling from her waist down. Although she was transferred to the University of Maryland Medical Center to undergo immediate spinal fusion surgery from T8 to L2, she never regained motor function below her waist. On April 3, 2007, Mrs. Reynolds developed an enterococcus and staphylococcal infection at her surgical site. Responsive surgery proved unsuccessful, and Mrs. Reynolds passed away on July 30, 2007, as a result of the staph infection she developed in her spine.

On June 9, 2008, Patricia Wantz, appellant, Mrs. Reynolds lone surviving child, filed a wrongful death action, in her capacity as representative of Mrs. Reynolds's estate. A number of original defendants were dismissed, and the case proceeded against Dr. Rizwana Afzal, M.D., the radiologist who read Mrs. Reynolds's CT scans, and Donelson & Carnell, M.D., P.A., the practice to which the doctors overseeing Mrs. Reynolds's care belonged (collectively referred to as "appellees").

Appellant took the depositions of three proposed expert witnesses to testify on the issue of causation: Dr. Karl Manders, M.D., a board-certified neurosurgeon, Dr. Jeffrey Gaber, M.D., a

board-certified internist and geriatric medicine specialist, and Dr. Gregg Zoarski, M.D., a board-certified radiologist. Dr. Manders's testimony was in the form of a *de bene esse* deposition, wherein he opined that immobilizing Mrs. Reynolds immediately after the second CT scan would likely have prevented paralysis, and that without paralysis and the concomitant neurological deficit, the spinal fusion, through bracing or surgery, would likely have been successful. Based on his discovery deposition and proffers by counsel, it appeared that Dr. Gaber planned to opine at trial that paralysis was a likely cause of Mrs. Reynolds' inability to heal following her spinal fusion surgery and, thus, a likely cause of the staph infection that ultimately caused her death. Based on his discovery deposition and proffers, it appeared that Dr. Zoarski was expected to opine that the lack of immobilization following the second CT scan was a likely cause of paralysis.

Before trial, appellees moved in limine to strike the *de bene esse* testimony of Dr. Manders and to preclude Drs. Gaber and Zoarski from testifying on the issue of causation, arguing that each was unqualified and/or lacked the requisite factual basis to offer expert testimony under Maryland Rule 5-702. The court granted the motion with respect to Dr. Manders, finding that he was not qualified and lacked a sufficient factual basis to provide his opinion. Similarly, the court granted appellees' motions relating to Drs. Gaber and Zoarski, finding that, with respect to Dr. Gaber, he was unqualified and/or lacked a sufficient factual basis to offer the opinion for which he was proffered, and finding that, with respect to Dr. Zoarski, he eviscerated his own qualifications when he admitted that how Mrs. Reynolds should have been immobilized and the specifics of how that would have been done was outside his expertise.

Appellees immediately moved for judgment. The court, recognizing that appellant had no witnesses to testify on the issue of causation, granted that motion.

On appeal to the Court of Special Appeals, appellant argued that the trial court abused its discretion in striking or precluding each witness's testimony on the ground that each was qualified and possessed a sufficient factual basis to offer the opinion for which each was proffered.

Held: The Court of Special Appeals reversed the trial court and concluded that all three experts were qualified and possessed a sufficient factual basis on which to opine on the issue of causation. Relying on the principle that the a proposed medical expert need not be a specialist in order to be competent to testify on medical matters, the Court concluded that Dr. Manders's fifty

years of experience with neurosurgery, his experience treating patients with a T9-T10 fracture with preexisting osteopenia, his experience following spinal fusion patients post-operatively, and his review of Mrs. Reynolds's medical records, allowed him to opine that without paralysis and the concomitant neurological deficit, the fusion would likely have been successful, despite never having performed the actual vertebral fusion aspect of the surgery.

Regarding Dr. Gaber's proposed testimony, the Court concluded that the mere fact that Dr. Gaber was an internist, and not a spinal fusion specialist, did not disqualify him from opining that paralysis likely caused Mrs. Reynolds's inability to heal and ultimately her fatal staph infection. Relying on Dr. Gaber's discovery deposition, wherein he testified as to his significant experience in internal medicine, and that he regularly treated patients with osteopenia and ankylosing spondylitis and gets very involved in the post-operative care of patients following spinal surgeries, the Court concluded that the trial court abused its discretion in finding that he was unqualified to offer the proposed opinion.

Finally, with respect to Dr. Zoarski, the Court concluded that he did not eviscerate his own qualifications to opine that the lack of immobilization following the second CT scan was a likely cause of paralysis when he stated that the specifics of how immobilization would have been done was outside his expertise. The opinion regarding whether immobilization was necessary was distinctly different from the opinion regarding how that immobilization should have been accomplished.

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Davis v. Petito, No. 468, September Term 2010, filed February 28, 2011 Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2011/468s10.pdf

CIVIL PROCEDURE – QUALIFICATION OF EXPERT WITNESS IN CIVIL ACTION TO TESTIFY ON BEHALF OF ONE PARTY WHEN THAT EXPERT PREVIOUSLY HAD BEEN CONSULTED BY OPPOSING PARTY WHEN A DEFENDANT IS IN A RELATED CRIMINAL PROSECUTION – CONFIDENTIAL RELATIONSHIP BETWEEN EXPERT WITNESS CONSULTED BY DEFENDANT AND HIS COUNSEL IN CRIMINAL CASE FOR PURPOSE OF BEING RETAINED AS A DEFENSE EXPERT IN CRIMINAL CASE – ATTORNEY-CLIENT PRIVILEGE.

Facts: Joanna Davis, the mother and primary physical custodian of an almost five year old daughter, moved for modification of child custody based on allegations that the child's father, Michael Petito, had sexually abused the child. The allegations had surfaced in the course of therapy sessions between the child and a professional counselor. During discovery, Davis designated a psychologist as an expert to rebut expected testimony from Petito's designated expert that counselors involved in the investigation of the alleged abuse had used improperly suggestive interviewing techniques. Petito's counsel informed Davis's counsel of his intention to challenge the designation of the rebuttal expert on the basis of privilege because Petito and his criminal defense attorney had contacted the expert to seek out her services in the related criminal case. They had not, however, retained the expert. Davis moved *in limine* for her rebuttal expert to be permitted to testify. Her motion was denied and her rebuttal expert was excluded at trial.

During trial, Davis sought to elicit lay testimony from a counselor who met with her daughter during the pendency of the sexual abuse investigation concerning disclosures of abuse allegedly made to the counselor. Petito moved to exclude her testimony on the basis of hearsay. Davis argued that, pursuant to Md. Rule 5-803(b)(4), the testimony fell within the exception for statements made for purposes of medical treatment or diagnosis. The court ruled that the statements did not fall within the Rule 5-803(b)(4) exception because the minor child would not have subjectively understood her statements to the counselor to have been made in contemplation of medical treatment or diagnosis.

At the conclusion of trial, the court ruled that the allegations of abuse were unsupported. It modified the custody and visitation schedule, granting Petito slightly more access to the child and also awarded Petito attorneys' fees. Davis appealed the judgment, arguing that her rebuttal expert was erroneously

excluded, that the testimony of the child's counselor should have been admitted under the Rule 5-803(b)(4) hearsay exception, and that the award of attorneys' fees to Petito was an abuse of discretion under the circumstances.

Held: Judgment affirmed. The circuit court did not err in excluding Davis's rebuttal expert. Petito and his criminal defense attorney submitted affidavits in the circuit court averring that they had discussed the facts of the case with the potential expert witness. The governing authority holds that, in a criminal case, the scope of the attorney-client privilege extends to expert witnesses consulted by defense counsel in order to prepare a client's defense. The fact that the potential expert witness never was retained by Petito did not change the fact that, when he discussed the facts of the case with the potential expert witness, he expected the communication would be confidential. Notwithstanding that in civil cases, Maryland law has permitted a party to call as its own expert witness an expert retained by the opposing party in the course of trial preparation, in this circumstance, when Petito's contact with the potential expert witness was in the context of his preparing his defense in the related criminal case, criminal law cases on the subject control.

It also was not error to exclude the testimony of the child's counselor, nor was it an abuse of discretion for the court to award attorneys' fees to Petito.

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Maryland State Police v. Anthony McLean, No. 1462, September Term, 2009. Opinion filed on February 28, 2011 by Kenney, J. (retired, specially assigned).

http://mdcourts.gov/opinions/cosa/2011/1462s09.pdf

CRIMINAL LAW - HANDGUN LICENSE - DISQUALIFYING CRIMES

Facts: In 2008, appellee applied for a renewal of a permit issued to him by appellant, Maryland State Police ("MSP") to carry a concealed weapon. MSP denied that application on the grounds that appellee had been convicted in 1983 of a misdemeanor that, at the time of his conviction carried a maximum sentence of six months but, at the time of the application for renewal, carried a maximum sentence of more than two years, thus disqualifying him, under Md. Code (2003), § 5-133(b)(1) and § 5-101(g)(3) of the Public Safety Article ("PS"), from possessing a regulated firearm. Appellee appealed MSP's denial of the renewal application to the Handgun Review Board ("the Board"), which issued a decision in favor of appellee. MSP sought judicial review in the Circuit Court for Baltimore County, which issued an opinion affirming the decision of the Board. MSP appealed the decision of the circuit court, asking whether, for purposes of PS 5-101(g)(3), the statutory penalty to be considered is the penalty in effect at the time of conviction or the penalty in effect at the time of the application for a permit or renewal application to carry or otherwise possess a regulated firearm.

Held: PS § 5-101(g)(3) provides that the term "disqualifying crime" includes "a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years." For purposes of PS § 5-101(g)(3), the penalty in place for the violation that the applicant has been convicted of at the time of the application for or renewal of the permit is considered.

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Adrian McFadden and Anthony Miles v. State of Maryland, No. 275, September Term 2009, filed February 3, 2011. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2011/275s09.pdf

CRIMINAL LAW & PROCEDURE – JURIES & JURORS – VOIR DIRE

APPEALS – REVIEWABILITY – PRESERVATION FOR REVIEW

Facts: Appellants, Adrian McFadden and Anthony Miles, were jointly tried by a jury in the Circuit Court for Baltimore City, for charges arising out of the shooting death of George Johnson, and the wounding of Avon Ball and Macy Wilson. At a bench conference during voir dire on October 21, 2008, the trial court informed both defense attorneys that it would be giving a "CSI instruction" and noted that they could "take exception," which they did. Thereafter, the court informed the venire panel, in part: "[I]f you are currently of the opinion or belief that you cannot convict a Defendant without 'scientific evidence,' regardless of the other evidence in the case and regardless of the instruction I give you as to law, please rise."

After a jury was not selected on that day, the venire panel was excused. When a new venire panel was assembled on October 23, 2008, the court again asked the CSI question and received no responses. The court then asked counsel to approach the bench, at which time McFadden's counsel took exception to the CSI question. The court proceeded with the trial and subsequently, the jury convicted McFadden of first degree murder and other related offenses. Miles was found guilty of first and second degree assault, conspiracy to assault, and attempted armed carjacking. This appeal followed.

Held: Reversed and remanded. When counsel objects to a trial court's question ***or*** refusal to give a requested question during voir dire, and not to the ultimate composition of the jury, he or she does not waive the objection by approving the panel selected. In this case, appellants did not waive their objection to a voir dire question when they accepted the jury as empaneled without qualification because appellants' claim of error did not lie upon the inclusion of exclusion of a prospective juror. Rather, appellants challenged the court's propriety in posing a particular question. Having determined that appellants preserved this issue for our review, we hold that they are entitled to a new trial. *See Charles & Drake v. State*, 414 Md. 726, 739 (2010) (holding that the CSI question poisoned the venire, thereby depriving appellants of a fair and impartial jury).

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State of Maryland, et. al. v. Jones, No. 2178, September Term, 2009, Opinion filed on Mar. 1, 2011 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/2178s09.pdf

CRIMINAL LAW - NEGLIGENT RETENTION, SUPERVISION, AND TRAINING - PUBLIC DUTY DOCTRINE - EXPERT TESTIMONY

Facts: On September 15, 2006, at approximately 11:30 a.m., Deputies Billy Falby and Gerald Henderson went to an apartment building in Greenbelt, Maryland, to serve a domestic violence arrest warrant on Lamarr Wallace. The deputies knocked on the door and announced that it was the Prince George's County Sheriff's Office. When Ms. Jones answered the door, she informed Deputy Falby that Mr. Wallace did not live there. A confrontation occurred between the deputies and Ms. Jones, first inside her apartment, and later, in the parking lot of the apartment complex. Ms. Jones ultimately was arrested and charged with hindering an investigation, assault on an officer, escape, and resisting arrest, charges that the State subsequently nolle prossed.

On November 27, 2007, Ms. Jones filed a Complaint against Deputy Falby, Deputy Henderson, and the State of Maryland. On March 16, 2009, a trial on counts I through X of Ms. Jones' Complaint commenced in the Circuit Court for Prince George's County. At the conclusion of the six-day trial, the jury found in favor of Deputy Henderson and the State on all counts, and in favor of Deputy Falby on all counts except the battery claim. On the battery claim, the jury found in favor of Ms. Jones, awarding no economic damages, but $5,000 in non-economic damages.

On September 14, 2009, a second trial commenced before a different jury on the claims of negligent retention, training, and supervision. The jury returned a verdict in favor of Ms. Jones, awarding $261,000 in damages, which the court reduced to $200,000. Both Ms. Jones and the State of Maryland appealed this judgment.

Held: Judgment Reversed. In a negligence action, a plaintiff must show that the defendant had a duty to protect the plaintiff from injury and that the defendant breached that duty. In this case, even if the State had a duty to Ms. Jones, judgment should have been entered in favor of the State because Ms. Jones did not establish any breach of duty.

To establish a claim for negligent hiring and retention, the plaintiff must prove the following five elements: (1) the existence of an employment relationship; (2) the employee's incompetence; (3)

the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. There is a rebuttable presumption that an employer has used due care in hiring an employee.

Evidence of one single incident where a deputy punched a prisoner, for which the deputy was cleared by an internal investigation, was insufficient to support a finding that the deputy was unfit or incompetent. The evidence, therefore, was insufficient to support a claim that the State was negligent in retaining the deputy.

With respect to a claim for negligent supervision and training of a police officer, in most cases, expert testimony regarding the standard of care regarding police training will be necessary to support such a claim. Ms. Jones failed to introduce any testimony, expert or otherwise, indicating that the training of the deputies was deficient. Accordingly, the circuit court erred in submitting the issue to the jury and failing to enter judgment in favor of the State.

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People's Insurance Counsel Division v. Allstate Insurance Company, et al., No. 1949, September Term, 2009, filed March 1, 2011. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2011/1949s09.pdf

INSURANCE - INSURER'S DECISION TO CEASE WRITING NEW PROPERTY INSURANCE IN A DESIGNATED GEOGRAPHIC AREA – INS. ART. § 19-107(a) – OBJECTIVE BASIS OF CATASTROPHE-PRONE GEOGRAPHIC AREA – INAPPLICABILITY OF INS. ART. § 27-501(a) TO A BROAD-BASED UNDERWRITING DECISION – THE INSUBSTANTIALITY OF THE CRUMLISH DICTA

Facts: In December 2006, Allstate Insurance Company and Allstate Indemnity Company (collectively "Allstate") advised the Maryland Insurance Administration (MIA) that it intended to cease writing new property insurance policies in "certain catastrophe-prone areas" in Maryland effective January 1, 2007. Based on information produced by a computer-generated model provided by a catastrophe modeling service, Allstate believed that certain coastal areas bordering the Atlantic Ocean and the Chesapeake Bay presented an unusually high risk of loss in the event of a catastrophic hurricane. Allstate's filing was approved by the Maryland Insurance Commissioner on May 31, 2007.

The next day, the People's Insurance Counsel Division (the Division) requested a hearing before the MIA regarding Allstate's filing. By order issued February 2, 2008, pertinent to this appeal, Associate Deputy Commissioner Thomas Paul Raimondi determined that Allstate sufficiently demonstrated that its filing satisfied Insurance Article §§ 19-107 and 27-501. This determination was affirmed in the Circuit Court for Baltimore City on the Division's petition for judicial review.

On appeal to this Court, the Division argued (1) that Allstate's proposed decision violates § 19-107 because its designation of a certain geographic area was arbitrary and unreasonable; and (2) Allstate's proposed decision violates § 27-501 because a) it failed to provide statistical data showing the probability of a catastrophic hurricane striking Maryland; and b) it failed to provide statistical data showing that its rating plan then in effect was insufficient to cover losses in the event of a catastrophic hurricane.

Held: Affirmed. Section 19-107 merely requires an insurer who proposes to discontinue writing insurance in a certain geographic area to prove that the geographic designation has an objective basis and is not arbitrary or unreasonable. That particular concern is not with "what," but with "where." Here, Allstate presented

voluminous evidence to the Commissioner detailing how the designated geographic area was determined. The Commissioner found Allstate's use of computer-generated hurricane model data to be justified, and that the data was reliable. He held that the geographic designation was objective because it was externally verifiable by zip code and is not subject to an insurer's perceptions, feelings, or intentions. The Court held that there was substantial evidence to support the Commissioner's findings and his rulings.

The Court next considered whether § 27-501 applied. That section prohibits an insurer from refusing to underwrite insurance risks for discriminatory reasons. The Court noted that the Court of Appeals had previously found that section applicable to underwriting decisions "aimed at individual persons or classes of persons, but not to decisions … which concern an entire line of insurance." *St. Paul Fire & Marine Insurance Co. v. Insurance Commissioner*, 275 Md. 130, 142, 339 A.2d 291 (1975). As such, the Court held that § 27-501 did not apply to Allstate's broad-based decision.

Even if that section applied, the Court's holding would be that Allstate fully satisfied the requirements of § 27-501(a)(2). The Division's subcontention that Allstate failed to provide any statistical data validating the probability of a catastrophic hurricane striking Maryland was unreal. As a state on the Eastern Seaboard of North America, which is battered by hurricanes annually, Maryland is at risk.

The Court also rejected the Division's contention that Allstate was required to provide statistical data demonstrating that its February 2006 rate plan was insufficient to cover losses in the event of a hurricane. This argument relied on dicta found in *Crumlish v. Insurance Commissioner*, 70 Md. App. 182, 520 A.2d 738 (1987). The Court expressly repudiated the *Crumlish* dicta, finding it to be based on a prior opinion's erroneous reliance on an inaccurate preamble to Chapter 752 of the Acts of 1974, the predecessor to § 27-501.

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Capital Select Realtors, LLC, et al. v. NRT Mid-Atlantic, LLC, et. al., No. 2373, September Term 2009, filed March 2, 2011. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/2373s09.pdf

MARYLAND UNIFORM ARBITRATION ACT – CONFIRMATION OF AWARD BY COURT

Facts: The parties had agreed to submit to arbitration any disputes arising among them and out of the real estate business. At the conclusion of arbitration proceedings, the arbitrators issued a signed form titled "Award of Arbitrators," which stated that they found a specified amount "due and owing . . . to be paid by Hyongjin Oh to Bonnie Camarata." The writing did not name any other parties. Appellees, NRT, Bonnie Camarata, and Dennis Roarty, filed a petition to confirm the arbitration award in the Circuit Court for Worcester County on February 12, 2009, naming as defendants appellants, Capital Select, Hyongjin Oh, and Chong Barden. Following a hearing on the matter, the trial court ordered "that Judgment shall be entered in favor of Plaintiffs NRT Mid-Atlantic LLC d/b/a Coldwell Banker Residential Brokerage, Bonnie Camarata and Dennis Roarty, and against Defendants Capital Select Realtors LLC and Chong Barden, in the amount of Fourteen Thousand Four Hundred and Seventy-Five Dollars ($14,475.00)." Appellants filed a timely appeal on December 14, 2009.

Held: The Court of Special Appeals reversed and remanded. The Maryland Uniform Arbitration Act anticipates the situation in which one party believes that the arbitrators' written award does not objectively reflect the arbitrators' intended resolution of the dispute. In such a case, the proper vehicle is an application with the arbitrators under C.J. § 3-222 or a petition under C.J. § 3-223 to modify or correct the award; otherwise, the court must confirm the award "as made," *viz.*, according to its objective terms. Therefore, in a proceeding to confirm an arbitration award under C.J. § 3-227, the trial court erred when it entered judgment against parties not named in the written arbitration award to be confirmed.

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John Zorzit v. 915 W. 36th Street, LLC, et al., No. 978, September Term, 2009, filed February 2, 2011. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2011/978s09.pdf

REAL PROPERTY – FORECLOSURE SALE – ABATEMENT OF INTEREST – ABUSE OF DISCRETION

Facts: Appellant, John Zorzit, a court-appointed substitute trustee, commenced foreclosure proceedings on three properties located in Baltimore City. Appellant advertised the foreclosure sale in a local newspaper of general circulation. Under a section entitled "Terms of Sale," the advertisement announced, *inter alia*, that the foreclosure purchaser was obligated to pay interest "on the unpaid purchase money at the rate of 10% per annum from the date of sale to the date funds are received in the office of the Substitute Trustee." The terms of sale further provided that, "[i]n the event settlement is delayed for any reason, there shall be no abatement of interest."

On June 30, 2008, appellees, 915 W. 36th Street, LLC and 919 W. 36th Street, LLC, purchased the three properties at the foreclosure sale for $1,200,000. The terms of sale in the advertisement stipulated that a deposit of $50,000 was required at the time of sale and that "[t]he deposit must be increased to 10% of the purchase price within 3 business days." In accordance with those terms, appellees made a total deposit of $120,000, of which $50,000 was paid at the time of the foreclosure sale. The remaining balance of $1,080,000 was due at settlement.

The initial date set for final ratification of the sale was August 15, 2008. However, on that date, the former owners of the properties filed exceptions to the foreclosure sale. On October 31, 2008, the Circuit Court for Baltimore City denied the former owners' exceptions and issued an order ratifying the sale of the properties. The settlement on the sale of the properties occurred on December 8, 2008. The settlement statement indicated that appellees paid $47,584.71 in interest at the closing.

Because of the delay caused by the former owners' exceptions, appellees moved for, and the circuit court granted, the abatement of the entire interest imposed on appellees, in the amount of $47,584.71. Appellant timely appealed.

Held: Affirmed in part and reversed in part and remanded to the circuit court for further proceedings. The Court of Special Appeals divided the relevant time span into three periods: "Period One" encompassed the date of the foreclosure sale, June

30, 2008, to the initial date set for final ratification, August 15, 2008; "Period Two" covered the initial date set for final ratification, August 15, 2008, to the actual date of final ratification, October 31, 2008; and "Period Three" spanned the actual date of final ratification, October 31, 2008, to the date of settlement, December 8, 2008.

As a preliminary matter, the Court held that the "Terms of Sale" section of the advertisement became a term of the contract that was made when the sale was ratified by the circuit court. Consequently, pursuant to the Court of Appeals' opinion in *Baltrotsky v. Kugler*, 395 Md. 468 (2006), the contractual prohibition against abating the interest on the unpaid purchase price was presumptively binding on appellant and appellees.

Next, the Court reaffirmed the three equitable exceptions to the common law rule that a foreclosure sale purchaser must pay interest on the unpaid balance of the purchase price until actual settlement of the sale. The Court determined that Period Two fit squarely within the third equitable circumstance, because Period Two constituted a delay "caused by the conduct of other persons beyond the power of the purchaser to control or ameliorate." Accordingly, the Court held that the circuit court properly exercised its discretion by abating the interest accrued during Period Two.

With respect to Periods One and Three, the Court held that appellants had failed to overcome the presumptively binding term of sale that prohibited the abatement of interest. The Court found that there was nothing in the record to indicate that Periods One and Three involved a delay in the foreclosure process, or that, if there was a delay, such delay fit within one of the recognized equitable exceptions. The Court therefore held that the circuit court's decision to abate the interest that accrued on the unpaid balance of the purchase price during Periods One and Three constituted an abuse of discretion. In light of its holding, the Court remanded the case to the circuit court to determine the appropriate amount of interest to be abated for the 77 days of delay between the initial date set for final ratification of the foreclosure sale and the actual date of final ratification.

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David Simard v. John S. Burson, et al., No. 1302, September Term, 2009, filed February 25, 2011. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2011/1302s09.pdf

REAL PROPERTY - FORECLOSURE SALES - DEFAULTING PURCHASER - NO LIABILITY FOR DEFICIENCIES CAUSED BY SUCCESSIVE DEFAULTS IN SUBSEQUENT RESALES OF FORECLOSED PROPERTY.

Facts: The question presented by this case involves the extent of the liability of a defaulting purchaser at a foreclosure sale. Appellant purchased residential real property at a foreclosure sale for $192,000. When appellant defaulted, the circuit court ordered a resale ("First Resale") at the risk and expense of appellant. Stan Zimmerman purchased the property at the First Resale for $163,000. Zimmerman also defaulted, and the court ordered a second resale ("Second Resale"). The property was sold at the Second Resale for $130,000, and the sale was completed. The auditor allocated the entire deficiency of $62,000 to appellant. Appellant filed exceptions, claiming that he was responsible for only the deficiency from the original sale price of $192,000 and the First Resale price of $163,000, or $29,000. The court agreed with the auditor.

Held: Reversed. The Court of Special Appeals held that Maryland Rule 14-305(g) contemplates that, when a foreclosure purchaser defaults, the circuit court may order a singular resale, not multiple resales, and the defaulting purchaser's risk and expense attaches only to the one resale resulting from his or her default. Moreover, when the circuit court ordered the Second Resale, it ordered that the property be resold at the risk and expense of Zimmerman, not appellant.

Finally, under general contract principles, the Court held that the deficiency occasioned by Zimmerman's default on the First Resale was not a consequential damage arising from appellant's default on the original sale. The Court explained that, although Zimmerman's default was a reasonably foreseeable consequence of appellant's default, the deficiency between the First Resale price and the Second Resale price was not caused by appellant's default, because appellant had no power to control or ameliorate Zimmerman's conduct that resulted in the default on the First Resale.

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Pomeranc-Burke, LLC v. Wicomico Environmental Trust, Ltd., No. 2492, September Term, 2009, filed March 2, 2011, Opinion by Eyler, James R.

http://mdcourts.gov/opinions/cosa/2011/2492s09.pdf

REAL PROPERTY - ZONING AND PLANNING

Facts: Pomeranc-Burke, LLC, appellant, applied to the Wicomico County Planning & Zoning Commission (the "Commission") for approval of a preliminary plat for a "cluster subdivision" (the "subdivision") called "The Woodlands at Whiton" ("Whiton") to be developed on a site in the A-1 "Agriculture-Rural" zoning district, which site was being utilized for crop and timber production in a rural area of the county (the "Property"). The Commission voted to deny the preliminary plat for the subdivision

On or about December 31, 2008, appellant appealed the Commission's denial to the Wicomico County Board of Appeals (the "Board"). Tthe Board held an "on the record" hearing, and reviewed the proceedings, testimony, and evidence from the Commission hearings, and affirmed the Commission's decision.

On May 11, 2009, appellant petitioned to the Circuit Court for Wicomico County for judicial review. Wicomico Environmental Trust, Ltd., Charles Shank, Jr., Mark and Lisa Wagner, and Audubon Maryland, DC, intervenors before the Board, as well as Wicomico County, Maryland, appellees, all responded to and indicated their intention to participate in and oppose appellant's petition. On October 9, 2009, the circuit court heard oral arguments, and on November 6, 2009, the court issued a written opinion and order affirming the Board's decision.

On appeal, appellant contended that (1) a "cluster subdivision" such as it had proposed, is an "inherently permitted use in the A-1 zoning district" as adopted by the County legislature pursuant to Wicomico County Code ("Code") § 225-52, which section specifies "clear, objective and unambiguous criteria for an A-1 cluster subdivision"; thus, (2) the Commission did not have the administrative authority to deny appellant's application for such use on the basis that the use did not comply with the "general purpose provisions" in Code §§ 225-27 A or 225-51 A, and the Commission "misconstrued and exceeded its authority" by applying the "general purpose provisions" in "order to promote their personal bias against residential development" on the Property; and, (3) the Commission's findings were unsupported by "any evidence," and, in any event, did not support its denial of appellant's proposal.

Held: Affirmed. The Board's findings, as adopted from the Commission's findings, went beyond just the purposes provisions of the Code and of the Comprehensive Plan. They related, *e.g*, to § 225-52 E. ("[t]o the greatest extent possible, cluster open space shall include . . . (b) Known habitats of threatened and endangered species; (c) The most productive agriculture land; (d) Steep slopes; . . . and (f) Riparian forest buffers . . . ."). In any event, the Board was entitled to consider the purposes of the ordinances and the Comprehensive Plan as part of its analysis.

Relying primarily on West Montgomery County Citizens Association v. Maryland-National Capital Park & Planning Commission, 309 Md. 183 (1987), and Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686 (1977), appellant argued that the Board exceeded its authority as an administrative body and acted legislatively when it relied on purposes and plans. Those cases are distinguishable. The Board was given considerable latitude in determining the design of a cluster development consistent with the maximum density permitted.

Importantly, in the context of approving subdivisions, the Commission and the Board were dealing with a specific design of a proposed subdivision. The language of the Code, emphasized above, is permissive, not mandatory. While residential use is a permitted use, and a cluster form of development is permitted under certain circumstances, the design of a specific subdivision, including its location and density, is subject to approval. The Board did not deny the plat on the ground that cluster developments were not a permitted use, or that cluster developments generally were inconsistent with the purposes of the applicable ordinance, but rather on the ground that this particular subdivision, as designed, was inconsistent with the purposes. The density permitted in Code § 225-75 generally, and in cluster developments specifically, is the maximum permitted. The maximum density is not available as of right. Many of the findings made by the Board related to density and location (e.g., lack of roads and services).

It is settled that an agency may deny approval of a proposed subdivision, even if it meets zoning requirements, when it does not comply with an applicable plan and the relevant jurisdiction requires compliance with the plan.

Almost all of the Board's findings related to the size, location and design of the specific subdivision (*e.g,* findings related to size, street arrangement, entrances, linear

arrangement, forest buffers, and slopes). The Board considered the purposes of the applicable ordinances and consistency with the relevant Plan provisions in interpreting and applying the cluster development ordinances in their entirety. It had the power to do so as long as it did not violate specific legislative requirements. An agency's denial may not be arbitrary, but here, there was substantial evidence to support the findings.

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Pro-Football, Inc. et al. v. Thomas Tupa, Jr., No. 1839, September Term, 2009, Opinion filed on February 28, 2011 by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2011/1839s09.pdf

WORKERS' COMPENSATION - COVERAGE - REGULAR OR INTERMITTENT EMPLOYMENT

WORKERS' COMPENSATION - CONTRACTS - FORUM SELECTION CLAUSE.

WORKERS' COMPENSATION - ACCIDENTAL INJURIES - COMPENSABILITY

Facts: Appellee, Thomas Tupa, sought workers' compensation for an injury sustained while he was employed as a professional athlete. At the time of his injury, Tupa was working as a punter for the Washington Redskins, a National Football League (NFL) team owned and operated by Pro Football, a Maryland corporation. Tupa claims that he injured his lower back when he landed awkwardly after a punt while warming up for a preseason game at FedEx Field in Landover, Maryland in August of 2005. He sought immediate medical treatment and has not played football since.

Tupa filed a claim with the Maryland Workers' Compensation Commission requesting temporary partial disability benefits for the period beginning March 1, 2006, and continuing to the present. Appellants, Pro Football and Ace American Insurance Co., contested Tupa's claim on three grounds: (1) Maryland did not have jurisdiction over the claim, (2) appellee did not suffer an "accidental injury" arising out of and in the course of his employment, and (3) there was no causal connection between appellee's injury and his ongoing disability. According to appellants, Tupa's disability was caused by his underlying chronic degenerative disc disease.

After a hearing held in 2008, a Commissioner found that Maryland had jurisdiction and that Tupa's disability was caused by an accidental injury suffered in the course of his employment. Appellants noted a timely appeal to the Circuit Court for Prince George's County and requested a jury trial. The court determined as a matter of law, based on stipulated facts, that Maryland had jurisdiction over the claim. The jury found that Tupa suffered an accidental injury, that his disability was causally connected to that injury, and that he was entitled to benefits for the time period from February 1, 2006 to February 28, 2007.

Held: Maryland has jurisdiction over appellee's workers'

compensation claim. He was regularly employed in Maryland and, although he was hired in Virginia, the purpose of his employment was to play in professional football games in Maryland and at various other stadiums around the country. Even though the player likely spent more time at a practice facility in Virginia than the stadium in Maryland, it is clear that the purpose of his employment was to play in games, not to practice.

The forum selection clause in the player's contract specifying Virginia as the jurisdiction for any injury claim will not be given effect because enforcement of the contract would contravene Maryland's public policy, as stated in LE § 9-104 of the Md. Code.

LE § 9-507 provides: "Compensation may not be denied to a covered employee because of the degree of risk associated with the employment of the covered employee." Under this statute, professional football players are not excepted from the application of the Workers' Compensation law. *Rowe v. Baltimore Colts*, 53 Md. App. 526 (1983), which held to the contrary, was abrogated by LE Section 9-507 and otherwise rejected by *Harris v. State,* 375 Md. 21 (2003). The "assumption of the risk" defense for hazardous employment was abolished by the Workers' Compensation Act and rejected by *Harris* when asserted as the "unusual activity" test. The unusual activity test required that an injury is only compensable if incurred during some unusual, unforeseeable activity, rather than in the usual activities incident to one's employment.

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ATTORNEY DISCIPLINE

By an Opinion and an Order of the Court of Appeals of Maryland dated March 4, 2011, the following attorney has been disbarred from the further practice of law in this State:

JOEL DESINGCO LARA
*

By an Order of the Court of Appeals of Maryland dated March 9, 2010, the following attorney has been disbarred by consent from the further practice of law in this State:

PATRICK JOSEPH REDD
*

By an Order of the Court of Appeals of Maryland dated March 22, 2011, the following attorney has been disbarred from the further practice of law in this State:

ROBERT J. PLESHAW
*

By an Opinion and Order of the Court of Appeals of Maryland dated March 24, 2011, the following attorney has been disbarred from the further practice of law in this State:

ANDREW GREGORY DE LA PAZ
*

RULES ORDER AND REPORT

Rules Order pertaining the the 167th Rules Report regarding the Rules Governing Admission to the Bar of Maryland was filed on March 7, 2011:

http://www.mdcourts.gov/rules/ruleschanges.html#167