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Facts: The Attorney Grievance Commission of Maryland acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Charles Zuckerman in which it alleged that he violated Maryland Rules of Professional Conduct ("MRPC"), 1.1 (Competence), 1.3 (Diligence), 1.15(d) (Safekeeping Property), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 8.4(d) (Misconduct), and Maryland Code § 10-306 of the Business Occupations and Professions ("BOP")Section.

The Circuit Court for Baltimore City held an evidentiary hearing and issued an opinion which presented the findings of fact and conclusions of law. It found that in 2005 Mr. Zuckerman had violated MRPC 1.1, 1.3, 1.4(a), 1.15(a), 5.3 (a) and (b), 8.4(d), § § 10-306 and 10-307 of the BOP Article, where he was suspended indefinitely for those violations. In an attempt to rectify the effects of the embezzlement that led to his first suspension, Mr. Zuckerman hired an employee, Ms. Rhonda Elkins to deal with the prior theft among other duties. Ms. Elkins, however, embezzled funds from Mr. Zuckerman in much the same manner as occurred in the prior case. The trial court therefore found that Mr. Zuckerman had failed to supervise adequately his employees, and that he failed to put in place procedures to ensure his employees' compliance with the MRPC, thereby violating MRPC 5.3(a) and (b). Additionally, the hearing court found that Mr. Zuckerman had, on several occasions, advanced client funds from his trust account before corresponding deposits were placed in his trust account, thereby violating BOP § 10-306. Finally, the trial court also found that Mr. Zuckerman's trust account revealed positive balances in several client's trust accounts as a result of his failure to pay clients promptly, thereby violating MRPC 1.1, 1.3, 1.15(d) and 8.4(d). No exceptions to the findings of fact were filed.

Held: Suspension. The Court of Appeals ordered that Mr. Zuckerman be suspended indefinitely with the right to apply after 90 days.

Attorney Grievance Commission of Maryland v. Charles Zuckerman, AG No. 7, September Term 2007, filed March 17, 2008. Opinion by Cathell, J.

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CRIMINAL LAW - EVIDENCE - CROSS-EXAMINATION - TENDER YEARS STATUTE

Facts: Robert Lee Myer was convicted in the Circuit Court for Baltimore County of sexual abuse of a H.C., a minor, third degree sexual offense, fourth degree sexual offense, and second degree assault. After the incidents with H.C. were reported, she was interviewed by a social worker in a room with a two-way mirror. The interview was videotaped and a police officer observed the interview, participating by telephone at the end of the interview.

The State offered the video-tape into evidence at the conclusion of the State's case in chief, and after H.C. had testified. Defense counsel opposed the admission of the videotape on the grounds that violated Myer's Sixth Amendment right to confrontation as articulated in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004) and that H.C.'s testimony was unreliable. Following direct examination of H.C., defense counsel declined to cross-examine H.C. When the State offered the video-tape into evidence, at the end of the State's case, defense counsel requested the court to recall H.C. to permit cross-examination of H.C. about the contents of the videotape, including contradictions between her in-court testimony and the videotape. The trial court denied the request to recall the witness.

Myer was convicted and noted a timely appeal to the Court of Special Appeals, arguing that the trial court violated his Sixth Amendment right to confrontation, his right of cross-examination and his right to due process. The intermediate appellate court found that the videotape was "testimonial" under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, but that no violation of

Myer's rights occurred because he was given the opportunity to cross-examine H.C. before the tape was admitted. Myer v. State, 399 Md. 33, 922 A.2d 573 (2007).

The Court of Appeals granted Myer's petition for a writ of certiorari to consider whether Myer's Sixth Amendment right to confrontation and right of cross-examination were violated when the videotape was admitted and defendant was permitted to recall H.C. for cross-examination on the videotape's contents.

Held: Reversed. The Court declined to reach the constitutional issue based on the well-established principle that if a case can be decided on a non-constitutional basis, the court will not reach the constitutional issue. The issue presented by this case could be decided on Maryland evidentiary, non-constitutional grounds.

Whether to allow a witness to be recalled is a matter within the discretion of the trial court. The Court reviewed the trial court's actions for abuse of discretion in the context of the facts and circumstances of the case *sub judice*.

The Court held that the trial court improperly precluded petitioner's counsel from the opportunity to pursue traditional avenues of cross-examination with respect to the video-taped testimony, which the State introduced into evidence after the child-victim had testified. The video-taped interview with the social worker was admitted into evidence pursuant to § 11-304 of the Criminal Procedure Article, Md. Code (2001, 2006 Cum. Supp.), a carefully crafted exception to the hearsay rule for certain out-of-court statements of child sexual assault victims under the age of twelve. Defense counsel objected repeatedly to the admissibility of the tape on constitutional grounds, as well as other grounds. Even though technically defense counsel had the opportunity to cross-examine the child witness after her direct examination, and chose not to do so, that opportunity to cross-examine was not a meaningful one when it preceded the receipt of the tape into evidence.

In this case, defense counsel was placed "on the horns of a dilemma." His theory that the tape was inadmissible was neither frivolous nor baseless. Had he elected to cross-examine H.C. on inconsistencies in her testimony and the tape, he might well have opened the door for the State to put the entire videotape into evidence and thereby waive his objections to its admissibility. The Court noted that although ordinarily the failure to exercise the opportunity to cross-examine a witness would be considered a waiver of the right, the introduction of an ex parte statement of

a child witness pursuant to § 11-304, well after the child has testified, is no ordinary case.

The Court held that given these facts and circumstances, the trial court abused its discretion by not allowing the defense to cross-examine H.C. after the videotape was admitted into evidence.

Robert Lee Myer v. State of Maryland, No. 15, September Term, 2007, filed March 3, 2008. Opinion by Raker, J.

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CRIMINAL LAW - JURY INSTRUCTIONS - WHERE IN A JURY TRIAL, A TAPE-RECORDED STATEMENT OF A WITNESS TESTIFYING IN THE TRIAL WAS PLAYED FOR THE JURY, AND WHERE THE TRIAL JUDGE INSTRUCTED THE JURY TO CONSIDER THE TAPED STATEMENT JUST AS IF THAT WITNESS HAD TESTIFIED AT TRIAL, BUT ALSO INSTRUCTED THE JURY TO CONSIDER THE CIRCUMSTANCES UNDER WHICH THE WITNESS TESTIFIED, SUCH AN INSTRUCTION DOES NOT WARRANT A REVERSAL.

Facts: Desmond Jerrod Smith was charged with murder and other offenses, for which he prayed a jury trial. At the trial, a witness, who gave a statement to the police during the investigation of the murder, testified that she was "pleading the fifth" because she had not been present during the murder, and that she gave the statement to the police in an attempt to "get out of" an unrelated charge. The State then played the tape recording of the statement the witness had given police. In its charge to the jury, the trial court included an instruction that the jury was to consider as evidence the recorded statement of the witness just as if she had testified at trial. It also instructed them to consider the testimony in evidence and the circumstances under which the witness testified. Mr. Smith ultimately was found guilty of second-degree murder and other offenses. He appealed to the Court of Special Appeals, which affirmed the judgment of the trial court in an unreported opinion.

Held: Affirmed. The Court of Appeals held so long as the

jury was apprised fully of the giving or not giving of the oath, it was free to weigh both statements and the circumstances under which they were given.

Desmond Jerrod Smith v. State of Maryland, No. 64, September Term 2007, filed March 14, 2008. Opinion by Cathell, J.

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CRIMINAL LAW - SEXUAL ABUSE OF A MINOR - MARYLAND CODE, CRIMINAL LAW ARTICLE § 3-602 DOES NOT REQUIRE THAT A DEFENDANT'S CONDUCT BE OTHERWISE PROHIBITED BY LAW IN ORDER FOR HIM/HER TO BE CONVICTED OF SEXUAL ABUSE OF A MINOR.

Facts: During the 2003 through 2006 school years, Kylie (born in May 1981), the victim, was a student in a physical education class taught by Christopher Larry Tribbitt, the defendant, at a Queen Anne's County public middle school. Over this time, Tribbitt and the victim grew "close."

According to Kylie's testimony at trial, Tribbitt requested, in the Spring of 2005, that she show him her thong underwear by pulling up her shirt and pulling down her pants. She complied. In August 2005, at the beginning of her ninth grade year, Kylie joined the school volleyball team. Tribbitt was its coach. Over the course of the volleyball season, Tribbitt touched Kylie inappropriately on four or five occasions in the school's locker room. Kylie testified that he requested that she hug him and rub her thighs up against him. During this hug, she noticed Tribbitt's tumescence. Kylie also claimed that Tribbitt grabbed her "butt" as they walked through the locker room.

On one occasion, when Tribbitt's shoe was untied, he said to Kylie, "can you bend down there and tie it and while you're down there," and, winking at her, "pretty much tugged on his penis . . . ." They then walked together into the equipment room. While in the equipment room, Tribbitt "rubbed [her] butt and inner thighs." Next, they walked into the girls' locker room where Tribbitt rubbed

Kylie's vaginal area through her pants.

In an encounter later during the volleyball season, Tribbitt grabbed Kylie and played with her thong. She described yet another incident where Tribbitt grabbed her and, with his hand, started "really going down [her] pants and he got like half way down there . . . ," stopping just above her vagina.

Following a bench trial of Tribbitt on 17 November 2006 in the Circuit Court for Queen Anne's County, the trial judge made the following relevant findings of fact:

> [T]here are several things that, probably a lot more than these, that are not in dispute. There was no oral sex; there was no sexual intercourse; there was no digital penetration. In my mind, there was no child pornography. There clearly was somebody who was responsible and that was you, Mr. Tribbitt, in your role, not only as Kylie's teacher, coach, and what you did was obviously, completely inappropriate, and we'll get to whether it was criminal momentarily.
>
> . . . .
>
> With respect to the statute, 3-602, sexual abuse of a minor, . . . there's no dispute that the supervisor here was Mr. Tribbitt. The issue is whether or not, in this case, that sexual abuse is exploitation of a minor and would include sexual offense in any degree.
>
> . . . .
>
> What is clear to me is that over this period of time, there were inappropriate acts that are criminal in nature, that involve sexual offenses which is improper touching. Clear to me, four or five occasions when in middle school, four or five occasions in high school, that there was contact, purposeful contact, where you felt Kylie's butt, not her hip; her vaginal area, rubbed against her. There's no question in my mind that all that occurred. So with respect to Count 1, I have absolutely no doubt that that involves sexual exploitation of Kylie by you, that that was for your own sexual gratification. So as to Count 1, child abuse of a minor, the verdict is guilty.

Tribbitt was sentenced to 25 years in prison, with all but 18 months suspended, and five years of supervised probation. The Court of Special Appeals, in Tribbitt's direct appeal, affirmed in an unreported opinion. The Court of Appeals granted Tribbitt's petition for certiorari to consider a single question: "[m]ay sexual contact that does not constitute a sexual offense in any degree or otherwise violate any provision of Maryland law nonetheless provide the basis for 'sexual abuse' within the meaning of Section 3-602 of the Criminal Law Article?"

Held: Affirmed. Tribbitt did not challenge the facts as found by the trial court. Rather, Tribbitt contended that Maryland Code (2002, 2007 Cum. Supp.), Criminal Law Article § 3-602[1] does not criminalize the acts that the trial court found that he committed on Kylie. Section 3-602 states:

> Sexual abuse of a minor.
>
> (a) Definitions. – (1) In this section the following words have the meanings indicated.
>
> (2) "Family member" has the meaning stated in § 3-601 of this subtitle.
>
> (3) "Household member" has the meaning stated in § 3-601 of this subtitle.
>
> (4)(i) "Sexual abuse" means an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not.
>
> (ii) "Sexual abuse" includes:
>
> 1. incest;
> 2. rape;
> 3. sexual offense in any degree;
> 4. sodomy; and
> 5. unnatural or perverted sexual practices.
>
> (b) Prohibited. – (1) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor.
>
> (2) A household member or family member

[1]Unless otherwise noted, all statutory references are to Maryland Code (2002, 2007 Cum. Supp.), Criminal Law Article.

> may not cause sexual abuse to a minor.
>
> (c) Penalty. – A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 25 years.
>
> (d) Sentencing. – A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for:
>
> (1) any crime based on the act establishing the violation of this section; or
>
> (2) a violation of § 3-601 of this subtitle involving an act of abuse separate from sexual abuse under this section.

Tribbitt argued that § 3-602(a)(4), which defines sexual abuse, requires that, in order to be convicted of a violation of the statute, a defendant's particular acts as found by the trial court must be "otherwise criminal" in nature. The Court of Appeals held that the plain language of the statute is unambiguous and that the statute clearly states that sexual abuse means "an act that involves sexual molestation of exploitation of a minor." The Court of Appeals noted the distinction between the words "means" and "including" as used in the statute. "Means" is used when the statutory drafters intend the definition to be exhaustive. "Including" is used to offer illustrative examples.

The Court also noted that prior to the recent 2002 recodification, the statute stated that sexual abuse meant "*any* act that involves sexual molestation or exploitation . . . ." The Special Revisor's Note to the 2002 recodification states that the recodification was "derived without substantive change" from the previous version. Therefore, the proper construction of the statute is that "sexual abuse" still encompasses "any" act that involves sexual molestation or exploitation of a child.

The Court of Appeals compared the statute in the present case to a statute structured grammatically in a way similar to the statute at issue here, *City of Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299, 322-323, 910 A.2d 406, 419-20 (2006) (*Carmel Realty*). The Court noted that the structure of the two statutes was identical. In *Carmel Realty*, the two subsections of the statutes were held to have created two independent, alternative definitions. The Court declined to decide

whether § 3-602(a)(4) created alternative definitions or § 3-602(a)(4)(ii) served as an illustrative subsidiary to § 3-602(a)(4)(i), noting only that Tribbitt's conduct clearly fell within the plain language of the statute.

The Court rejected Tribbitt's argument that a recent change in the law enacted after the occurrence of Tribbitt's conduct indicated that the General Assembly did not his intend for his conduct to be unlawful. The Court dismissed Tribbitt's argument because it ignored both the plain language of the statute and the legislative history of the new law. Tribbitt's final argument was that the Court should apply the doctrine of *ejusdem generis* in interpreting the statute. The Court declined to apply *ejusdem generis* to find the forced and unnatural interpretation of the statute urged by Tribbitt.

Christopher Larry Tribbitt v. State of Maryland, No. 72, September Term 2007, filed March 13, 2008 Opinion by Harrell, J.

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EMPLOYMENT LAW - EXEMPTION FROM TIME AND A HALF COMPENSATION FOR OVERTIME

Facts: Joseph Colburn and thirty-nine other appellants are correctional supervisors with the Maryland Department of Public Safety and Correctional Services ("DPSCS"). Appellants filed a grievance with DPSCS claiming entitlement to overtime compensation at a rate of one and one-half times their regular hourly rate of pay for their overtime performance of non-supervisory correctional duties. Appellants claimed that in performing these duties outside their forty-hours-a-week schedule, they became non-exempt employees under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, and were, therefore, entitled to overtime compensation pursuant to Md. Code (1993, 1997 Repl. Vol), §§ 8-303 and 8-305 of the State Personnel and Pensions Article. DPSCS, instead, gave appellants straight compensatory time, on an hour-for-hour basis,

for the additional hours worked. On April 6, 2006, an Administrative Law Judge ("ALJ") issued a detailed written opinion and order denying the Appellant's grievance. In pertinent part, the ALJ found that appellants were salaried employees with supervisory duties requiring independent judgment and discretion and concerning the management and operations of the correctional facility. Appellants appealed to the Circuit Court for Somerset County, who affirmed the ALJ's decision, finding it was supported by substantial evidence. The Court of Appeals granted certiorari while an appeal was pending in the Court of Special Appeals.

Held: Affirmed. The Court held that appellants were not entitled to overtime compensation for time worked on non-supervisory activities in excess of forty hours per week. Under the FLSA and its implementing regulations, an employee who is paid on a salary basis and is a "bona fide executive, administrative, or professional employee"is exempt from the FLSA's minimum wage and overtime pay requirements. An employee is consider an exempt administrative employee if his or her primary duties consist of: (1) "[t]he performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers," and (2) the performance of work "requiring the exercise of discretion and independent judgment." 29 C.F.R. § 541 (e)(2) (2002).

In reviewing the record, the Court held that the ALJ did not err in concluding that appellant were employed on a salary basis. The record showed that appellants earned a set amount of money per year, depending on the position they held. The Court then rejected appellants' argument that the State of Maryland's practice of deducting a salaried employee's wages for unexcused absences rendered them non-salaried employees. The Court noted that 29 C.F.R. § 541.118 (b) clarified that an employee's salaried status is not affected if deductions are made to his or her salary when "the employee absents himself from work for a day or more for personal reasons, other than sickness or accident." In addition, the Court pointed out that C.F.R. § 541.5d specifically permits government employers to reduce the wages of their salaried employees for unexcused absences. The Court also rejected appellants' argument that they were non-salaried employees because they are subject to reductions in wages due to variations in quality or quantity of work performed, specifically disciplinary suspension without pay. The Court noted that, under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), "the mere possibility of a disciplinary suspension without a significant practice or policy of suspending correctional supervisors for disciplinary infractions "is not enough to render [appellants]' pay 'subject to' disciplinary deductions." *Auer*, 519 U.S. at 462, 117

S.Ct. at 911, 137 L. Ed. 2d at 90. The Court stated that appellants did not submit any evidence before the ALJ showing that suspension without pay had ever been utilized as a disciplinary action by DPSCS against any correctional supervisors.

The Court then held that the ALJ did not err in concluding that appellants' job duties qualified them for the administrative employee overtime exemption. The Court first found substantial evidence in the record to support the ALJ's conclusion that appellants' primary duties related directly to the management policies and the general business operations of the correctional facility. The record showed that appellants were members of the correctional facility's management team. Security Chief Ron Dryden, for example, testified that management team consists of Lieutenants, Captains, and Majors as well as the Administration (Security Chief, Assistant Warden, Warden). Security Chief Dryden also testified as that the day-to-day duties of Lieutenants, Captains, and Majors, including: supervising other correctional employees; scheduling work rotations; conducting daily inspections of buildings and grounds; coordinating prison activities, including prisoner transfer; investigating complaints of employee misconduct; and, completing administrative reports and evaluations.

The Court then found there was substanital evidence in the record to support the ALJ's finding that appellants exercise discretion and independent judgment in the performance of their work. The Court noted that the duties assigned to appellants. The duties of Lieutenants included: preparing the daily post assignment schedules; providing "specific guidance to subordinates in the application of direct supervision" of subordinates' activities, including routine and special searches; preparing written investigative reports and employee evaluations; and, counseling subordinate employees. The duties of Captains included: supervising subordinate employees, including lieutenants; providing guidance and direction to subordinates; investigating inmate complaints and employee misconduct; preparing shift schedules and managing employee leave; coordinating inmate searches and transfers; and recommending changes to post orders and policy directives.

Joseph Colburn, et al. *v. Department of Public Safety and Correctional Services*, No. 41, September Term, 2007, filed January 14, 2008. Opinion by Greene, J.

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IMPLIED OR EXPRESS WARRANTY - MAGNUSON-MOSS WARRANTY ACT REQUIRES SAME AS MARYLAND LAW TO PROVE BREACH OF IMPLIED OR LIMITED WARRANTY: PLAINTIFF MUST PROVE WARRANTED ITEM DID NOT CONFORM TO WARRANTY AT TIME OF SALE - NEED FOR EXPERT TESTIMONY REGARDING CAUSATION

Facts: On 20 November 2001, Mary Susan Crickenberger (Appellant) purchased from Antwerpen/Hyundai Kia ("Antwerpen") in Baltimore, Maryland, a used 2001 Hyundai XG-300 with 8,911 miles on its odometer. A limited warranty accompanied the sale of the vehicle, agreeing to repair or replace any component displaying a defect in materials or workmanship. Prior to Ms. Crickenberger's purchase, the vehicle was part of the rental car fleet owned by the Hertz Corporation.

The record of the case did not indicate what, if any, maintenance the Hertz Corporation performed on the vehicle while in its ownership, its repair record, or whether it was in any accidents. After Ms. Crickenberger acquired it, she claimed to have caused the car to be serviced for maintenance purposes on several occasions and to have had repaired or replaced various components. On 4 February 2005, the vehicle, with an odometer reading then of 63,700 miles, stopped working altogether. The dealer advised Ms. Crickenberger that the engine would have to be replaced. Through its authorized dealer, Antwerpen, Hyundai Motor America (Appellee, hereinafter "HMA") declined to replace the engine under the limited warranty.

Crickenberger initiated a suit in the Circuit Court for Howard County on 23 January 2003, alleging that the vehicle's continued need for repair established defects in the vehicle and that HMA's failure to cure the defects resulted in a breach of the Maryland Consumer Protection Act and the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act. As the foundation of her Magnuson-Moss Act claims, she alleged breach of express and implied warranties under the Maryland Code. The Consumer Protection Act count derived from an alleged violation of the Maryland Automotive Warranty Enforcement Act because, as plead, a violation of the latter also was a violation of the former.

In discovery, Ms. Crickenberger designated an expert, James E. Lewis, and indicated that he would testify at trial as to the Hyundai's repair history and loss in value as a result of the alleged defects. HMA filed a motion *in limine* to exclude Lewis's opinions on the grounds that they lacked an adequate factual basis, were unreliable, and constituted inadmissible speculation, in violation of Maryland's requirements for the admissibility of expert witness testimony. Prior to the hearing on HMA's motion *in*

limine, Crickenberger withdrew her designation of Mr. Lewis as her expert. No other expert witness was advanced by her on the issues of causation or damages.

HMA filed a Motion for Summary Judgment asserting that Crickenberger could not prevail on her breach of warranty (Magnuson-Moss Act) claims because, without expert testimony, she could not prove the existence of a defect attributable to the manufacturer at the time of sale, HMA's failure to correct alleged defects in violation of warranty, or the amount of damages caused by a defect. HMA also argued that Ms. Crickenberger could not prevail on her Maryland Consumer Protection Act claim as it was derivative of a violation of the Automotive Warranty Enforcement Act, which was inapplicable because the Hyundai was owned previously at the time she purchased it. As to her Consumer Protection Act count, Crickenberger conceded HMA's argument. As to HMA's Motion concerning the Magnuson-Moss Act, she filed an opposition alleging that proof of a violation of the Act does not require expert testimony or proof of a specific defect. The Circuit Court, after a hearing, granted HMA's motion, finding that expert testimony would be required to prove causation and damages before Ms. Crickenberger could recover under the Act. Because no such expert was identified, the court determined HMA was entitled to judgment as a matter of law.

Crickenberger appealed to the Court of Special Appeals. In her brief filed in the intermediate appellate court, she framed three arguments: (1) in breach of limited or implied warranty claims under the Magnuson-Moss Act, expert testimony is not required to prove a product contained a defect existing at the time of sale; (2) a consumer does not bear the burden of proving a specific defect to prevail on breach of limited or implied warranty claims under the Act; and (3) expert testimony is unnecessary to prove damages under the Act. The Court of Appeals issued a writ of certiorari, on its initiative, while the appeal was pending before the Court of Special Appeals.

Held: Judgment of the Circuit Court for Howard County affirmed. Ms. Crickenberger offered two principal arguments to support her main thesis that expert testimony was unnecessary to link her Hyundai's malfunctions with a defect in the vehicle attributable to the manufacturer. She argued that, under the Magnuson-Moss Act, a consumer need not prove a specific defect to prevail, even if the derivative state law would require such proof, and she argued that Maryland law does not require expert testimony where a particular product required so many repairs. Crickenberger asserted that the alleged circumstantial evidence of a defect (her record of service and repairs in this case) sufficiently raised

triable questions of fact as to causation and defect.

The Court concluded that the Magnuson-Moss Act required no less than Maryland law to prove a defect in violation of a limited warranty or an implied warranty. The Court then reviewed Maryland law and noted the burden of proof is on the plaintiff to establish that the article sold did not at the time of the sale conform to the representations of the implied or limited warranty. The Court acknowledged that the nature and circumstances of an accident or malfunction may support an inference of a defect attributable to the manufacturer of the product where circumstantial evidence tends to eliminate other causes, such as product misuse or alteration, and that expert testimony is not always necessary to prove a defect. The Court found in this case, however, that, due to Ms. Crickenberger's erratic oil services of the engine and her failure to submit evidence as to the care or accident record of the vehicle prior to her purchase, allegations of a defect amounted to mere speculation. Given this conclusion, the Court found it unnecessary to reach and decide whether expert testimony would have been required also to establish Ms. Crickenberger's alleged damages.

Mary Susan Crickenberger v. Hyundai Motor America, No. 81, Sept. Term 2007, filed 21 March 2007, Opinion by Harrell, J.

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REAL PROPERTY - PROPERTY LAW - SPECIAL EXCEPTIONS - THE "IN HARMONY WITH" TRADITIONAL STANDARD IN APPLICATIONS FOR SPECIAL EXCEPTIONS REMAINS THE STANDARD IN THE ABSENCE OF SPECIFIC LEGISLATIVE LANGUAGE TO THE CONTRARY.

Facts: Terrapin Run, LLC, applied to the Board of Appeals of Allegany County for a special exception to establish a planned residential development. The development was to be located on 935 acres of land, primarily zoned as District "A" (Agricultural, Forestry and Mining), with a portion of the tract located in District "C" (Conservation). The jurisdiction's Master Plan identified the site as future "Urban Development." The Board of

Appeals found that the proposed development would be in harmony with the Allegany County Comprehensive Plan, 2002 Update, finding that the Plan was advisory in nature, and that strict conformance with the plan was not required. Objecting to the application of the "in harmony with" standard, David Trail, et al., appealed to the Circuit Court for Allegany County, which remanded the case to the Board with instructions to determine whether the proposed use was "consistent with" the policies and recommendations of the Plan. David Trail, et al., appealed the decision of the Circuit Court to the Court of Special Appeals. Terrapin Run cross-appealed. That Court reversed the judgment of the Circuit Court, and affirmed the decision of the Board.

Held: Affirmed. The Court of Appeals held that where Article 66B required that special exceptions "conform" to a local jurisdiction's Plans, that term had the semantical equivalent of the phrase "in harmony with," which has long been the standard utilized in Maryland land use administrative practice.

David Trail, et al. v. Terrapin Run, LLC, et al., No. 44 September Term 2007, filed March 11, 2008. Opinion by Cathell, J.

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STATE ETHICS COMMISSION - SANCTIONS - STATE GOVERNMENT ARTICLE § 15-405 - STATE ETHICS COMMISSION REASONABLY CONCLUDED BASED ON THE EVIDENCE, THAT THE PROHIBITED CONDUCT BY A LOBBYIST OCCURRED AFTER THE ADOPTION OF § 15-405; THUS, SANCTIONS WERE NOT APPLIED RETROSPECTIVELY.

MISSING WITNESS RULE - ADMINISTRATIVE ACTIONS - STATE ETHICS COMMISSION IMPERMISSIBLY APPLIED MISSING WITNESS RULE TO DRAW ADVERSE INFERENCE WHERE THERE WAS NO RECORD OF HOSTILITY BETWEEN THE WITNESS AND THE COMMISSION, NO FINDING OF FACT REGARDING THE UNAVAILABILITY OF THE WITNESS TO THE COMMISSION OR ITS STAFF ATTORNEY, AND THE MISSING WITNESS RULE WAS NOT MENTIONED OR ARGUED ON THE RECORD PRIOR TO THE COMMISSION'S FINAL DECISION.

Facts: In September of 2001, Bruce C. Bereano, an experienced lobbyist of many years, entered into an agreement to provide lobbying and consulting services to Mercer Venture, Inc., d/b/a Social Work Associates (Mercer). The terms of this agreement were set forth in a letter from Bereano to Mike Traina of Mercer, dated 1 September 2001. The letter was signed by Traina on 13 September 2001. The agreement provided, among other things:

> [2] I propose commencing the month of September 1, 2001, a monthly retainer fee of $2,000.00 plus reimbursement for any necessary and reasonable expenses such as postage, duplicating costs, long distance telephone calls, mileage, fax expense, and legislative meals and entertainment. Any significant or unusual expenses would have to be approved and authorized by you before being incurred. These fees and expenses would be paid and continue on a regular basis once your company attains a financial cash flow, and ability to do so.
>
> . . . .
>
> [4] It is further understood and agreed that in addition to and separate and apart from payment of the aforementioned monthly fee retainer fee and any further increase thereof, Mercer Ventures will compensate and further pay me one percent (1%) of the first year receivable for continuing representation and services be performed, provided, and made available when and after each separate facility and/or site or location that is opened in which I was involved in securing and participated in obtaining, and/or any contract and performance of services which is entered into by your company with any government entity, unit or agency in the State of Maryland or any other state or jurisdiction in which I worked on the matter.

On 13 November 2001, Bereano filed a lobbying registration form with the State Ethics Commission, declaring, under oath, his intention to perform executive and legislative action lobbying on behalf of Social Work Associates, a subsidiary of Mercer. Bereano indicated that the effective date for lobbying on behalf of Social Work Associates for "any and all legislative and executive matters concerning staffing and case management foster care, children and social services issues" was 1 November 2001 to 31 October 2002.

Later, on 1 December 2001, Bereano sent an invoice to Mercer requesting a $2,000 retainer for each of the months of September, October, November, and December. He also requested payment for expenses that included long distance phone calls, mileage, duplicating, and $393.34 in "Legislative Meals [and] Expenses." Again, in an invoice dated 16 January 2002, Bereano requested payment in the amount of $24,000 for "professional [s]ervices [r]endered," and a $2,000 retainer for January. He also sought reimbursement for expenses, including $454.39 in "legislative meals and expenses." Bereano sent similar invoices to Mercer billing for his monthly retainer fee and seeking reimbursement of "legislative expenses," meals and entertainment, mileage, duplicating, and long distance telephone calls throughout the first half of 2002.

Traina sent Bereano a letter dated 17 May 2002, detailing Mercer's recent projects. The letter was accompanied by an "Organizational Capability" statement, listing among Mercer's "major clients" the following State Agencies: the Department of Public Safety and Correctional Services; the Department of Assessments and Taxation; the Department of Health and Mental Hygiene; the Department of Business and Economic Development; and the Department of Human Resources.

On 12 June 2002, Traina wrote to Bereano that he had learned of an investigation by the press into whether paragraph 4 of their agreement was a prohibited contingency fee. Although Traina told Bereano he considered this a "misinterpretation," he requested that their contract be amended to delete that language. Bereano agreed.

In addition, Bereano filed with the Commission an amended report on his lobbying activities on behalf of Mercer. In his initial report, dated 31 May 2002, he listed compensation for lobbying activities during the period of 1 November 2001 through 30 April 2002 as $139,379.46. On 13 June 2002, he changed that figure to $17,579.46. In a later report, filed on 2 December 2002, Bereano stated that he had performed lobbying activities on behalf of Traina's business from 1 May 2002 through 31 October 2002, for which he had received a total of $10,000.00.

The State Ethics Commission's staff initiated a complaint against Bereano on 19 September 2002. A hearing on the merits began on 25 June 2003. Throughout his testimony, Bereano insisted that paragraph 4 of the 1 September 2001 letter agreement did not create a contingency agreement. He stated repeatedly that he was an experienced lobbyist and legislative draftsman who knew of the longstanding prohibition against contingency fees. In addition, Bereano testified that it was not he, but his client, who authored

the paragraph containing the contingency fee language.

Bereano further testified that Traina never asked him for his assistance with obtaining work from State agencies, although he acknowledged that he tried to find opportunities for Mercer in the private sector and at the county and municipal levels of government. He denied performing any services for Mercer that could be considered lobbying and detailed his work on business development with private entities. He explained that he registered as Mercer's lobbyist out of an abundance of caution, as previous legal problems had convinced him always to make the fullest possible disclosure.

When confronted with his bills to Mercer for "legislative meals and expenses," performed after 1 November 2001, under paragraph 2 of the 1 September 2001 letter of agreement, Bereano gave several accounts of what had happened during meetings with legislators. He denied that the terms used in these bills meant he had been lobbying.

The Commission found Bereano in violation of State Ethics rules and imposed sanctions. In reaching that result, the Commission applied the "missing witness rule" to draw a factual inference adverse to Bereano regarding Traina's failure to testify. Bereano appealed to the Circuit Court for Howard County, which affirmed the Commission's findings and conclusions. The Court of Special Appeals affirmed in a reported opinion. *Bereano v. State Ethics Comm'n*, 174 Md. App. 146, 920 A.2d 1137 (2007). The Court of Appeals granted certiorari to consider two questions presented by Bereano:

> Whether the enforcement provisions of the Maryland state ethics laws may be applied retroactively to an agreement that was executed two months before the statute was enacted?
>
> 1. Whether the "missing witness rule" should be applicable to administrative agency proceedings in Maryland, and even if it can be, did the Commission commit reversible error by misapplying the rule by violating petitioner's due process rights to notice and an opportunity to be heard, shifting the burden of proof to petitioner, and ignoring the "peculiar control" requirement?

Held: Judgement reversed. Case remanded to the Court of Special Appeals with instructions to reverse the judgment of the Circuit Court for Howard County and direct the Circuit Court to reverse the action of the State Ethics Commission and remand for proceedings not inconsistent with this opinion.

On the first issue, Bereano conceded that Maryland law has long prohibited contingency fees for lobbying. Prior to 1 November 2001, this prohibition was codified in § 5-706 of the State Government Article. Although the prohibition existed, a sanction did not. The General Assembly adopted legislation, which became effective on 1 November 2001, codified as § 15-405. The new legislation permitted the State Ethics Commission to impose sanctions, including fines and suspension, for violation of the prohibition on contingency fees.

The Court of Appeals agreed with Bereano at the outset of its analysis, noting that the sanctions in § 15-405 could not be applied retrospectively. The Court concluded, however, that based on the conflicting evidence, the State Ethics Commission reasonably found that Bereano had violated the prohibition on contingency fees after the effective date of the new legislation.

As to the second issue, the Court of Appeals held that the missing witness rule was misapplied by the Commission. The Court stated that because there was no discussion or argument regarding the failure of Bereano to call Traina to testify, the Commission could not draw an inference adverse to Bereano. The Court noted that perhaps a discussion or argument on the record regarding the missing witness would have alleviated these concerns. The Court held that Traina was equally available to both parties because Traina volunteered to be interviewed by and submitted documents to the Commission during its investigation. There was nothing in the record to indicate any hostility between Traina and the Commission. Similarly, there was no factual finding by the Commission that Traina was hostile. The use of the missing witness rule in this circumstance impermissibly shifted the burden of proof on to Bereano. Therefore, the Commission's reliance on the missing witness rule to draw an inference adverse to Bereano was inapproriate.

Bruce C. Bereano v. State Ethics Commission, No. 32, September 2007, filed 19 March 2008, Opinion by Harrell, J.

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COURT OF SPECIAL APPEALS

CONTRACTS - PERSONAL JURISDICTION OVER VIRGINIA CORPORATION IN MARYLAND COURT - MARYLAND WAGE COLLECTION AND PAYMENT LAW - LIABILITY OF VIRGINIA-BASED EMPLOYER FOR VIOLATION OF THE MARYLAND WAGE COLLECTION AND PAYMENT LAW.

CIRCUIT COURT HAD SPECIFIC PERSONAL JURISDICTION OVER VIRGINIA CORPORATION IN ACTION FOR BREACH OF EMPLOYMENT CONTRACT AND VIOLATION OF MARYLAND WAGE COLLECTION AND PAYMENT LAW WHEN THE EMPLOYEE WAS CLAIMING THAT THE EMPLOYER HAD FAILED TO PAY CONTRACTUALLY AGREED SEVERANCE PAY AND EMPLOYER'S OSTENSIBLE REASONS FOR NOT PAYING THE SEVERANCE WERE BASED, IN PART, ON CONDUCT OF EMPLOYEE IN CARRYING OUT WORK IN THE STATE OF MARYLAND. WHEN DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION WAS DENIED, AND CASE PROCEEDED TO TRIAL, ISSUE OF PERSONAL JURISDICTION IS REVIEWED ON THE ENTIRE RECORD ON APPEAL.

VIRGINIA-BASED EMPLOYER WAS SUBJECT TO LIABILITY FOR VIOLATION OF THE MARYLAND WAGE COLLECTION AND PAYMENT LAW FOR FAILING TO PAY WAGE DUE TO EMPLOYEE WHO, AS PART OF HIS EMPLOYMENT, WAS DIRECTED BY THE EMPLOYER TO GO TO WORK SITES IN MARYLAND. THE EMPLOYER EMPLOYED THE EMPLOYEE IN THE STATE OF MARYLAND WITHIN THE MEANING OF THE OPERATIVE LANGUAGE OF THE MARYLAND WAGE COLLECTION AND PAYMENT LAW.

Facts: Himes Associates, Ltd. ("Himes"), is a Virginia corporation with its principal place of business in Fairfax. It is a construction management company. Eric Anderson was hired by Himes on April 27, 2001, via a written agreement ("Agreement") to be an executive project manager and Vice President of Operations at Himes's Fairfax office. On the issue of severance pay, the Agreement provided that if Himes terminated Anderson "for reasons other than performance or cause" he would receive three months salary or three months notice of termination. Himes terminated Anderson's employment on March 25, 2004, without notice but refused to pay Anderson three months' severance pay. Anderson filed suit in the Circuit Court for Anne Arundel County for breach of contract and violation of the Maryland Wage Payment and Collection Law ("MWPCL"), Md. Code (1957, 1999 Repl. Vol.), sections 3-501 *et seq.* of the Labor and Employment Article ("LE").

Himes filed a motion to dismiss, arguing that the court lacked personal jurisdiction over Himes and that Himes, as a Virginia corporation, was not subject to liability under the MWPCL. The

court denied the motion. At a subsequent trial, Anderson testified that his primary responsibility at Himes since 2001 was to oversee Lockheed Martin's construction of a new facility in Virginia ("the Project"). During the course of the Project, Anderson met twice a month with employees of Lockheed Martin at the corporation's Baltimore office. Anderson testified that he was working on getting an extension of the contract between Himes and Lockheed Martin for the Project when he was terminated. Anderson also testified to having participated in some oversight of two other Himes projects in Maryland.

According to Anderson, Paul Himes, the president of Himes, had told him on the day he was terminated that his position within the company was being eliminated. When Anderson reminded Paul Himes about the severance pay due in such a case, he responded that he would find "cause" if that is what was needed. Anderson additionally testified that Paul Himes had sent him a series of e-mails on March 30 and 31, 2004, asking Anderson to come back to work for approximately 2-3 months to finish the Project because certain employees at Lockheed Martin were disappointed that Anderson had left before construction was finished. Anderson did not accept this offer.

Himes adduced evidence showing that Anderson had been fired for cause or poor performance related to four separate incidents. In the first incident, Anderson's manner was "brusque" in speaking to another Himes employee in the summer of 2003. In the second incident, Anderson had promised that his son would help Himes at a project site in Gaithersburg, Maryland, since Anderson himself could not attend. Allegedly, Anderson's son never showed. Third, Paul Himes received a call from the president of Davis Construction Company, the general contractor on the Project, in which the president complained that Anderson was making it difficult to "conduct[] the business of building the Project." Fourth, Anderson had failed to secure an extension of Himes's contract with Lockheed Martin on the Project.

Ruling from the bench, the court credited Anderson's testimony, characterized Himes's allegations of poor performance or cause for firing as trumped-up "afterthoughts," and found that "there couldn't possibly be any way a reasonable trier of fact could conclude that [Anderson] was terminated for [poor] job performance" or cause. Further, the court found that there was no *bona fide* dispute as to whether the severance pay was owed. Accordingly, the court cited the MWPCL, LE section 3-507.1(b), which states that if, in an action such as this, "a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a *bona fide* dispute, the court

may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs," and awarded Anderson treble damages, attorneys' fees and costs.

Himes appealed, arguing that 1) the trial court erred in asserting personal jurisdiction over Himes, 2) the court erred in subjecting Himes, a Virginia corporation to liability under the MWPCL, 3) the court erred in placing the burden of proof on Himes and used the wrong legal standard to evaluate Himes's decision to terminate Anderson for performance or cause, 4) the court's finding of no *bona fide* dispute between the parties was clearly erroneous.

Held: Affirmed. On the issue of personal jurisdiction, Himes had established minimum contacts with the State of Maryland arising out Anderson's cause of action such that Himes "purposefully availed" itself of the benefit of conducting business in Maryland. Himes entered into a series of ongoing obligations with Anderson, a resident of Maryland, and Anderson's poor performance, according to Himes, occurred at least in part in Maryland-based job responsibilities.

Second, the court did not err in holding that Himes was subject to liability under the MPWCL. LE section 3-501 defines "employer" to "include[] any person who employs an individual in the State . . . ." The operative word in that sentence – "employs" – is defined in LE section 3-101: "'[E]mploy' means to engage an individual to work . . . . 'Employ' includes: (i) allowing an individual to work; and (ii) instructing an individual to be present at a work site." Under the plain language of the statute, it is clear that Anderson was instructed to be in Baltimore twice each month as an integral part of job to oversee the Project for Lockheed Martin. Accordingly, Himes is an "employer" and subject to liability under the MPWCL.

Third, the court did not err in placing the burden of proof regarding the existence of cause or poor performance on Himes. This Court held in *Tricat Industries, Inc. v. Harper*, 131 Md. App. 89, 119 (2000), in a wrongful termination case, that the burden of proof is on the employer to show cause or poor performance for the termination. The Court of Appeals specifically declined to overrule *Tricat*'s holding in *Towson Univ. v. Conte*, 384 Md. 68, 91 (2004). The analogy between the wrongful termination suit in *Tricat* and the current suit is close. The trial court did not err in placing the burden of proof on Himes. Further, the trial court did not apply an incorrect legal standard in evaluating Himes's decision to terminate Anderson. The court found that the reasons cited by Himes for terminating Anderson were nothing more than "afterthoughts" and not the product of a good faith finding by

Himes that Anderson had performed poorly.

Finally, the court's finding that there was no *bona fide* dispute between the parties was not clearly erroneous. The court credited Anderson's testimony that Paul Himes intended to find "cause" for the termination and did not fully credit the testimony of Paul and the other Himes witnesses. There was competent and material evidence to support the court's finding that Himes did not act in good faith when it refused to pay Anderson the three months severance wages.

Himes Associates, Ltd v. Anderson, No. 310, September Term, 2007, filed February 29, 2008. Opinion by Eyler, Deborah S., J.

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CRIMINAL LAW - SEARCH INCIDENT TO LAWFUL ARREST - WARRANTLESS SEARCH OF LOCKED GLOVE COMPARTMENT - CONTAINER EXCEPTION

Facts: Jason Keith Hamel, stopped for a traffic violation, was observed to be wearing a handgun holster. After securing Hamel and his passengers, the police searched the passenger compartment of his vehicle. No contraband was found. Police then used the car keys to open and search the locked glove compartment, finding cocaine, $2,100 in currency, and a .357 magnum handgun.

Hamel moved to suppress the fruit of the search at trial, challenging the search of the glove compartment, not his arrest. The Circuit Court for Baltimore County denied the motion and he was convicted of possession of cocaine and use of a handgun in a drug offense. On appeal, Hamel argued that the search of a locked glove compartment exceeds the permissible search of a vehicle incident to a lawful arrest.

Held: Affirmed. The scope of the container exception, as enunciated in *Belton v. State*, 453 U.S. 454 (1981) and its progeny extends to locked glove compartments. Locked glove compartments may be searched incident to a lawful arrest, even after the arrestee

has been secured and safely removed from the vehicle.

Hamel v. State, No. 2129, September Term, 2005, filed March 6, 2008. Opinion by Sharer, J.

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CRIMINAL LAW - SILENT WITNESS" THEORY OF AUTHENTICATION: *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12 (1996): The "silent witness" theory of admissibility authenticates a photograph as a "mute" or "silent" independent photographic witness because the photograph speaks with its own probative effect, rather than solely to add to or illustrate the testimony of a human witness. The silent witness theory applies where "no human is capable of swearing that he [or she] personally perceived what a photograph purports to portray." *Cole*, 342 Md. at 21. Videotape and still photographs, admitted over appellant's objection, through testimony of detective, purported to place appellant at the scene of the shooting.

Even where offered to illustrate the testimony of a witness, authentication is nevertheless required. The modern trend is to require "that a person with first-hand knowledge of the subject of [a] movie or video tape testify that it is a fair and accurate portrayal of the subject." 5 Lynn McLain, *Maryland Evidence* § 403.6 at 322 (1987).

ALLEN CHARGE. *Kelly v. State*, 270 Md. 139 (1973): The ultimate test of whether an *Allen*-type charge should be given is whether the wording of the charge and the time, circumstances and conditions under which the charge is given would coerce a jury into reaching a verdict contrary to a juror's free will and judgment. Prior to the trial court's *sua sponte* issuance of an *Allen*-type instruction, the jury had deliberated for a little over one hour and had neither indicated that it was deadlocked nor that it was having difficulty reaching an agreement.

Facts: Appellant was found guilty of assault in the first

degree, assault in the second degree, illegal use of a handgun in the commission of a felony or crime of violence, illegal carrying or transporting of a handgun and illegal possession of a regulated firearm by a jury sitting in the Circuit Court for Baltimore City. Appellant appealed his conviction.

Held: Affirmed. Although a witness (the victim) "capable of swearing that he [or she] personally perceived what the [videotape and still photographs] purported to portray" testified *after* videotape and still photographs were admitted, the videotape and still photographs served "to illustrate the testimony of [the victim] when [he] testified from first-hand knowledge that the photograph fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time." As such, the videotape and still photographs therefrom did not speak with their own probative effect and, thus, were not admitted pursuant to the "silent witness" theory of authentication.

Nevertheless, the State failed to lay an adequate foundation assuring the accuracy of the process that produced the videotape of the surveillance footage. The trial judge erred by failing to require the State to produce the technician to explicate the process by which the data from the computerized surveillance system was transferred to a compact disc which was later converted to a VHS videotape. Because the videotape and still photographs only purported to place appellant at the scene of the crime, they did no more than corroborate the victim's testimony regarding appellant's presence at the scene of the crime. Upon review of all of the State's evidence - including the fact that the victim's testimony that he had known his assailant for three years and the purpose for which the videotape and still photographs were admitted - the jury would have convicted appellant even without the videotape and photographs and, thus, the error in admitting the evidence was harmless beyond a reasonable doubt. In addition, the trial court did not abuse its discretion in permitting the detective's lay testimony regarding his observations of the videotape and still photographs.

After the trial court's *sua sponte* issuance of an *Allen*-type instruction, the trial court issued a second *Allen*-type charge using antiquated language expressly disapproved by Maryland's appellate courts. Although it would have been preferable for the trial judge to wait until the jury, either directly or indirectly, communicated that it was deadlocked, the record reflects that the *Allen*-type charge was non-coercive, particularly in light of the fact that, even after the *Allen*-type charges, the jury remained deadlocked on the count.

Appellant's complaint that there was insufficient evidence to convict him of possession of a regulated firearm was not preserved; had it been preserved, the evidence established beyond a reasonable doubt that appellant possessed a firearm with a barrel less than sixteen inches in length.

Rory Howard Washington v. State of Maryland, No. 938, September Term, 2006, decided March 6, 2008. Opinion by Davis, J.

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FAMILY LAW - CINA - PERMANENCY PLAN - REASONABLE EFFORTS - BEST INTERESTS - RELATIVE PLACEMENT - C.J. § 3-823; F.L. § 5-525.

Facts: James was born on July 26, 1996, to Mr. G. and Rhonda A. In March of 2004, James moved from his mother's residence and began to live with appellant, because Ms. A.'s drug abuse prevented her from caring for James. On August 6, 2004, Mr. G. was arrested for a violation of parole. He expected to be released from incarceration in October of 2004. On October 8, 2004, James was adjudicated a CINA, and the parties jointly recommended placement of James with his aunt, Joslyn B. Ms. A. did not participate in the various court proceedings.

After a review hearing on August 29, 2005, the court placed James with his paternal cousin, Angela C. The court also issued an Order on that date, establishing a permanency plan of "reunification with parent or guardian," to be achieved by August 29, 2006. A master for juvenile causes held a six-month review hearing on May 16, 2006. On May 24, 2006, pursuant to the master's recommendation, the court entered an Order continuing James's placement with his cousin, and continuing the permanency plan of reunification. However, it extended the target date for implementation until May 16, 2007.

At the next six-month review hearing, held by a master on December 12, 2006, the parties requested a "contested hearing" concerning the permanency plan. At that evidentiary hearing, held

by a master on February 23, 2007, DSS sought to change James's permanency plan from parental reunification to placement with a relative for custody and guardianship.

Philomena Ukadike, a DSS case worker who had been assigned to the case since April 2006, was the sole witness for DSS. She recounted that, during the period between July 2006 and December 2006, she met with appellant on one occasion. In addition, she stated: [H]e came to the office once to see my supervisor." According to Ukadike, DSS and appellant had executed a "service agreement," which required appellant to obtain employment and housing, and to maintain contact with James and with the Department. However, the service agreement was not placed in the record, and no evidence was presented as to the Department's obligations, if any, under the agreement.

With regard to the Department's request to change James's permanency plan, Ukadike stated: "This child came into care in 2004. This is 2007. It's over 12 months and [appellant] hasn't provided documentation for employment or housing. . . . [W]e can't do reunification at this point." However, Ukadike conceded that, apart from appellant's unemployment and lack of housing, nothing else prevented James from being reunified with his father.

Counsel for James and appellant both opposed the Department's request for a change in the permanency plan. James's attorney argued that the Department's single referral of appellant to an employment organization was "not. . . appropriate," and that the Department should provide further employment assistance to appellant. Appellant's lawyer echoed those arguments, stating: "We believe that the department has not made reasonable efforts to implement the permanency plan basically on the reasons she has stated."

The master found that BCDSS had made reasonable efforts towards reunification. Therefore, he recommended a change in the permanency plan to placement with a relative for custody and guardianship.

Following a hearing on Exceptions on April 26, 2007, the court issued an order finding that BCDSS "has made reasonable, although certainly not exemplary, efforts to achieve reunification." It changed the permanency plan from reunification to placement with a relative for custody and guardianship.

Held: Reversed and Remanded. Maryland's statutory scheme for child protection derives from federal law. When a child is removed from the home for health or safety reasons, both federal and state

law require local departments of social services, with exceptions not applicable here, to make "reasonable efforts" to accomplish parental reunification. Under the circumstances of this case, the circuit court erred in finding reasonable efforts in connection with a permanency plan that had a stated goal of parental reunification. Father's unemployment and lack of housing were his sole impediments to reunification. Yet, DSS made only one referral to father, for vocational assistance, which was unsuccessful.

The circuit court also erred or abused its discretion in terminating the permanency plan of parental reunification based on its erroneous finding of reasonable efforts, and because, among other things, it did not address child's best interests in changing the permanency plan. Instead, it focused almost entirely on the length of time the child had been out of the home. Although length of time is an important consideration, it does not compel a change in the permanency plan when, as here, the child was in care of a relative and DSS failed to make reasonable efforts towards reunification.

In re James G., No. 625, September Term, 2007, filed February 29, 2008. Opinion by Hollander, J.

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FAMILY LAW - PENSION BENEFITS - REVISORY POWER TO AMEND ORDER, QUALIFIED DOMESTIC RELATIONS ORDER, PENSION BENEFITS: *Rohrbeck v. Rohrbeck*, 318 Md. 28 (1989); Where modification in Amended Order that added a provision entitling spouse to commutation pay in the same percentage that applied to other pension benefits under the parties' original agreement, as reflected in the Original Order, was necessary in order for the Original Order to be accepted by the pension plan administrator as a Qualified Domestic Relations Order, the circuit court did not err in entering the Amended Order. Because the circuit court had reserved jurisdiction to modify any qualified pension order in the Judgment for Absolute Divorce and because the amendment did not deviate from the terms of the parties' settlement agreement and was invoked to effectuate intent

of parties after pension amount was altered by commutation, the Amendment was proper.

NUNC PRO TUNC, FAILURE TO DISCLOSE, CURE FOR INADVERTENT OMISSIONS: *Eller v. Bolton*, 168 Md. App. 96 (2006); *Patton v. Denver Post Corp.*, 326 F.3d 1148 (10th Cir. 2003); circuit court did not err in ruling that *nunc pro tunc* is not appropriate cure for spouse's omission of the existence of a second retirement plan, not included in the parties' original agreement, where the failure to disclose was not inadvertent.

MOTION TO VACATE: The circuit court did not err in denying Motion to Vacate where the Amended Order did not deviate from terms of the parties' settlement agreement and was properly entered.

Facts: Upon notification of former husband's employer that there were questions regarding the Order embodying the parties' separation agreement on the division of pensions, former wife filed a Second Motion for Enforcement of Judgment of Absolute Divorce and For Appropriate Relief with the Circuit Court for Montgomery County. The trial judge granted former wife's motion and entered an Amended Order. On that same day, former husband received documentation that his employer was prepared to honor the Original Order. Former husband filed a Motion to Vacate Amended Order, which was later denied. Former husband appealed from the entry of the Amended Order and the denial of his Motion to Vacate.

Held: Judgment of the Circuit Court affirmed. Trial court properly amended the Original Order, which reserved jurisdiction for the court to modify any qualified pension order, to include a provision entitling former wife to commutation pay in the same percentage that applied to other pension benefits for the purpose of effectuating the intent of the parties and ensuring enforcement.

Trial court's denial of former husband's Motion to Vacate Amended Order was not an abuse of its discretion.

Cadman Atta Mills v. Maimouna Mills, No. 2002, September Term, 2006, decided March 5, 2008. Opinion by Davis, J.

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REAL PROPERTY - TAX SALES - POWER TO DECLARE TAX SALE VOID - PROPERTY MISTAKENLY SOLD FOR TAXES WHEN TAXES WERE NOT ASSESSABLE.

WHEN AN ACTION TO FORECLOSE RIGHT OF REDEMPTION IN A PROPERTY SOLD AT TAX SALE IS PENDING IN CIRCUIT COURT, AND THE LOCAL GOVERNMENT THEN LEARNS THAT UNPAID TAXES FOR WHICH THE PROPERTY WAS SOLD AT TAX SALE NEVER WERE ASSESSABLE, THE TAX COLLECTOR CAN DECLARE THE TAX SALE VOID UNDER THE CONTRACTUAL TERMS OF THE TAX SALE. COURT ERRED BY DENYING LOCAL GOVERNMENT'S MOTION TO DISMISS AND DECLARING TAX SALE VOID UNDER SECTION 14-848 OF THE TAX PROPERTY ARTICLE.

Facts: On July 20, 1999, the property at issue ("Property") was conveyed from Elkhorn Associates, LLLP ("Elkhorn") to the Allen & Shariff Condominium ("A&S"). The Property is part of the general common elements (the parking lot) of the A&S condominium regime. Once conveyed as such, the Property was no longer an independently taxable parcel of land. The conveyance was recorded in the Land Records of Howard County. However, the Maryland State Department of Assessments and Taxation ("SDAT") misinterpreted the recorded plat of the condominium and continued to assess taxes on the Property in error.

When taxes on the Property were not paid for two years, the Property was included in the County's annual tax sale on June 6, 2001. Heartwood 88, LLC, ("Heartwood"), purchased the Property at the tax sale and signed written "Terms of the 2001 Tax Sale." One of the terms stated that when a tax sale is voided for any reason, reimbursement for the voided tax sale purchase "will be limited to the amount paid at the tax sale unless otherwise required by law."

On March 27, 2003, Heartwood filed suit in the Circuit Court for Howard County for foreclose the right of redemption on the Property. Elkhorn was named as a defendant, as was Howard County. Heartwood alleged that it had conducted a title search of the Property which revealed that the Property was owned by Elkhorn (a thorough title search at this time would have revealed that the Property was conveyed to A&S in 1999).

Sometime in May of 2006, SDAT realized its error regarding the Property's taxation status and contacted Howard County's Director of Finance to communicate the error. On May 31, 2006, Howard County sent Heartwood a letter stating that the County had reduced the taxable assessments on the Property to zero for the years 2000-2006 and would refund the tax sale purchase price to Heartwood. Heartwood objected and argued that since it had already filed suit to foreclose in the circuit court, only the circuit court had the power to invalidate the tax sale. Moreover, if the court were to

declare the tax sale void under Md. Code (2001; 2007 Repl. Vol.) section 14-848 of the Tax-Property Article ("TP"), then Heartwood would be entitled to repayment of the purchase price and "interest at the rate provided in the certificate of tax sale, together with all taxes that [had] accrue[d] after the date of sale, which were paid by the holder . . . and all expenses . . . ." TP § 14-848. The certificate of tax sale bore an interest rate of 18%.

Heartwood presented these arguments and a request for 18% interest and expenses to the circuit court in a motion to declare the tax sale void. The County filed an opposition to Heartwood's motion and a motion to dismiss. On January 24, 2007, the circuit court granted Heartwood's motion, set aside the tax sale as void, and ordered the County pay Heartwood in accordance with TP section 14-848. The County appealed.

Held: Reversed and remanded for further proceedings. In *Heartwood 88, Inc. v. Montgomery County*, 156 Md. App. 333 (2004), we held that, for TP section 14-848 to apply, there must be a pending action to foreclose the right of redemption and the defendant must have answered raising the invalidity of the taxes or of the proceedings so as to rebut the presumption of regularity in the tax sale established by TP section 14-842. The tax sale purchaser in *Montgomery* could not have brought such an action, however, because the tax sales were void from the inception in that case and consequently there were no rights of redemption to foreclose.

In the case at bar, unlike *Montgomery*, there was a pending action before the circuit court and a response by a defendant, the County. However, in the case at bar, as in *Montgomery*, the tax sale was void from its inception. When we look to the statutory language of TP section 14-848, we note that the statute instructs that after any sale is declared void by the court, the County "shall proceed to a new sale of the property under this subtitle and shall include in the new sale all taxes that were included in the void sale, and all unpaid taxes that accrued after the date of the sale declared void." Thus, the legislature clearly contemplated that for the power of the circuit court to void the tax sale as well as the penalty interest rate of the tax certificate under TP section 14-848 to apply, there must have been, at some point, a valid sale of unpaid taxes. By its plain language, TP section 14-848 cannot cover a tax sale that is void from its inception due to an error in assessing any tax to begin with. It only can cover a tax sale that was procedurally invalid or erroneous but correctable. Accordingly, the Heartwood purchase in the case at bar is governed by the Terms of the 2001 Tax Sale, and Heartwood's compensation is limited to the price it paid for

the tax sale certificate.

Howard County v. Heartwood 88, LLC, No. 3011, September Term 2006. Opinion filed on February 28, 2008 by Eyler, Deborah S., J.

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REAL PROPERTY - ZONING - SPECIAL EXCEPTIONS - APPELLATE PROCEDURE - FINALITY OF JUDGMENT - NON-WAIVER OF ISSUE ON APPEAL AFTER REMAND BY CIRCUIT COURT.

Facts: Singley and other opponents challenged Sugarloaf's application to the Frederick County Board of Appeals for a special exception to build and operate a commercial greenhouse/nursery on its raw land. The Board granted the special exception and the opponents brought an action for judicial review in the Circuit Court for Frederick County. The Circuit Court affirmed most of the Board's decision, but remanded one issue to the Board for further explanation. The opponents did not appeal the circuit court's affirmance of the other issues. The opponents brought a second action for judicial review after the Board acted upon the remand, but the Board's decision was again affirmed. The opponents then challenged all of the issues in the Board's decision in an appeal before the Court of Special Appeals. The Board contended that the opponents waived an issue that was affirmed in the first action for judicial review because they chose not to appeal it immediately.

Held: Affirmed. The Court of Special Appeals held that the opponents had the right to appeal the Board's decision immediately after the first action for judicial review, but did not waive any issues by waiting to do so until after the subsequent action for judicial review following remand. This holding is consistent with Maryland's established policy against piecemeal appeals.

Singley v. County Commissioners of Frederick County, No. 2536, September Term, 2006, filed March 4, 2008. Opinion by Eyler, Deborah S., J.

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SECURED TRANSACTIONS - SOVEREIGN IMMUNITY - THE STATE, AS PAYOR ON AN ACCOUNT, WHICH EXISTS PURSUANT TO A VALID WRITTEN CONTRACT, HAS WAIVED SOVEREIGN IMMUNITY WITH RESPECT TO A SECURED PARTY'S ENFORCEMENT OF A SECURITY INTEREST IN THE ACCOUNT RECEIVABLE.

Facts: In October 2002, Chesapeake Cable, LLC ("Chesapeake") borrowed money from Kevin Mooney and Teresa Mooney, appellants. Chesapeake executed two promissory notes. In accordance with their agreement, Chesapeake agreed to perform certain obligations and to make various payments to appellants. To secure repayment, Chesapeake entered into a security agreement with appellants, granting appellants a security interest in, among other things, Chesapeake's accounts receivable.

Chesapeake defaulted on its obligations under the terms of the promissory notes when it failed to make timely payments to appellants. As a result, on April 9, 2003 appellants notified Chesapeake via a letter of its default and of their intention to exercise their rights under the notes to accounts receivable. Thus, appellants stated their intent to notify all account debtors to make payment directly to them.

Chesapeake had a contractual agreement with the University System of Maryland, appellee, whereby Chesapeake provided cable services in exchange for payment from appellee. Appellants contend that on April 13, 2003, five days after notifying Chesapeake of its default, appellants sent a letter to appellee notifying appellee of Chesapeake's default and instructing appellee to make payments on the above-referenced account directly to the Mooneys. Appellee disputes that it received notice, but that issue is not before the Court of Special Appeals.

On April 22, 2003, appellee paid the balance owed to Chesapeake, not to appellants. According to appellants, appellee terminated its contract with Chesapeake on June 19, 2003.
On June 4, 2004, appellants filed a complaint in circuit court, seeking the balance, attorney's fees, interest, and costs, based on an alleged violation of Maryland Code (2002 Repl. Vol., 2007 Supp.), § 9-406(a) of the Commercial Law Article (C.L.). The parties filed cross motions for summary judgment. The circuit court granted appellee's motion on the ground that, because there was no contract between appellants and appellee, appellants' claim was based in tort and concluded it must be dismissed because appellant failed to provide notice under the Maryland Tort Claims Act.

Appellants noted an appeal to the Court of Special Appeals. In an unreported opinion, the Court vacated the judgment on the

ground that appellants' claim was for enforcement of a security interest under the Uniform Commercial Code and was not a tort action.

On remand, the parties again filed motions for summary judgment. Appellee again asserted that it was immune from liability. The circuit court granted appellee's motion on the ground that appellee had not expressly waived sovereign immunity under Title 9 of the Uniform Commercial Code.

Held: Judgment vacated. Case remanded to the circuit court for Prince George's County.

C.L. § 9-607(a) provides that when a debtor defaults, the security interest in an account receivable operates as an assignment by the debtor to the secured party of the right to receive payment from the account debtor. However, under contract law, an obligor under an assigned contract owes a duty of performance to an assignee only when the obligor has received notice of the assignment. Once the debtor defaults, C.L. § 9-607(a)(3) provides that the secured party may enforce the obligation of an account debtor and exercise the rights of the debtor with respect to that obligation. Finally, the State may not raise defense of sovereign immunity in a contract action based on an authorized written contract.

Here, appellants are a secured party holding a security interest in an account receivable owed by appellee to Chesapeake. Appellants can enforce Chesapeake's right to payment, and appellee remains obligated to pay, provided that appellee received proper notification. Because appellee is not immune from an action for payment by Chesapeake, due to their entering into a written contract with Chesapeake, it is not immune from an action to enforce the security interest by appellants because appellants' rights are as an assignee of Chesapeake.

The time limitations for filing suit on a government contract are found in Maryland Code (2004 Repl. Vol., 2007 Supp.), § 12-202 of the State Government Article ("S.G."). The Court of Appeals has held that § 12-202 operates as a condition to the action itself, not merely as a statute of limitations, because the waiver of sovereign immunity "vanishes" after the one year period. Moreover, the Court of Appeals stated that it is clear that S.G. §§ 12-201 and 12-202 must be read together in order to understand the limitation and/or condition of the University's waiver of sovereign immunity in contract actions.

Here, if appellants are correct as to the facts, the suit was

filed timely. Factual issues, including the issue of when the contract between appellee and Chesapeake was terminated and the issue of proper notice to appellee, will have to be determined on remand.

Kevin Mooney v. University System of Maryland, No. 302, September Term, 2007, filed March 3, 2008. Opinion by Eyler, James R., J.

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TORTS – DUTY

COMMERCIAL LAW – FORGERY AS A DEFENSE TO PAYMENT – PRECLUSION – SUBSTANTIAL CONTRIBUTION

Facts: During the relevant period, American Trade Bindery, Inc. ("ATB") submitted its weekly payroll information to Paychex, a payroll services business, for processing. Paychex prepared checks on ATB's payroll account made payable to ATB's employees and forwarded them, unsigned, to ATB. An authorized ATB officer then personally signed the checks and distributed them to the employees. ATB did not use or possess a signature stamp, and it did not keep blank payroll checks on its premises.

In December 2001, ATB's office manager resigned. A new office manager was hired in March 2002. During the interim, ATB's treasurer assumed the bookkeeping duties. On February 13, 2002, while reconciling ATB's accounts, the treasurer discovered that counterfeit checks had been paid from its payroll account. He contacted the police and ATB's bank.

Select Express, LLC ("Select Express") cashed what purported to be payroll checks drawn on a bank account of ATB. When Select Express's account was debited the amount of the counterfeit checks, Select Express sued ATB, alleging negligence and breach of contract under Maryland Code Annotated (1975, 2002 Repl. Vol.), § 3-406(a) of the Commercial Law Article ("CL").

Following a hearing, the Circuit Court for Baltimore City granted summary judgment in favor of ATB on both counts. It found that ATB had no duty to Select Express to check its bank account statement earlier than it did and that there was no cause of action for breach of contract.

Held: Affirmed. ATB did not have a duty to Select Express because there was no contractual relationship between them, nor was there the equivalent of contractual privity. Even if Select Express's endorsement on the back of the cancelled checks provided ATB with knowledge that Select Express had been cashing its payroll checks over a period of time, it did not communicate to ATB that Select Express was relying on ATB's internal bank statement reconciliation procedures in cashing ATB's checks.

Assuming that CL § 3-406 is applicable in the case of counterfeit checks, ATB's failure to check its monthly bank statement for approximately 45 days did not substantially contribute to the creation or issuance of the counterfeit checks. There is no evidence that ATB or any of its officers or employees ever had any control over these checks and nothing that ATB did or did not do substantially contributed to the making or issuance of the counterfeit checks. Further, any failure to exercise ordinary care occurred after the scheme had begun. Any delay in reviewing the bank statements was harmless in the absence of criminal actions taken by others for which and for whom ATB was in no way responsible.

Select Express, LLC v. American Trade Bindery, Inc., No. 2588, September Term, 2006, filed March 3, 2008. Opinion by Kenney, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated March 11, 2008, the following attorney has been suspended for (60) days by consent, effective retroactively to April 1, 2007, from the further practice of law in this State:

PHYLLIS J. OUTLAW
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By an Opinion and Order of the Court of Appeals of Maryland dated March 17, 2008, the following attorney has been indefinitely suspended from the further practice of law in this State:

CHARLES JAY ZUCKERMAN
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