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COURT OF APPEALS

Motor Vehicle Administration v. Frank William Loane, Jr., No. 52, September Term 2010, Filed June 22, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/52a10.pdf

ADMINISTRATIVE LAW – DRUNKEN DRIVING – LOCATION OF STOP:

Facts: On May 17, 2009, Officer Karsmith of the Ocean City Police Department stopped Respondent Frank William Loane, Jr. for failing to obey lane directions. Upon detecting an odor of alcohol on Respondent's breath, Officer Karsmith administered field sobriety tests, which Respondent failed to complete. Consequently, Officer Karsmith asked Respondent to submit to a chemical breath test. He also notified Respondent of his right to refuse to submit to the breath test and, if Respondent did refuse, what the resulting administrative sanctions would be. Officer Karsmith then provided Respondent with Form DR-15, entitled "Advice of Rights," which explained the administrative process and the rights afforded to drivers under § 16-205.1 of the Maryland Transportation Article ("T.R." or the "Statute").

Respondent refused to submit to the test. In accordance with § 16-205.1(b)(3), Officer Karsmith confiscated Respondent's driver's license and issued him a temporary license and an Order of Suspension. Officer Karsmith then completed and signed Form DR-15A, entitled "Officer's Certification and Order of Suspension." He indicated that the stop occurred at the location of "Wor.," evidently referring to Worcester County. The exact address of the stop was not provided.

Pursuant to the Statute, Respondent filed a timely appeal for an administrative hearing to show cause for why his driver's license should not be suspended. At the hearing Respondent moved for "no action." He argued that his license could not be suspended unless the Motor Vehicle Administration ("MVA") proved that he was stopped either on a highway or private property used by the public in general, which, in his view, the MVA had not done. Respondent based this argument on the prefatory language contained in subsection (a)(2) of the Statute, which provides that "[a]ny person who drives or attempts to drive a motor vehicle on a highway or on any private property that is used by the public in general in this State is deemed to have . . . consented to take a test . . . ." The Administrative Law Judge ("ALJ") rejected Respondent's claim, finding that there was sufficient evidence to indicate that Respondent was stopped on a public road. Respondent's license was suspended for 120 days.

Respondent filed in the Circuit Court for Anne Arundel

County a petition for judicial review, where he repeated the arguments that he made before the ALJ. The Circuit Court agreed with Respondent, and reversed the ALJ's decision because it determined there was not substantial evidence to support the ALJ's finding that the stop occurred on a public highway or publicly-used private property.

The MVA filed a petition for writ of certiorari, which the Court of Appeals granted. The question before the Court was: "Did the ALJ correctly conclude that the implied consent statute, Md. Code Ann., Transp. II § 16-205.1(f), does not require the MVA to prove the exact location when a suspected drunk driver was detained after driving on a "highway or private property used by the public in general," before suspending the motorist's license for a test refusal?"

Held: Reversed and remanded with directions to affirm the decision of the MVA. The Court of Appeals held that T.R. § 16-205.1 applies to both public and private property, and therefore the MVA is not required to prove at a license suspension hearing that the stop occurred "on a highway or private property that is used by the public in general[.]"

The Court began its analysis by noting that subsection (a)(2) contains two separate references to "driving or attempting to drive." The first reference, contained within what the Court termed the "implied consent" clause, states that "[a]ny person who drives or attempts to drive a motor vehicle on a highway or on any private property that is sued by the public in general in this State is deemed to have consented . . . to take a test . . . ." The second reference, contained within what the Court called the "applicability clause," provides that submission to the breath test is required "if the person [is] detained on suspicion of driving or attempting to drive while under the influence of alcohol . . . ." By reading both the "implied consent" and "applicability" clauses together, the Court concluded that the "implied consent" clause means that any driver who has availed himself or herself of the privilege of driving on Maryland's roadways impliedly consents to submitting to a breath test, and the "applicability" clause means that the consented-to breath test is triggered whenever an officer has stopped or detained a driver on suspicion of driving while under the influence. In other words, noticeably missing from the "applicability" clause is any indication that the Statue applies only to stops of a person driving on a highway or publicly-used private property. Consequently, reading the two clauses together, the Court construed subsection (a)(2) to mean that the administrative license provisions apply to any licensed driver, whether driving on public or purely private property in Maryland.

The Court then noted that its construction of subsection (a)(2) is confirmed when read in conjunction with the rest of the

Statute. Specifically, neither subsection (f)(7)(i), which sets forth the issues that may be raised at an administrative license suspension hearing, nor subsection (f)(8)(i), which lists the specific findings that an ALJ must make in order to suspend a motorist's driver's license, includes a requirement that the MVA provide proof of the location of the stop. Based on the plain language of those provisions and previous decisions construing that language, the Court concluded that the location of the stop is not required to be proven by the MVA nor found by the ALJ in order to suspend a person's driver's license at an administrative hearing.

Moreover, the Court noted that its construction of the Statute was confirmed by the purpose of the Statute, which is "to reduce the incidence of drunk driving and to protect public safety by encouraging drivers to take alcohol concentration tests; the [S]tatute [is] not meant to protect drivers." The Court also noted that T.R. § 21-902(a), which makes it a crime to drive while, inter alia, under the influence of alcohol, applies to both public and private property. The Court reasoned that, based on the Statute's purpose of public safety, it would defy common sense for a driver to be criminally responsible for driving while intoxicated on private property, but at the same time, not be subject to T.R. § 16-205.1's administrative sanctions.

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County Council of Prince George's County, Maryland, Sitting as the District Council, et al. v. Dedra Billings, No. 46, September Term, 2010, filed on June 20, 2011. Opinion written by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/46a10.pdf

ADMINISTRATIVE LAW - STANDING

ADMINISTRATIVE LAW - EXHAUSTION OF ADMINISTRATIVE REMEDIES - FILING WRITTEN EXCEPTIONS

ZONING AND LAND USE - DEPARTURE FROM DESIGN STANDARDS - PRINCE GEORGE'S COUNTY CODE - DISTRICT COUNCIL REVIEW

ZONING AND LAND USE - SPECIAL EXCEPTIONS - PRINCE GEORGE'S COUNTY CODE—DISTRICT COUNCIL REVIEW

Facts: A developer's proposed expansion of a gas station in Prince George's County required two local zoning approvals, a Special Exception and a Departure from Design Standards. The developer sought the necessary approvals from the appropriate local agencies, which each held public hearings. The Respondents, a group of nearby residents (the "Citizens"), were wary of the proposed expansion, and appeared in opposition at the agency level. After the hearings, the local agencies granted both zoning approvals.

By statute, a party to the administrative proceedings could file written exceptions and obtain administrative review from the Prince George's County District Council. Alternatively, the District Council could, pursuant to statute, "elect to review" the local decisions on its own motion. The District Council elected to review both zoning approvals before any action from the Citizens. Months later, the District Council "withdrew" its election to review the administrative approvals and declared those earlier decisions final.

On appeal, the Court of Special Appeals reversed and remanded to the District Council to complete review.

Held: Court of Special Appeals affirmed. First, the Citizens did not fail to exhaust their administrative remedies. When a statute provides administrative review of an agency decision, that review must occur before judicial review is allowed. A party must generally request such an appeal when available before filing judicial review. If the administrative review proceeds without action by a party, however, our general principles of administrative law apply, and a party preserves their right to review (and exhausts their administrative remedies) by participating in the agency proceedings and being "aggrieved" with that decision.

Moreover, the District Council was not permitted, by statute, to withdraw its election to review. In a Departure from Design Standards action, the Prince George's County Code requires the District Council to schedule a public hearing and issue a written decision after it elects to review a Departure from Design Standards application. The District Council may not, then, withdraw its election to review.

Similarly, in a Special Exception action, the Prince George's County Code, the District Council is not entitled to withdraw an election to review a special exception decision by the Zoning Hearing Examiner. The statute allows the Council to approve, approve with conditions, remand, or deny the application. This decision must be "based on the record" and supported by written findings of fact and conclusions of law. The District Council's withdraw of an election to review, the final decision in this case, was not among the options for disposition of the matter, nor was it supported by written findings or based off the record, as required by law.

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Lamar Cornelius Harris v. State of Maryland, No. 79, September Term 2010, Filed June, 24, 2011, Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/79a10.pdf

CRIMINAL LAW - APPELLATE JURISDICTION - DISCOVERY ORDER

Facts: The State charged Lamar Cornelius Harris with, inter alia, first degree murder of a correctional officer. Harris requested a competency evaluation, and he was thereafter committed to Perkins Hospital. An evaluating doctor opined that Harris was not competent to stand trial. After back and forth motions between the parties and after a reevaluation of Harris, the trial court held a hearing to address motions regarding competency. The trial judge ruled that because Harris had put his mental competency in issue he had no privilege to maintain confidentiality in any of the medical records made for purposes of the competency evaluation, or otherwise, and therefore all of the hospital's records pertaining to Harris should be disclosed to both the defense and the State. The trial court later granted a stay for, inter alia, an interlocutory appeal by the defense.

The Court of Special Appeals dismissed Harris's appeal because, as an interlocutory discovery order, it was not an appealable, final order. The Court of Special Appeals further held that the case did not merit application of the collateral order doctrine. The Court of Special Appeals declined to reconsider the case in light of the Perlman doctrine, a narrow exception to the final judgment rule allowing a privilege holder to immediately appeal from an interlocutory discovery order directed to a disinterested third-party who, due to a lack of interest in the proceedings, would be unlikely to risk contempt by refusing compliance.

Held: Interlocutory orders authorizing disclosure of treatment records and testimony by the treating physician that are allegedly protected by the patient-therapist privilege are not immediately appealable under the collateral order doctrine or the Perlman doctrine.

The Court looked to the four factors of the collateral order doctrine: whether the interlocutory order (1) conclusively determined a disputed question; (2) resolved an important issue; (3) resolved an issue separable from and collateral to the merits of the action; and (4) would be effectively unreviewable on appeal from a final judgment. The Court found that the competency hearing, while a distinct phase of a criminal trial, was not separate from and collateral to the trial but rather a step toward the final disposition. The court further held that the discovery orders were not effectively unreviewable because the issue of whether privileged information was improperly disclosed at the competency determination phase may be addressed after a

conviction and sentencing.

The Court declined to adopt the Perlman doctrine as a fourth exception to the final judgment rule. Maryland recognizes only three exceptions to the final judgment rule: appeals expressly allowed by statute; appeals allowed under Maryland Rule 2-602; and appeals allowed under the common law collateral order doctrine. First, the Court noted that it was not required to adopt Perlman because Perlman did not address a constitutional principle that is binding on the State Courts but rather addressed federal appellate procedure. Primarily, the Court determined that Perlman was an unnecessary departure from established jurisprudence. Moreover, the Court held that application of the doctrine in this case was unnecessary because adequate review after a final judgment is available. Finally, the Court partially relied on decisions from two federal circuit courts of appeals that have explicitly questioned whether Perlman survived the subsequent United States Supreme Court's decision in Mohawk Industries. Mohawk Industries v. Carpenter, 558 U.S. __, 130 S.Ct. 599, 175 L. Ed. 2d 458 (2009).

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Steven Hill, Terri Alston, & Charles Yates v. State of Maryland, No. 93, September Term, 2010, filed on May 23, 2011. Opinion written by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/93a10.pdf

CRIMINAL LAW – ESCAPE – INVALIDITY OF UNDERLYING SENTENCE

Facts: The Petitioners were sentenced to terms of imprisonment with a deferred, or "springing," start date. Under these sentences, their jail terms were scheduled to begin three to five years after the sentencing date. The sentencing judge informed Petitioners that if they stayed out of further legal trouble during that time, they could return to court before the start date and have their sentences vacated. Petitioners, however, did not return to court, and later failed to report on the respective start dates, and each was charged and pled guilty to second degree escape.

After the escape convictions, this Court decided *Montgomery v. State*, 405 Md. 67, 950 A.2d 77 (2008), and invalidated a "springing sentence" similar to the underlying sentences here. After that decision, Petitioners attempted to vacate their escape convictions, arguing that they could not be criminally responsible for failure to report for the now-invalid sentences. The Circuit Court denied the motions to vacate the convictions, and the Court of Special Appeals affirmed in an unreported opinion.

Held: Court of Special Appeals affirmed. Maryland law does not allow criminal defendants, seeking relief from their sentences, to engage in self-help, i.e. by failing to report for a term of imprisonment. A criminal defendant who wishes to challenge his sentence must do so through the appropriate legal channels. Absent such a challenge, the defendant will be guilty of escape for failing to report for a term of imprisonment, whether or not the underlying court order would be invalid if properly challenged.

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Raymond Charles Lupfer v. State of Maryland, No. 109, September Term 2010. Opinion by Harrell, J. Filed 20 June 2011.

http://mdcourts.gov/opinions/coa/2011/109a10.pdf

CRIMINAL LAW – FIFTH AMENDMENT – PRIVILEGE AGAINST SELF-INCRIMINATION – *MIRANDA* – ADMISSION OF EVIDENCE OF POST-ARREST, POST-*MIRANDA* SILENCE – FAIR RESPONSE DOCTRINE

EVIDENCE RELATING TO A CRIMINAL DEFENDANT'S POST-ARREST, POST-*MIRANDA* SILENCE, WHEN OFFERED TO REBUT AN IMPRESSION MADE BY THE DEFENDANT THAT HE INTENDED TO COOPERATE AND SPEAK WITH THE POLICE AT SOME UNSPECIFIED, UNDETERMINED FUTURE TIME IS INADMISSIBLE UNDER MARYLAND RULE 5-403 BECAUSE IT IS NOT INCONSISTENT FOR A DEFENDANT TO TESTIFY, ON ONE HAND, THAT HE – AT SOME POINT IN THE FUTURE – INTENDED TO SPEAK WITH THE POLICE, AND, ON THE OTHER HAND, TO HAVE REMAINED SILENT AFTER BEING READ HIS *MIRANDA* RIGHTS AND ADVISED FURTHER OF FIRST-DEGREE MURDER AND OTHER CHARGES.

Facts: On 16 June 2007, Raymond Charles Lupfer ("Lupfer") shot and killed Jeremy Yarbray ("Yarbray") outside of a residence in Cecil County, Maryland. The details of how the fatal shooting occurred were disputed sharply at Lupfer's trial in the Circuit Court for Cecil County. Although Lupfer testified that the shooting was accidental, the State's witnesses testified that Lupfer was the initial aggressor in a fight that ended in Lupfer shooting Yarbray, who was retreating.

Lupfer testified that, following the shooting, he ran out the back of the residence, threw the gun in the nearby woods, and encountered a former co-worker who agreed to give him a ride in his truck to New Jersey, where Lupfer claimed to have another friend with whom he could stay. After reaching New Jersey, Lupfer claimed he called his girlfriend, Pam Hamilton, in Maryland, to come pick him up, "[b]ecause I had time to think about what was going on and I needed to come back to Maryland." Lupfer stated that, on his return to Maryland, he intended to go to Hamilton's house "[b]ecause I had been up for almost two days and I wasn't prepared mentally or physically to deal with going to turn myself in instantly," and, therefore, he was going to "[t]ry to get some sleep and prepare to go talk to the police." Upon Hamilton's arrival in New Jersey, a truck driver agreed to drive Lupfer and Hamilton to a truck stop in Cecil County. Ultimately, the police arrested Lupfer later that night, as he was resting in the cab of the truck driver's truck, now back in Cecil County.

After testifying to this rendition of the events of June 16, the trial judge ruled, at a bench conference, that Lupfer, in testifying regarding his potential intention to return to Maryland and speak with the police, had opened the door to cross-examination regarding the fact that Lupfer chose ultimately not

to make a statement to police. The State then called Sergeant David J. Sexton of the Maryland State Police, who acted as the lead investigator in the case, who testified that, after advising Lupfer that he was going to be charged with murder, Lupfer "elected not to answer any questions," and said "he wanted to speak to a lawyer.

The jury acquitted Lupfer of first-degree murder, but convicted him of second-degree murder, first-degree assault, and use of a handgun in a crime of violence. The Circuit Court sentenced Lupfer to forty years' incarceration. Lupfer appealed timely to the Court of Special Appeals. A panel of the intermediate appellate court, in a reported opinion, *Lupfer v. State*, 194 Md. App. 216, 4 A.3d 32 (2010), affirmed the judgment of the Circuit Court, citing with approval federal cases holding that introducing a defendant's post-arrest, post-*Miranda* silence is permissible where the "silence is introduced for the limited purpose of rebutting an impression created by the defendant that he cooperated fully with the police," and explaining that, cross-examination regarding his post-arrest, post-*Miranda* silence was permissible because Lupfer's testimony created the impression that he was cooperating fully with the police.

Lupfer filed timely a petition for writ of certiorari, which we granted, *Lupfer v. State*, 417 Md. 384, 10 A.3d 199 (2010), to consider whether "the trial court err[ed] when it permitted the State, over objection, to introduce evidence that after being arrested, '*Mirandized*,' and informed of the charges against him, Mr. Lupfer did not make a statement to police and asked to speak to an attorney[.]"

Held: Reversed. The Court began by reiterating the well-known dangers in introducing at trial the fact that a defendant in a criminal case decided not to speak to law enforcement personnel, and the "significant potential for prejudice" inherent in admitting evidence relating to a defendant's silence.

After examining federal caselaw regarding the admissibility of post-arrest, post-*Miranda* silence, the Court turned to its opinion in *Grier v. State*, 351 Md. 241, 718 A.2d 211 (1998), in which we stated that "[e]vidence of post-arrest silence, after Miranda warnings are given, is inadmissible for any purpose, including impeachment." In that opinion, we recognized that the admission of evidence relating to post-arrest silence that is otherwise inadmissible may be permissible under the "opening the door" doctrine, under which "evidence which was previously irrelevant . . . [is] now relevant through the opponent's admission of other evidence on the same issue . . . ."

In the present case, Lupfer pointed to *Grier*'s suggestion that "[e]vidence of post-arrest silence, after Miranda warnings are given, is inadmissible for any purpose, including

impeachment," whereas the State argued the evidence relating to Lupfer's post-arrest, post-*Miranda* silence was admissible under the "fair response" doctrine. The Court stated that, from Supreme Court caselaw, we learn that the prosecution may employ a fair response relating to a defendant's post-arrest silence to "contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest," and, therefore, if a defendant claims to have made a statement following his or her arrest, the prosecution may introduce evidence that the defendant had, in fact, remained silent. Supreme Court caselaw teaches us also that the prosecution is entitled to a fair response regarding a defendant's post-arrest silence when either defendant or "his counsel urge[] . . . that the Government ha[s] not allowed [defendant] to explain his side of the story." Finally, the Court noted a line of cases standing for the proposition that "a defendant may open the door to cross-examination for impeachment purposes by testifying or creating the impression through his defense presentation he has cooperated with police when, in fact, he has not."

Here, the State did not elicit the testimony of Sergeant Sexton for the purposes of rebutting Lupfer's claim that he cooperated fully with police or that he created an impression or implication that he had cooperated fully with the police. Rather, Lupfer created the impression that he fully *intended* to cooperate and speak with the police, at some unspecified, undetermined future time. At bottom, it cannot be said that both (1) the sum of Lupfer's testimony as to what he intended to do at some undermined time in the future; and (2) Sergeant Sexton's testimony regarding Lupfer's post-arrest, post-post *Miranda* silence are evidence on the same issue, as an individual may choose not to carry out his expressed intentions for any number of reasons. Stated differently, it is not inconsistent necessarily for Lupfer to have testified, on one hand, that he, at some undetermined point in the future, intended to speak with police, and, on the other hand, to have remained silent after being read his *Miranda* rights and seeing a charge of first-degree murder made manifest.

Therefore, the Court held that when the prosecution elicits evidence relating to a defendant's post-arrest, post-*Miranda* silence to rebut an implication that the defendant merely *intended*, at some undetermined point in the future, to cooperate with police, the probative value of such evidence is dwarfed by the danger of unfair prejudice such that the evidence is inadmissible under Maryland Rule 5-403. Finally the Court held that, because the viability of Lupfer's defense at trial – that Yarbray's death was the unintended consequences of a struggle between Lupfer and Yarbray over a gun – hinged on Lupfer's credibility, it could not say beyond a reasonable doubt that the error was harmless. ***

Policarpio Espinoza Perez and Adan Canela v. State of Maryland, No. 94, September Term, 2010, Filed June 17, 2011. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/94a10.pdf

CRIMINAL PROCEDURE – JURY COMMUNICATIONS

Facts: In 2006, in the Circuit Court for Baltimore City, Policarpio Espinoza Perez and Adan Canela were convicted of murder and related offenses. Perez and Canela appealed their convictions to the Court of Special Appeals, claiming multiple jury notes were not disclosed to counsel at trial. The Court of Special Appeals remanded the matter to the Circuit Court for an evidentiary, fact-finding hearing, in order to determine whether certain notes had been disclosed. At the conclusion of the evidentiary hearing, the hearing judge determined that six of the twenty-eight jury notes which were submitted to the trial judge during the trial were not disclosed to either counsel or the Petitioners.

Based on the hearing judge's opinion, both parties filed supplemental briefs in the Court of Special Appeals. After the supplemental briefing and oral argument, the court affirmed the judgments of conviction, and held that the Petitioners were not prejudiced by the failure to disclose the jury notes.

Held: Reversed and remanded. The Court of Appeals held that the Court of Special Appeals erred in holding that the trial judge's failure to disclose the jury notes resulted in harmless error. Maryland Rule 4-326(c) requires the court to disclose jury notes prior to responding to them. The rule is founded on the absolute right of a criminal defendant to be present at every stage of his or her trial, which has been determined previously to include communications between the trial judge and the jury relating to the jury's verdict.

The Court applied the harmless error standard announced in Dorsey v. State to the violations of Md. Rule 4-326(c). The Court explained that when a Petitioner in a criminal case establishes error, the burden is on the State to prove, beyond a reasonable doubt, that the error in no way influenced the verdict, and thus did not cause prejudice. The Court held that the State failed to prove, beyond a reasonable doubt, that the violation of Rule 4-326 did not influence the verdict. The Court emphasized that expanding the harmless error standard to allow a trial judge to read a jury note, not inform counsel, and ask the question directly to the witness without allowing for counsel's input in advance, would fundamentally alter Md. Rule 4-326(c) and greatly expand the discretion of the trial judge.

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Ricky Savoy v. State of Maryland, No. 120, September Term, 2009, Filed June 23, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/120a09.pdf

CRIMINAL LAW - REASONABLE DOUBT JURY INSTRUCTION – STRUCTURAL ERROR – PRESERVATION – MARYLAND RULE 4-325(e) – PLAIN ERROR

Facts: Following a jury trial in the Circuit Court for Baltimore City, Petitioner Ricky Savoy was convicted of manslaughter, use of a handgun in the commission of a felony, and carrying a handgun upon his person. At that trial, the court gave the jury a reasonable doubt instruction that provided in relevant part:

> [I]f you feel that the prosecution has failed to prove beyond a reasonable doubt **and to a moral certainty** all of the evidence necessary to convict, then you must acquit the defendant . . . the evidence must be so convincing that it would enable you to act on an important piece of business in your everyday life. **The words "to a moral certainty" do not mean an absolute or mathematical certainty but a certainty based upon convincing grounds of probability**.

Petitioner did not object to the instruction at trial. Following his first direct appeal and post-conviction proceedings, at which his trial and appellate counsel were found ineffective, Petitioner was granted a second, belated appeal.

In 2008, the Court of Special Appeals heard the appeal. Petitioner asserted that the jury instruction in question lowered the State's burden of proof, violating his Sixth and Fourteenth Amendment rights and creating structural error that required automatic reversal of the 1994 judgments of conviction. Petitioner further argued that, even if the instructional error was not per se reversible in the absence of a contemporaneous objection at trial, the Court of Special Appeals should take cognizance of it as plain error. In an unreported opinion, the Court of Special Appeals affirmed the convictions, finding no reason to exercise its discretion to take cognizance of the error as plain.

Held: Reversed. The Court of Appeals held that the reasonable doubt jury instruction reduced the State's burden of proof, rendering it structural error. Nonetheless, the error was subject to the normal preservation requirement of a contemporaneous objection. The Court, however, exercised its discretion under Maryland Rule 4-325(e) to take cognizance of the erroneous instruction as plain error.

The Court began by noting that both parties agreed that the

reasonable doubt instruction contained erroneous language and that Petitioner did not lodge a contemporaneous objection to it. The Court then distinguished the doctrines of forfeiture and waiver, stating that the knowing and intelligent waiver concept is not applicable to the failure to object to an erroneous jury instruction. The Court made clear that structural error is not per se subject to appellate review, pursuant to Maryland Rule 8-131(a), the general principle requiring preservation of claims by contemporaneous objection, and Maryland Rule 4-325(e), requiring contemporaneous objection in order to challenge instructional error on appeal as a matter of right.

The Court identified the standard for review of jury instructions as "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." The Court looked to *Cage v. Louisiana*, the single Supreme Court case in which a reasonable doubt jury instruction was found constitutionally deficient, and *Himple v. State*, a Court of Special Appeals opinion in which a jury instruction substantially similar to the one at issue in the present case was held to be plainly erroneous. As in *Himple*, the Court concluded that the instruction was constitutionally deficient because it used the phrase "moral certainty," lacked any curative or explanatory context for the phrase "a convincing ground of probability," and omitted the language "without reservation" from the phrase "enabling you to act on an important piece of business in your everyday life." The Court noted that the omission of the "without reservation" language alone was not a fatal defect, but found the errors, taken together, sufficient to render the instruction constitutionally deficient.

The Court explained that appellate review of unpreserved instructional errors is limited to circumstances warranting plain error review. The Court noted that exercising discretion to take cognizance of unpreserved instructional plain error is appropriate only when the error is, inter alia, "fundamental to assure the defendant a fair trial." The factors to consider in that determination are the context of the error and whether the error was purely technical, the product of conscious design or trial tactics, or the result of bald inattention. The Court concluded that such error is self-evidently plain and material to Petitioner's right to a fair trial.

The Court then considered whether discretionary review under Rule 4-325(e) was appropriate. The Court noted that Petitioner's trial predates *Ruffin v. State*, in which the Court held that all jury instructions in criminal jury trials must closely adhere to MPJI-CR 2:02. The Court explained that, because the legal landscape surrounding erroneous jury instructions on reasonable doubt was far different at the time of appeal than at the time of Petitioner's trial, and because it was most unlikely that counsel failed to object to the instruction as a matter of strategy,

exercise of the Court's discretion to take cognizance of plain error was warranted. Accordingly, the Court reversed the judgment of the Court of Special Appeals and directed that court to vacate the judgments of the Circuit Court for Baltimore City and order a new trial.

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Eugene Edward Gardner v. State of Maryland, No. 11, September Term, 2010, Filed May 24, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/11a10.pdf

CRIMINAL PROCEDURE – SENTENCING – THREE-JUDGE PANEL REVIEW – SENTENCING ON REMAND:

Facts: In 2005, Petitioner Eugene Gardner stood trial in the Circuit Court for Baltimore County on charges of armed robbery and use of a handgun in the commission of a felony. After the jury found Petitioner guilty, the judge imposed a concurrent sentence of twenty-five years' imprisonment without the possibility of parole for armed robbery, and five years without the possibility of parole for the handgun violation, totaling twenty-five years' incarceration. Petitioner filed a notice of appeal from his convictions and also requested review of his sentence by a three-judge panel.

While the appeal was pending, the three-judge panel reviewed Petitioner's sentence and unanimously decided to increase his sentence from twenty-five years to forty-five years' incarceration. Subsequently, the Court of Special Appeals reversed the judgments of conviction and remanded the case to the Circuit Court for a new trial. Petitioner elected a bench trial and was again found guilty of the same offenses. Petitioner argued for reimposition of the original, twenty-five year sentence while the State argued that the forty-five year sentence of the three-judge panel should be followed. The court imposed a sentence of forty-years without parole.

Petitioner appealed the new sentence arguing that it violated Maryland Code (1988, 2006 Repl. Vol.), § 12-702(b) of the Courts and Judicial Proceedings Article which prohibits, upon remand for a new trial following a successful appeal, a trial court from imposing a sentence greater than the "sentence previously imposed." The Court of Special Appeals disagreed. Finding that the words "sentence previously imposed" did not refer to the original trial court sentence, but instead to the forty-five year sentence imposed by the three-judge panel, the court held that the subsequent forty-year sentence was permissible. Petitioner filed a petition for writ of certiorari, which the Court of Appeals granted. The question in front of the Court was, where retrial and conviction follow a successful appeal, is the trial court, on remand, bound by the original trial judge's sentence or a subsequent sentence imposed by a three-judge panel.

Held: Affirmed. The Court of Appeals held that, in cases where a three-judge panel changes a trial court's original sentence before a conviction is overturned on appeal, the sentence imposed by the three-judge panel is the "sentence

previously imposed," for the purposes of § 12-702(b).

The Court rejected Petitioner's claim that the word "previous" created ambiguity as applied to his case. To reach its holding, the Court compared § 12-702(b) as enacted in 1966, when it contained both the phrases "original sentence" and "sentence previously imposed," with the current version of § 12-702(b) which contains only the latter. After deciding that the deletion of the phrase "original sentence" from the former version did not change the meaning of "sentence previously imposed," the Court concluded that the phrase "sentence previously imposed" must carry a different meaning than "original sentence." Otherwise, the Legislature would not have included both phrases.

Additionally, the Court looked to Maryland case law which states that the three-judge panel's sentence "is the effective sentence in the case." Moreover, Rule 4-344(f) provides in pertinent part that, where the "sentence is to be increased, the defendant shall be brought before the panel and resentenced[.]" Finally, the purpose of § 12-702(b)—to prevent vindictiveness against Petitioner for successfully appealing his conviction—is not circumvented in this case as the three-judge panel rendered its decision before the Court of Special Appeals reversed the conviction, so the panel's sentence could not be influenced by Petitioner's success on appeal. Consequently, the Court held that, in order for both § 12-702(b) and the three-judge review scheme to be faithfully applied, the original trial court's sentence is erased, having been superseded, and the panel's sentence becomes the "sentence previously imposed."

The Court also rejected Petitioner's argument that the rule of lenity should be applied in his favor. The Court noted that the rule of lenity, which instructs courts not to interpret a "criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the legislature] intended," need not be utilized in this case. Rather, the Court stated that the rule of lenity should only be applied to criminal statutes after all tools of statutory interpretation are exhausted and Legislative intent remains unclear. In this case, the Court was able to ascertain the legislative purpose behind § 12-702(b) and therefore declined to apply the rule of lenity.

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Donna Silver v. State of Maryland, No. 98, September Term, 2010, and *Hilton Silver v. State of Maryland*, No. 99, September Term, 2010, filed on June 20, 2011. Opinion written by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/98a10.pdf

CRIMINAL LAW - SENTENCING - RESTITUTION - DISCOVERY VIOLATIONS - REMEDIES - EVIDENCE - OTHER CRIMES

Facts: The Petitioners, Donna and Hilton Silver, owned three horses who were found by police in terrible health. One of the horses had to be euthanized on the property, and the other two were sent to a rescue farm for rehabilitation. Police charged the Silvers with three counts of animal cruelty. The Silvers entered plea bargains in District Court sitting in Baltimore County, pursuant to which they each pleaded guilty to one count of animal cruelty, and the State did not pursue the remaining counts.

After being sentenced by the District Court, however, the Silvers appealed for a de novo trial in the Circuit Court for Baltimore County. The State did not re-file charges for the dropped counts, thus pursuing only the charge relating to the horse that died. At trial, the Circuit Court heard evidence regarding the condition of the other two horses and convicted the Silvers each of one count of animal cruelty. As a condition of probation, the Court ordered the Silvers to pay restitution to veterinarian who euthanized one horse, and to the rescue farm for the costs of caring for the surviving horses.

The Silvers sought certiorari, arguing that the restitution order was invalid.

Held: Circuit Court order reversed in part and affirmed in part. Under *Walczak v. State*, 302 Md. 422, 488 A.2d 949 (1985), a trial court may not order a criminal defendant to pay restitution to a victim of a crime for which he was not convicted. There is an exception to the *Walczak* rule, recognized in *Lee v. State*, 307 Md. 74, 75-76, 512 A.2d 372, 373 (1986), where we held that a criminal defendant may be ordered to pay restitution for other alleged crimes *only if* the defendant freely and voluntarily agrees to make restitution to victims of the other, alleged crimes as part of a plea agreement. Applying the standards of *Walczak* and *Lee* in this case, it is clear that the Circuit Court's order of restitution for the surviving horses was invalid. The restitution order was not part of a plea agreement, and the Silvers never agreed to pay for the rehabilitation of the two surviving horses. This case, therefore, falls under the general rule of *Walczak*, and the court was only permitted to order restitution relating to the crimes of which each of the Silvers was convicted.

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C & M Builders, LLC v. Kelly Lynn Strub, No. 77, September Term 2010, Filed June 23, 2011, Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/77a10.pdf

LABOR & EMPLOYMENT – ASSUMPTION OF RISK – EVIDENCE – EXPERT TESTIMONY ON VIOLATION OF STATE AND FEDERAL OCCUPATIONAL SAFTEY STANDARDS

ASSUMPTION OF RISK - MOTION FOR JUDGMENT AS A MATTER OF LAW

Facts: In 2006, Wayne Barry Nocar, II was involved in a fatal accident while performing residential construction work for Comfort Masters Cooling and Heating, Inc. As a result of Nocar's death caused by his fall at the worksite, Kelly Lynn Strub, Respondent, sued one of the sub-contractors, C & M Builders, LLC, Petitioner, on behalf of her son alleging negligence in the death of Nocar, her son's father. Strub contended that C & M was obligated to protect its own employees as well as the employees of other sub-contractors from a fall hazard created by stairwell openings in floors that C & M built, under the Federal Occupational Safety and Health Act ("OSHA") or the Maryland Occupational Safety and Health Act ("MOSHA").

The Circuit Court for Baltimore City precluded expert testimony on OSHA and MOSHA, as well as testimony that violations of regulations passed pursuant to the Acts indicated negligence on C & M's part. The trial court also denied C & M's motion for judgment wherein it argued that Nocar had assumed the risk of his injury as a matter of law. The jury found that C & M was not negligent. On appeal, the Court of Special Appeals held that the trial judge erred in precluding the expert testimony that C & M either owed or breached a duty of care to Nocar under OSHA or MOSHA. In addition, the intermediate appellate court held that the trial court properly denied C & M's motion for judgment and submitted the case to the jury.

Held: Reversed. The Court held that C & M did not owe a duty of care to Nocar under MOSHA. The Court of Special Appeals erred, therefore, when it held that expert testimony regarding C & M's duty of care under MOSHA should have been admitted at trial. The general duty provisions of MOSHA apply only to an employer's own employees. Therefore, C & M's duty to maintain a safe workplace did not apply to Nocar, a non-employee. Federal cases interpreting OSHA have found that, where there is evidence that an employer created and retained control over a worksite, the "creating employer's" duty of care may extend to non-employees on the worksite. C & M retained no control or oversight at the worksite at the time of the accident, and the Court of Special Appeals therefore erred in adopting and applying the "creating employer" doctrine.

The Court further held that the evidence at trial established that Nocar assumed the risk of injury, as a matter of law, and, therefore, the trial judge erred in failing to grant C & M's motion for judgment. When assumption of risk is established as a matter of law, no determination of liability is required by the factfinder, and the defendant's motion for judgment should be granted. Contrary to the holding of the intermediate appellate court, the evidence at trial showed that Nocar knew, appreciated, and voluntarily encountered the holes through which he fell even though there was no direct evidence indicated exactly "how" he fell. Nocar knew of the holes because he and the crew used them to move between floors and he poked his head through the floor in one instance to communicate with his coworker. Moreover, the evidence that the crew utilized the openings in the floors to move their own equipment between the different stories of the house indicates that Nocar undeniably appreciated the risk of falling through the holes. Finally, there was evidence that Nocar did not have a task to perform on the third floor because the crew had forgotten essential equipment, but, regardless, he voluntarily remained on the third floor and apparently attempted to perform at least some of the installation task as evidenced by photographs and testimony about the accident scene.

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James Doe v. Mary Roe, No. 95, September Term 2010, filed 23 May 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/95a10.pdf

STATUTORY INTERPRETATION – LIMITATIONS PERIOD – EXPANSION – RETROSPECTIVITY – "PARTIAL" RETROSPECTIVITY

WHERE AN AMENDED STATUTORY PROVISION EXPANDING A LIMITATIONS PERIOD FOR CERTAIN TYPES OF CLAIMS IS APPLIED, AS OF ITS EFFECTIVE DATE, TO CLAIMS NOT-THEN BARRED BY THE PRE-EXISTING LIMITATIONS PERIOD AND THE STATUTE DOES NOT CREATE A NEW CAUSE OF ACTION, SUCH AN AMENDED STATUTORY PROVISION IS REMEDIAL AND/OR PROCEDURAL, SUCH THAT, ABSENT CLEAR LEGISLATIVE INTENT TO THE CONTRARY, THE EXPANDED LIMITATIONS PERIOD IS GIVEN FULL RETROSPECTIVE APPLICATION.

Facts: Mary Roe ("Roe") reached the age of majority on 29 September 2001. In her complaint in the Circuit Court for Calvert County filed against James Doe ("Doe" or "Petitioner"), her grandfather, in 2008, Roe alleged that she was sexually assaulted on two separate occasions by Doe, the first of which occurred when she was six or seven years of age, and the second incident when she was eight years of age. At the time Roe reached the age of majority, pursuant to Maryland Code (1974, 1998 Repl. Vol.) Court & Judicial Proceedings Art., § 5-101 the limitation on civil claims stemming from alleged sexual assault was three years from the time it accrued. Effective 1 October 2003, the General Assembly added § 5-117 to the Courts and Judicial Proceedings Article, which extended the statute of limitations to seven years after the date the victim attains the age of majority. Section 2 of the Act, which was uncodified, provides that "[t]his Act may not be construed to apply retroactively to revive any action that was barred by the application of the period of limitations applicable before October 1, 2003." Under the three- year rule, the statute of limitations would expire on 28 September 2004. Under the seven-year rule, it would expire on 28 September 2008.

On 3 September 2008, Roe filed her complaint against Doe. Doe responded with a motion to dismiss, arguing that her claims were time-barred because they accrued in 2001, prior to the effective date of § 5-117 in 2003. Therefore, he argued, the seven year time limit could not be applied retrospectively. The Circuit Court for Calvert County agreed, and dismissed the claims. The Court of Special Appeals reversed, reasoning that the plain language of the uncodified section of the 2003 amendment barred explicitly only the revival of claims that expired before the effective date of the amendment.

Doe filed a timely Petition for Writ of Certiorari, which we granted, *Doe v. Roe*, 416 Md. 272, 6 A.3d 904 (2010), to consider whether "§ 5-117 [may] be properly applied retroactively to permit a claim that arose before the effective date of § 5-117, and which

is barred by the prior statute of limitations."

Held: Affirmed. The Court first traced the development of § 5-117. The Act emerged in response to the growing and developing understanding of the harm resulting from child sexual abuse. The new limitations period specifically addressed the fact that victims may not develop a full understanding of the harm inflicted until well after their twenty-first birthday. During the development of the bill, Senator Brian E. Frosh, Chairperson of the Senate Judicial Proceedings Committee, consulted publically with Assistant Attorney General Kathryn M. Rowe regarding 1) whether retroactive application of the bill would violate due process and 2) what effect would result if there was no provision detailing whether the bill should be applied retroactively. On the first point, Ms. Rowe advised that, although there was no Maryland case that would mandate a finding of unconstitutionality, there was a possibility of such due to a jurisdictional split. On the second point, Ms. Rowe advised that without the provision, the bill likely would be applied only prospectively. Following the response from Ms. Rowe, the bill was revised and passed. It modified the statute of limitations to seven years past the date the victim attains the age of majority, and retained the language detailing that it was not meant to revive retrospectively claims barred by the application of the period of limitations applicable prior to 1 October 2003.

The Court then addressed whether the Legislature intended § 5-117 to be applied at least partially retrospectively. Quoting from *Rawlings v. Rawlings*, 362 Md. 535, 555, 766 A.2 109 (2001), the Court reiterated that, "despite the presumption of prospectivity, a statute effecting a change in procedure only, and not in substantive rights, ordinarily applies to all actions whether accrued, pending or future, unless a contrary intention is expressed." Moreover, the Court reiterated the long-held proposition that "if the Rule only [a]ffects procedure, and not substantive rights, and is therefore remedial in nature . . . [it] may be applied retrospectively unless a contrary intention is expressed." (citing *Rawlings*, 362 Md. at 556, 766 A.2d at 110.

In addressing whether the amendment to § 5-117 is procedural or remedial, the Court noted remedial statutes are ones that "improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." The Court then held that § 5-117 is remedial because in extending the limitations, it "'improves' the child's right to seek compensation for the alleged wrongs committed against him or her." Furthermore, in deciding that § 5-117 is remedial, the Court reasoned that its decision is in accord with the overwhelming majority of jurisdictions that hold that a change to a limitations period - when applied to claims not-yet-barred by the previous limitations period - is procedural or remedial in nature.

Moreover, the Court noted that because the statute retained the

retrospective revival provision - despite the advice from Ms. Rowe that, without this provision, the bill likely would be applied only prospectively - there is evidence that the Legislature did not intend for the bill to be applied prospectively only.

Because the Court held the Act to be procedural and remedial in nature, and because there was no evidence in the record that it was intended to be prospective only, the Court saw no reason to apply the presumption of prospectivity. Accordingly, § 5-117 may be applied properly to sexual abuse claims not yet barred by the prior limitations period as of the effective date of 1 October 2003.

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Maryland Transportation Authority v. Maryland Transportation Authority Police Lodge #34 of the Fraternal Order of Police, No. 131, September Term 2010, filed 20 June 2011. Opinion by Harrell.

http://mdcourts.gov/opinions/coa/2011/131a10.pdf

TRANSPORTATION - COLLECTIVE BARGAINING – EXPRESS AUTHORIZATION REQUIRED NORMALLY – AS A LONGSTANDING PRINCIPLE OF MARYLAND LAW, THE LEGISLATURE MUST AUTHORIZE A STATE AGENCY AND ITS EMPLOYEES TO BARGAIN COLLECTIVELY BEFORE ENTERING INTO AN AGREEMENT CONCERNING "WAGES, HOURS, PENSION RIGHTS, OR WORKING CONDITIONS FOR PUBLIC EMPLOYEES." THE LEGISLATURE, HOWEVER, NEED NOT AUTHORIZE CERTAIN AGREEMENTS THAT NEITHER CONTAIN BINDING ARBITRATION CLAUSES NOR "OTHERWISE BIND[]" THE STATE. IN THE PRESENT CASE, THE LEGISLATURE DELEGATED TO THE MARYLAND TRANSPORTATION AUTHORITY ("MDTA") A BROAD ARRAY OF POWERS, BUT NOT THE POWER TO BARGAIN COLLECTIVELY. AS A RESULT, THE AGREEMENT ENTERED INTO BY THE MDTA AND THE FRATERNAL ORDER OF POLICE LODGE #34 ("FOP"), REGARDING THE COMPENSATION OF MDTA POLICE OFFICERS IN THE FORM OF TAKE-HOME VEHICLES, WAS UNENFORCEABLE.

Facts: In February 2006, a one page agreement was signed by the President of the FOP, Corporal John Zagraiek, and the then-Executive Secretary of the MdTA, Trent Kittleman. The Agreement required, as a condition, that bills pending in the Maryland House and Senate authorizing collective bargaining between the MDTA and the FOP be withdrawn. It also mandated that no collective bargaining legislative covering the MdTA be passed during the 2006 legislative session and the following two legislative sessions. In exchange, the MdTA would fund, over the course of three years and amounting to approximately $11 million, a take-home vehicle program ("THV program") for existing and future MdTA officers. Without more, the Agreement concludes that the THV program "will be essentially the program outlined in the [N]otebook prepared by the MdTA[], in conformance with all laws and regulations." The referenced Notebook was approximately 400 pages in length.

According to the FOP's complaint filed in the Circuit Court for Baltimore City in 2007, "[o]n 20 April 2006, the [MdTA] Board held a meeting where the members unanimously approved the plan to implement, over a three[-]year period, a police [THV program] for sworn [MdTA] police personnel in exchange for withdrawal of [the] bills . . . ." For its part under the Agreement, the FOP entreated successfully Delegate Steven DeBoy, Jr. and Senator John Gianetti, Jr., the bills' respective sponsors, to withdraw their collective bargaining bills. According to the FOP, thereafter, the MdTA "undertook steps to implement the [THV] program," "includ[ing] ordering an initial 25 cars, which the MdTA successfully purchased and delivered, and marketing the [THV] program to prospective recruits as an incentive for joining

the MdTA force." The THV program acted primarily as a non-monetary benefit for new *and* current officers.

In 2006, Governor Martin O'Malley was victorious in the gubernatorial election. A few months after his administration assumed control of the Executive Branch, a newly-configured MdTA Board voted to discontinue the MdTA take-home vehicle program. On 29 June 2007, a day after that vote, the FOP filed a complaint in the Circuit Court for breach of contract and promissory estoppel.

The MdTA moved to dismiss the complaint, asserting that (1) the Agreement was unenforceable as too indefinite and (2) against public policy. Under the "public policy" contention, the MdTA posited that the Agreement is void as violative of (a) legislative ethics, (b) delegated powers and sovereign immunity, (c) procurement laws, and (d) collective bargaining laws. Moreover, the MdTA averred that promissory estoppel may not be maintained against a State agency, and, alternatively, the FOP neither satisfied the elements of promissory estoppel nor overcame the same barriers (i.e., indefiniteness and public policy) that rendered the Agreement unenforceable otherwise. The FOP responded that the Agreement was clear and definite and that it did not run counter to public policy. The FOP attempted also to distinguish cases the MdTA cited for the proposition that an action for promissory estoppel may not lie against a State agency or unit. According to the FOP, reliance, in this case, was not only reasonable, but also carried consequences.

The Circuit Court agreed ultimately with the MdTA. The FOP appealed timely to the Court of Special Appeals, which reversed, holding that the Agreement was enforceable. *Md. Transp. Auth. Police Lodge # 34 of FOP, Inc. v. Md. Transp. Auth.*, 195 Md. App. 124, 5 A.3d 1174 (2010). The Court of Appeals granted the MdTA's petition for writ of certiorari, *Maryland Transportation Authority v. Maryland Transportation Authority Police Lodge #34 of the Fraternal Order of Police*, 417 Md. 500, 10 A.3d 1180 (2011).

Held: Reversed. The Agreement was unenforceable because it did not comport with State collective bargaining law. To be able to bargain collectively, an agency and its employees must be so authorized by the Legislature, unless the agreement in question does not contain an arbitration clause or otherwise bind the State. In the present case, although the Legislature delegated a large amount of authority to the MdTA, it did not grant expressly the right to bargain collectively. Such express authorization was required, as the Agreement limited the otherwise independent budgetary discretion of the MdTA. As a result, the Agreement was unenforceable.

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COURT OF SPECIAL APPEALS

AFCO Credit Corporation v. Maryland Insurance Administration, No. 2084, September Term, 2009, filed April 1, 2011. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2011/2084s09.pdf

ADMINISTRATIVE LAW - INSURANCE COMMISSIONER - SECTION 2-210 OF THE INSURANCE ARTICLE - NO AUTHORITY TO STAY PROPERLY REQUESTED ADMINISTRATIVE HEARING WITHOUT MUTUAL CONSENT OF THE PARTIES.

Facts: Maryland Insurance Administration ("MIA") notified all Maryland consumer premium financing companies of new requirements deeming certain practices improper and requiring that they agree to comply with the new requirements to obtain their annual renewal of registrations. AFCO renewed its Maryland registration by agreeing to comply with the new requirements but then filed an administrative complaint challenging the Insurance Commissioner's statutory authority to impose the new requirements and requesting a hearing. Other PFCs refused to comply with the new requirements and were denied renewal. They challenged that action and also requested a hearing. The Insurance Commissioner issued a notice stating that a consolidated hearing would be held, but asking all interested parties to state their positions about whether the hearing should be stayed pending the final judicial resolution of a related case. Not all the PFCs involved in the requested consolidated hearing agreed to the proposed stay. AFCO was one of the PFCs that did not so agree.

Thereafter, the Insurance Commissioner issued an order staying the proceedings, including the hearing, pending the outcome of a related case. AFCO filed a petition for judicial review of that order. An order of the MIA refusing to hold a hearing is a final order that is appealable. The circuit court dismissed the petition on the ground that the Insurance Commissioner had the discretion to stay the requested hearing, and therefore his order was not a refusal to hold a hearing and was not final and appealable (*i.e.,* subject to judicial review by the circuit court).

Held: Under section 2-210 of the Insurance Article, upon proper demand for a hearing, the Insurance Commissioner shall "grant and unless postponed by mutual consent of the parties, hold the hearing," or shall issue an order refusing the hearing. Permissible reasons for the Insurance Commissioner to deny a requested hearing are stated in Maryland regulations; none applied to the circumstances here. The MIA's order staying the requested hearing amounted to an indefinite postponement of the hearing without the mutual consent of the parties. The Insurance Commissioner did not have authority to postpone the hearing

without the consent of all the parties. Accordingly, the order was a refusal to grant a hearing, and was subject to judicial review. The proper decision on judicial review would have been to declare that the Insurance Commissioner acted beyond the scope of his authority in issuing the stay order, to vacate the order, and to remand the matter to the MIA for further appropriate proceedings.

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David N. v. St. Mary's County Department of Social Services, No. 1450, September Term, 2009, filed April 1, 2011. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2011/1450s09.pdf

ADMINISTRATIVE LAW – STATUTORY CONSTRUCTION - CHILD ABUSE AND NEGLECT - REPORTING AND INVESTIGATION BY DEPARTMENTS OF SOCIAL SERVICES UNDER TITLE 5, SUBTITLE 7 OF THE FAMILY LAW ARTICLE - AUTHORITY OF LOCAL DEPARTMENT OF SOCIAL SERVICES TO INVESTIGATE REPORT OF CHILD ABUSE COMMITTED IN MARYLAND AGAINST A CHILD RESIDING OUTSIDE OF MARYLAND.

Facts: A report was made to the local department of social services alleging that David N., age 15, had sexually abused his 4-year-old cousin at a family picnic in Maryland. The victim resided with her parents in Virginia. The local department investigated and made a finding of indicated child sexual abuse. David N. requested a contested case hearing, which was held. He asserted that, by virtue of the 2003 amendments to section 5-706 of the Family Law Article, the local department lacked authority to investigate any report of suspected child abuse (or neglect) committed in Maryland against a victim residing outside of Maryland; and therefore its finding could not be sustained. The ALJ agreed and found in favor of David N. on that basis. In an action for judicial review, the circuit court reversed the ALJ's decision.

Held: A local department of social services, upon receiving a report of suspected child abuse or neglect alleged to have been committed in Maryland against a victim not residing in Maryland, is authorized to investigate, pursuant to section 5-706, and therefore must conduct an investigation under that statute. That section, as amended in 2003 to state that a local department shall conduct an investigation "[p]romptly after receiving a report of suspected abuse or neglect of a child who lives in this State that is alleged to have occurred in this State," is ambiguous. The language reasonably could mean that the investigation shall be conducted if the reported abuse or neglect was perpetrated against a Maryland resident and the abuse or neglect happened in Maryland, but that interpretation would be directly contrary to the language of the scope section of the subtitle, which states that the subtitle covers abuse or neglect perpetrated against children in Maryland, without any residency limitation. The ambiguity is best resolved by reading the implied "and" in the statute as "or," so that the statue authorizes an investigation of a report of suspected child abuse or neglect that happened in Maryland or to a child who lives in Maryland, regardless of where the abuse or neglect happened. This interpretation comports with the intention of the General Assembly in enacting the 2003 amendments.

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Edy Sanchez v. Potomac Abatement, Inc., Case No. 569, 2009 Term and Case No. 504, 2010 Term (consolidated), filed April 27, 2011. Opinion by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/569s09.pdf

APPEAL AND ERROR - MOOTNESS

Facts: Edy Sanchez suffered a job-related injury in 1998 and filed a claim with the Workers' Compensation Commission. In August 2006, the Commission issued an award including compensation for a 25 percent permanent partial disability ("PPD") and a 5 percent psychiatric impairment. Sanchez sought a de novo appeal before the Circuit Court for Baltimore City, where a jury found that he had sustained a 37 percent PPD, with no psychiatric impairment. Sanchez again appealed the issue of whether the award had been improperly capped. His contention was rejected by this Court in 2009, *Sanchez v. Potomac Abatement, Inc,* 134 Md. App. 755 (2009), and later by the Court of Appeals in November 2010, *Sanchez v. Potomac Abatement, Inc.* 417 Md. 76 (2010).

In January 2008, while the PPD appeal was pending, Sanchez sought and obtained a Commission award of temporary total disability ("TTD") benefits for the period of November 30, 2007 to January 8, 2008. On July 31, 2008, he filed for a second period of TTD benefits, for the period of January 9 to June 11, 2008. The employer opposed this claim, arguing that the Commission lacked jurisdiction to order TTD benefits while the PPD case was still pending on appeal. In an order dated October 21, 2008, the Commission agreed, finding that it "lack[ed] jurisdiction during the pendency of the appeal pursuant to LE 9-742." The Commission's order was affirmed by the Circuit Court for Baltimore City in May 2009. That affirmance was appealed to the Court of Special Appeals.

On August 19, 2009, while the TTD and PPD appeals were pending, Sanchez returned to the Commission to request vocational rehabilitation benefits. After an October 2009 hearing, the Commission ruled that it did not have jurisdiction during the pendency of the other appeals. The Circuit Court for Baltimore City affirmed in April 2010, again finding that the Commission lacked jurisdiction under Section 9-742 of the Labor and Employment Article ("LE"). Sanchez also appealed this decision.

Held: Sanchez's appeals are moot because the only effective remedy this Court could fashion– ordering the Commission to consider the claimant's post-PPD claims– is one Sanchez has an unfettered right to pursue now that the PPD appeal has been resolved. However, although moot, this case implicates "public interest" concerns the appellate court decided to address.

Sanchez argues that the jurisdictional question is controlled by LE § 9-736(b) and Potomac contends is governed by LE § 9-742(a). LE § 9-742 is not an exclusive jurisdiction statute; it does not deprive the Commission of jurisdiction to consider additional issues while a previous award is on appeal. The mere isolation or rearrangement of words in a statute as a result of a nonsubstantive code revision and a caption inserted during code revision do not transform LE § 9-742 into an exclusive jurisdiction statute; nor do assumptions in subsequent legislation or fleeting statements in fiscal notes alter legislative intent. Under LE § 9-736(b), the Commission retains jurisdiction to consider additional matters during the pendency of an appeal in the courts, but only if the issues before the Commission are independent and distinct from the issues on appeal. Although answering this question, the appellate court dismissed the appeal as moot.

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Heit v. Stansbury, No. 354, September Term, 2010, filed May 27, 2011. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2011/354s10.pdf

APPELLATE PROCEDURE - RULE 8-502(a)(3) - TIME FOR FILING REPLY BRIEF.

Facts: Appellee filed her brief on November 5, 2010. Appeal was scheduled for argument on May 4, 2011. On April 21, 2011, appellant filed a reply brief. Appellee moved to strike the reply brief on the ground that it was untimely filed. Appellant opposed, arguing that the reply brief was timely filed.

Held: Motion to strike reply brief granted. Rule 8-502(a)(3) states that, unless otherwise ordered, "[t]he appellant may file a reply brief within 20 days after the filing of the appellee's brief, but in any event not later than ten days before the date of the scheduled argument." Appellant argued that the use of the word "may" in that rule meant that he had until ten days before the date of oral argument to file a reply brief. The Court rejected that argument. "May" is used in that rule because there is no requirement that an appellant file a reply brief at all. The plain meaning of the rule, when read in the context of the surrounding rules that use the word "shall" in reference to appellant's and appellee's briefs, which are required to be filed, is that if appellant is going to file a reply brief he must do so within 20 days of the date the appellee filed his brief, unless that deadline would fall within 10 days of oral argument, in which case it must be filed sooner.

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Kumar v. Dhanda, No. 2934, September Term, 2009, filed April 5, 2011. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2011/2934s09.pdf

CIVIL LITIGATION - ACTION FOR BREACH OF CONTRACT - STATUTE OF LIMITATIONS - ACCRUAL TIME OF CAUSE OF ACTION WHEN CONTRACT CONTAINS MANDATORY NON-BINDING ARBITRATION CLAUSE - JUDICIAL TOLLING OF STATUTE OF LIMITATIONS.

Facts: Parties entered into a contract containing a mandatory non-binding arbitration clause. One party contended the other breached the contract, but the cause of action for breach of contract did not accrue, within the meaning of the general three-year statute of limitations for civil actions, until the parties had completed mandatory non-binding arbitration. After arbitration was completed, that party brought suit in the circuit court for breach of contract. Circuit court granted a motion to dismiss on limitations on the ground that suit was filed more than three years after the latest possible time at which the alleged breach of contract had occurred; and the alleged breach was known to the suing party, so the discovery rule was not implicated.

Held: The plaintiff's cause of action for breach of contract accrued when the elements of the claim came into existence, which was when the alleged breach happened. Accrual did not await completion of mandatory non-binding arbitration. In addition, the circumstances did not warrant recognizing a judicial tolling exception that would suspend the running of the limitations period until the completion of arbitration. Circuit court's ruling affirmed.

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Julie Lang v. Zion Levi, Case No. 1425, Sept. Term 2009, filed April 1, 2011. Opinion by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/1425s09.pdf

CIVIL PROCEDURE - ALTERNATIVE DISPUTE RESOLUTION

Facts: Appellant Julie Lang and Appellee Zion Levi were married in 2003 and signed a prenuptial agreement, which stated in part that Levi had an obligation to pay Lang $100 a day from the time they no longer resided together until Levi granted Lang a *get*, a Jewish divorce. They also signed an arbitration agreement giving the Beth Din, a rabbinical court and arbitration panel, the authority to decide any disputes that arose regarding this prenuptial agreement. When the marriage deteriorated, Lang and Levi appeared before the Beth Din in 2008. The panel rejected Lang's claim that she was entitled to a cumulative amount of $108,000 in stipulated per diems, but granted her an award of $10,200. However, the award was later reduced to zero by a representative of the Av Beth Din (head of the rabbinical court) who found, on the basis of Jewish law, that Levi was not obligated to pay any amount to Lang. Lang petitioned the Circuit Court for Montgomery County to vacate the arbitration award, and Levi moved for summary judgment. The circuit court found no grounds to vacate the award, and granted Levi's motion.

Held: The circuit court properly denied appellant's petition to vacate the arbitration award. Under the Maryland Uniform Arbitration Act, the courts play a very restricted role in the arbitration process, and may only vacate a ruling by an arbitration panel under limited circumstances, including if an arbitor exceeds his authority and the decision was irrational. Neither circumstance exists in this case. First, the Beth Din's award was not irrational because it was based on the Av Beth Din's interpretation of Jewish law and the prenuptial agreement. The intent of the parties in signing the $100-a-day-penalty was to prevent Levi from withholding a *get* from Lang, a known issue in the orthodox Jewish community which prevents the wife from remarrying while the husband is free to do so under Jewish law. Because Levi was willing to give Lang the *get* and she was reluctant to accept it, the Av Beth Din reasoned that, under Jewish law, requiring Levi to pay any monetary award would be an unintended consequence of the prenuptial agreement and therefore inequitable. Since a Maryland appellate court cannot interpret Jewish law or gauge equities as determined by rabbinical tribunals, the Court of Special Appeals declined to vacate the decision of the Beth Din as contrary to the parties' agreement.

Second, the Beth Din appropriately exercised its authority within the confines of its own rules and procedures, which both Lang and Levi agreed to be subject to under the arbitration agreement. Because of the religious nature of the Beth Din, the

religious question doctrine, derived from the First Amendment, prohibits the courts from determining whether reversal of the $10,200 award by the Av Beth Din is appropriate under Jewish law and the principles of equity as determined by a religious tribunal. Thus, the Av Beth Din had the authority to reverse the panel’s decision.

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Joanie Bradford v. State, No. 206, September Term 2010, filed June 1, 2011. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2011/206s10.pdf

CIVIL PROCEDURE - CHILD SUPPORT – CIVIL CONTEMPT – DELAYED SENTENCING AGREEMENT – WAIVER OF COUNSEL.

When a defendant in a civil contempt proceeding in which incarceration is sought is not represented by an attorney, a court may not enter an order finding the defendant in contempt and imposing a sentence of incarceration without first conducting an inquiry into whether the defendant's waiver of counsel was knowing and voluntary pursuant to Maryland Rule 15-206(e).

CHILD SUPPORT – CIVIL CONTEMPT – DELAYED SENTENCING AGREEMENT-ILLEGAL SENTENCE

A defendant cannot validly agree to the imposition of an illegal sentence. A sentence to a fixed period of incarceration, to commence in the future, without a feasible purge is an illegal sentence in a civil contempt proceeding to enforce a child support obligation.

CIVIL CONTEMPT PROCEEDINGS – MOOT APPEAL – PROPER APPELLATE DISPOSITION IS DISMISSAL.

After the court sentenced Ms. Bradford to a jail sentence, her husband paid the court-ordered purge amount on his wife's behalf. Payment of the purge rendered the appeal moot. Although the Court of Special Appeals can address the merits of appellant's contentions, to prevent harm to the public interest, the proper disposition of the appeal is dismissal and the mandate should so reflect.

Facts: Joanie Bradford was in arrears on her court-ordered obligation to pay child support for two of her children. The Child Support Enforcement Unit of the Washington County Department of Social Services filed a petition to hold her in civil contempt in order to enforce her support obligation. The petition sought incarceration as a sanction. Before she appeared in court, Ms. Bradford met with a representative of the Department and signed a "Delayed Sentencing Agreement." In the agreement, she waived her right to counsel, admitted to being in contempt, and consented to a specific sentence of incarceration if she failed to remain current on her support obligations and reduce her arrearage. The agreement provided that the sentence of incarceration would commence approximately ninety days after the date the agreement was signed and did not have a provision by which Ms. Bradford could have purged her contempt once she began to serve the sentence. Shortly thereafter, based solely upon the agreement, the circuit court entered an order finding defendant

in contempt and imposing a jail sentence subject to a purge. After the court sentenced Ms. Bradford to jail, her husband paid the court-ordered purge amount on his wife's behalf, rendering this appeal moot. Nevertheless, the Court of Special Appeals determined that appellate review was warranted.

Held: Appeal Dismissed.

The circuit court erred in holding Ms. Bradford in contempt and imposing a sentence of incarceration without first ascertaining that she had validly waived her right to counsel. In addition, a sentence that provides for a fixed period of incarceration, to commence in the future, without a feasible purge is an illegal sentence in a civil contempt proceeding. Therefore, the delayed sentencing agreement was unenforceable because it called for the imposition of an illegal sentence.

While errors by the circuit court, and defects in the DSA itself, would have justified reversing the orders holding appellant in contempt and sentencing her to incarceration had this appeal not been moot, the appeal was rendered moot by the payment of the purge. Therefore, the appeal was dismissed as moot.

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Phoenix Life Ins., Co. v. Wachovia Bank, N.A., No. 562, September Term 2010, filed June 1, 2011. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2011/562s10.pdf

CIVIL PROCEDURE – REMEDIES – PROVISIONAL REMEDIES – GARNISHMENTS
CIVIL PROCEDURE – REMEDIES – WRITS – ANCILLARY WRITS

Facts: Appellant, Phoenix Life Insurance Company ("Phoenix"), obtained a judgment against Dinkins Dry Cleaners, Inc. ("DDC") and Lila Dinkins ("Dinkins") in the United States District Court for the District of Maryland. On May 9, 2005, it recorded the judgment in the Circuit Court for Baltimore City. Subsequently, Phoenix filed requests for garnishment of property directed to appellee, Wachovia Bank, N.A. ("Wachovia"). In its request for a writ filed on May 6, 2008, Phoenix named DDC and Dinkins as judgment debtors, and listed the address of "2142 W. North Avenue, Baltimore, Maryland 21217-1222" for both of them. After issuance by the court clerk and service was effected, Wachovia answered the writs of garnishment by filing a confession of DDC's assets. Nothing in the record indicates that Wachovia filed an answer as to Dinkins, individually. It was later revealed that Wachovia held an account belonging to Dinkins with an address of "3705 Ellamont Ave., Baltimore, MD 21215."

On September 11, 2009, Wachovia was again served with a writ of garnishment with respect to DDC. Subsequently, Wachovia filed a confession indicating that it held no assets belonging to DDC. On September 29, 2009, Phoenix sent a fax transmission to Wachovia attaching a request for writs of garnishment of property, which had been filed with the court on or about August 21, 2009. The request listed DDC and Dinkins as Judgment Debtors, and specifically sought information related to an account ending in -5700. Although the court issued a writ on September 11, 2009, with respect to DDC, nothing in the record indicates that it issued a writ with respect to Dinkins.

Believing that it was entitled to monies that had been in Dinkins's individual account, but had not been reported by Wachovia, and had since been withdrawn, Phoenix filed a motion to determine conditions for satisfaction of an order of condemnation as to the first writ and a motion for judgment of condemnation as to the second writ. The court denied Phoenix's motion as to the first writ, and granted in part and denied in part the motion pertaining to the second writ. This appeal followed.

Held: Affirmed. When obtaining issuance of a writ of garnishment under Maryland Rule 2-645(b), it is the judgment creditor's responsibility to state clearly which individual is a debtor and which account is subject to garnishment, by providing the debtor's correct address. Moreover, the judgment creditor is charged with the duty to assure the correctness of a writ being

issued by the court, as it is the party with the ability to do so. Thus, even if the name on the writ matches that on the account to be garnished, the garnishee does not have authority to take any action regarding money or property in its possession if the address on the writ does not match the address on the account.

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Carla A. Latty, et al. v. St. Joseph's Society of the Sacred Heart, Inc., Case No. 2487, Sept. Term 2009, filed April 4, 2011. Opinion by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/2487s09.pdf

CONSTITUTIONAL LAW - FIRST AMENDMENT

Facts: Father Francis Ryan, a priest for St. Joseph's Society of the Sacred Heart, Inc. ("the society"), allegedly had an affair over fifty years ago with church organist Anna Senna. Fr. Ryan allegedly fathered two children from the affair, appellants Carla Latty and Adrian Senna. Appellants, now in their late fifties (Latty) and sixties (Senna), brought suit in the Circuit Court for Baltimore City against the society. They claimed they recently learned through DNA testing that Fr. Ryan, now deceased, was "most probably" their father. They alleged that the society knew about Fr. Ryan's breach of a vow of celibacy and the birth of the children and asserted they worked to cover up the affair and the identity of appellants' father. They also asserted that the society forced Anna Senna to give Carla up for adoption, forced her to conceal the identity of appellants' biological father, and never provided financial support to the children. They brought claims of fraudulent concealment, intentional infliction of emotional distress, negligent hiring, negligent supervision and retention, and breach of fiduciary duty against appellees. The society moved to dismiss the claims, and the circuit court granted the motion. Appellants timely appealed.

Held: The circuit court did not err in dismissing all of appellants' claims. Actions for fraudulent concealment and breach of fiduciary duty both require the existence of an underlying duty that the society owed to them. The Court of Special appeals found that the society owed no legal duty to appellants arising out of a special relationship. There is no rule or statute in Maryland establishing a legal relationship between an employer and employee's children, or between a priest and his parishioners. A confidential relationship could also establish a duty, but none existed here because there was no actual relationship of trust or confidence between the parties where, for example, one party depends on the other for basic needs such as a caregiver, or handling one's financial affairs. There was no fiduciary duty because the parties' relationship did not give rise to one presumed as a matter of law, such as a trustee-beneficiary relationship. There was also no agreement between the parties giving rise to a fiduciary duty. Nor does Fr. Ryan's financial dependence on the society create a duty for the society to be financial responsible for Fr. Ryan's children. There is no statute, tort or caselaw in Maryland making an employer liable for financial support of an employee's children, even if the salary paid by the employer was the employee's only

source of income. Third party paternity liability is not a viable claim in Maryland. Further, Maryland courts generally do not recognize breach of fiduciary duty as a stand alone tort.

For the fraudulent concealment claim to stand, the society must have had a duty to disclose Fr. Ryan's possible parenthood. Absent an agreement or obligation to disclose, or a special relationship, non-disclosure cannot constitute fraud. There was no agreement, and as discussed above, no special legal relationship. Thus, this claim fails as well.

Appellants' negligent hiring, supervision, and retention claims were also properly dismissed in the circuit court. While such claims may be brought against a religious institution for the act of an employee, including a priest, committing sexual misconduct against a minor, there is no evidence of criminal misconduct here. Aside from a conclusory allegation that Fr. Ryan took advantage of Anna Senna, appellants' complaint fails to show that the couple had anything more than an adult, consensual relationship. The Court declined to explore appellants' argument that Fr. Ryan's breach of an alleged vow of celibacy was sufficient misconduct to provide a basis for the society's negligence because that would ensnare the Court in religious questions that cannot be determined in light of the First Amendment's Free Exercise and Freedom of Religion clauses.

Next, the allegation that Fr. Ryan took advantage of his position of power over Anna Senna when he had an affair with her, is still insufficient to constitute a negligence claim against the society. Unless there is an "officially sanctioned treatment relationship," such as that between a psychiatrist and patient, an employer cannot be held liable for the consequences of an employee's adult, consensual sexual relationship. If the Court were to hold that the society was negligent in this case, it would have the effect of requiring all employers to become entangled in their employees' relationships and to monitor them.

Boiled down, appellants' arguments appear to assert that the society's negligence ultimately caused them to be born, and that they should be able to collect damages as a result. This smacks of a cause of action for wrongful life, which Maryland courts do not recognize.

Finally, the circuit court properly dismissed appellants' intentional infliction of emotional distress claim. Appellants did not sufficiently allege that the emotional distress they suffered was severe, which is a required element of this tort. At most, they suffered "mental anguish, embarrassment, [and] loss of self-esteem." Maryland caselaw requires far more to constitute severe emotional distress. Therefore, the circuit court properly dismissed this claim.

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Clinton Edward Sinclair v. State of Maryland, No. 73, September Term, 2010, filed May 26, 2011. Opinion by Rodowsky, J.

http://mdcourts.gov/opinions/cosa/2011/73s10.pdf

CRIMINAL LAW - CHILD SEX OFFENDER REGISTRATION – DECLARATORY JUDGMENT – CRIMINAL COURT JURISDICTION

Facts: On June 22, 2006, in the Circuit Court for Anne Arundel County, Clinton Edward Sinclair pleaded guilty to a charge of child abuse, in violation of Maryland Code (1957, 1996 Repl. Vol.), Article 27, § 35C(b)(1). The prosecutor's statement of facts made clear that the abuse occurred between 1989 and 1994, and was sexual in nature. Sinclair was sentenced to four years of house arrest, with all but twelve months suspended, and placed on five years probation, beginning with sentencing.

The probation order did not require Sinclair to register as a sex offender, and the State conceded that at the time of his conviction, there was no statutory requirement that he register. The sex offender registration statutes were subsequently amended in order to give
retroactive effect to the requirement. Of relevance in this appeal was the amendment by Chapter 541 of the Acts of 2009, effective October 1, 2009, codified as Maryland Code (2001, 2008 Repl. Vol., 2009 Cum. Supp.), § 11-702.1(c)(1) of the Criminal Procedure (CP)
Article, providing that the registration requirement applies to "a person convicted on or after October 1, 1995, of an offense committed before October 1, 1995, for which registration as a child sexual offender is required under this subtitle."

On February 4, 2010, Sinclair filed in the Circuit Court for Anne Arundel County a "MOTION TO DENY UNLAWFUL ORDER OF PAROLE & PROBATION and/or MOTION FOR APPROPRIATE RELIEF." The motion was filed in his criminal case. He alleged that, pursuant to the 2009 amendment to the registry statutes, he had been "ordered" by the Division of Parole and Probation to register. Sinclair argued that, as a matter of statutory construction, he was not a "child sex offender" within the ambit of the 2009 amendment. After a hearing on the motion, the motion was denied.

Held: The Court vacated the judgment, and remanded the case with instructions to dismiss the motion without prejudice. The issue that Sinclair attempted to raise, and the relief sought, presented a civil matter that is not cognizable in his criminal cause.

Sinclair sought to avoid application of the registration requirement to him, with the result that no criminal prosecution under CP § 11-721 (the enforcement statute) could be brought. Such relief is not available under the Postconviction Procedure

Act because he was not seeking to "set aside or correct the [2006] judgment or sentence." CP § 7-102(b)(1).

The relief requested by Sinclair was most cognizable under the Maryland Declaratory Judgment Act, which provides that "[a]ny person … whose rights, status, or other legal relations are affected by a statute … may have determined any question of construction or validity arising under the … statute … and obtain a declaration of rights, status, or other legal relations under it." Maryland Code (1973, 2006 Repl. Vol), § 3-406 of the Courts & Judicial Proceedings Article (CJ) (emphasis added). The Court found it unnecessary to determine the ripeness of the issue raised by Sinclair under the Declaratory Judgment Act. Rather, the Court held that a petition for a declaratory judgment may not be filed in a criminal cause. See CJ §3-409(a) ("[A] court may grant a declaratory judgment or decree in a civil case[.]" (emphasis added)). The Court noted that the merger of law and equity for purposes of pleadings, parties, court sittings, and dockets, by the adoption of Maryland Rule 2-301 in 1984, did not merge criminal causes as well.

The Court also noted that a charging document, alleging a cognizable crime, confers jurisdiction on a criminal court. *See Williams v. State*, 302 Md. 787, 490 A.2d 1277 (1985). The charging document does not confer on the circuit court the power to issue a declaratory judgment in a criminal cause.

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Ali v. State, No. 518, September Term, 2010, filed June 1, 2011. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2011/518s10.pdf

CRIMINAL LAW - EVIDENCE - PATIENT/PSYCHOLOGIST PRIVILEGE - COURTS AND JUDICIAL PROCEEDINGS ARTICLE (CJP) SECTION 9-109 - EXCEPTION TO PRIVILEGE FOR MAKING MENTAL CONDITION A DEFENSE - COMMUNICATIONS BY PATIENT RELATING TO DIAGNOSIS OR TREATMENT.

Facts: After defendant, who was in treatment with a psychologist, violated the boundary agreement by excessively sending texts and emails, therapist terminated the therapeutic relationship except for a 30-day emergency treatment period. Defendant illegally accessed therapist's computer email account and obtained an email the therapist had sent to her private attorney concerning the defendant, including concerns about her stability and about threats of litigation defendant had made. The defendant doctored the email by adding commentary of her own and sent it to the therapist. The defendant then sent multiple texts to the therapist during the 30-day emergency-only treatment period. The therapist terminated the therapeutic relationship completely and obtained a peace order against the defendant. The defendant was charged with and ultimately convicted of multiple computer hacking crimes, false identification, violating a peace order, harassment, and submitting a false application to obtain a regulated firearm. During trial, defendant objected to the introduction of many of her communications with the therapist as inadmissible under the patient/psychologist privilege.

Held: Convictions affirmed in part and reversed in part.

State's argument that the privilege did not apply under CJP section 9-109(d)(3)(i), because defendant raised her mental health as a defense to the crimes charged, is without merit. Defendant's disturbed mental state was a fact raised by the prosecution and central to the State's case. The defense addressed the topic for that reason, not as a separate defense to the charges.

Several text messages that were sent by the defendant to the therapist during the 30- day emergency-only treatment period and that were admitted into evidence were privileged because, objectively viewed from the standpoint of a reasonable person, and not merely from the standpoint of the therapist, they were communications regarding the state of the defendant's mental health, including statements relevant to whether she would harm herself, and therefore related to her treatment and diagnosis. Likewise, some of the communications inserted by the defendant into the email the therapist sent to her lawyer were privileged. These documents should have been admitted into evidence only in redacted form, so that the privileged communications were omitted.

Error in the admission of the privileged communications into evidence was harmless as to the convictions for computer-related crimes and violations of the peace order. The communications were not relevant to those crimes and, beyond a reasonable doubt, would not have affected the jurors' verdict on those crimes. The error was not harmless as to the harassment conviction, however.

Firearms application conviction reversed on the basis of *Furda v. State*, 193 Md. App. 371 (2010).

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Darvell Lamar Belote v. State of Maryland, No. 2633, September Term 2009, filed May 25, 2011. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/2633s09.pdf

CRIMINAL LAW - EVIDENCE — FRUIT OF THE POISONOUS TREE — PROBABLE CAUSE — COMMON CRIMINAL ENTERPRISE — CRIMINAL LAW ARTICLE §5-101 — CRIMINAL LAW ARTICLE §5-619(c)

Facts: Police obtained a warrant to search an apartment for items including stolen property and a handgun. Police entered the apartment lessee's bedroom and found appellant in bed with her. A search of the bedroom closet revealed a lockbox containing controlled dangerous substances and paraphernalia, including a digital scale. Police then found on the bedroom dresser an empty scale package and lid, as well as a key that the lessee admitted was hers and that fit the lockbox. Appellant was placed under arrest for possession of CDS and paraphernalia and then searched, at which point police found in his pocket a key to the lockbox. Appellant moved to suppress evidence of the key, the motion was denied, and appellant was tried and convicted of possession with intent to distribute CDS and three related charges.

Held: The Court of Special Appeals reversed and remanded for a new trial. Probable cause exists where the facts and circumstances taken as a whole would lead a reasonably cautious person to believe that a felony had been or is being committed by the person being arrested. Police did not have probable cause to suspect appellant of possession of a controlled dangerous substance and paraphernalia, where the only evidence of a common criminal enterprise was appellant's presence in the bedroom of the apartment's lessee, and none of the other individuals in the apartment were "known" to be involved in CDS distribution; where the CDS and paraphernalia were contained within a lockbox that was hidden under a pile of clothing in the lessee's bedroom closet; where appellant had no ownership or possessory right in the premises; and where there were no other circumstances which reasonably warranted the intrusion. Therefore, the key to the lockbox found on appellant's person subsequent to his arrest should have been suppressed.

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Tyrone Davis v. State of Maryland, No. 1233, September Term, 2010, filed June 2, 2011. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2011/1233s10.pdf

CRIMINAL LAW - MARYLAND WIRETAPPING AND ELECTRONIC SURVEILLANCE LAW – A CELL PHONE INTERCEPT IS NOT A WIRETAP – THE LOCATION OF THE OTHER END OF THE LINE IS IMMATERIAL – THE SITUS OF THE CRIME AS THE JURISDICTION ANCHOR

Facts: Judge Ann S. Harrington in the Circuit Court for Montgomery County signed an order authorizing officers of the Montgomery County Police Department and other federal law enforcement officers to intercept all calls, the substance of which were pertinent to an ongoing narcotics trafficking investigation, on a cell phone being used by Tyrone Davis. The application for the interception order stated that the applicants believed "the events being investigated are occurring within the jurisdiction of Montgomery County, Maryland." Judge Harrington ordered an exhaustive list of cell phone service providers to provide a wide variety of information in any way connected to Davis's phone "without geographic limit."

The listening post from which the police were monitoring Davis's cell phone was located in Montgomery County. On September 11, 2006, the police intercepted a call made to Davis's phone. From the substance of the intercepted conversation, it could reasonably be inferred that Davis was physically located in northern Virginia, and was returning to Montgomery County after having made a drug-pick up in Miami. This phone call gave police the probable cause needed for a warrantless detention and questioning of Davis when he arrived home. A suitcase being carried by Davis was found to be packed with high-grade marijuana.

Davis filed a pretrial motion seeking to suppress the marijuana as the derivative fruit of the cell phone intercept. The intercept, he argued, violated the Maryland Wiretapping and Electronic Surveillance Act (the Maryland Act). Davis's motion was denied, and he was convicted of possession of marijuana with the intent to distribute. On appeal to this Court, the sole issue was whether the police violated the Maryland Act.

Held: Affirmed. The Court first noted that the Maryland Act, enacted in 1977 and codified as Courts and Judicial Proceedings (CJ) Article, §§ 10-401 through -414, was modeled after and tracks closely "Title III" of the Omnibus Crime and Safe Street Acts of 1968, codified as 18 U.S.C. §§ 2510-2521.

The Court distinguished the interception of a communication between two cell phones from wiretapping, an investigative technique used to intercept a message between two phones at a

fixed location (i.e. landlines), and "bugging," which is the use of a hidden listening device to pick up sound in a room or other place. Neither the original Title III nor the original Maryland Act covered communications between cellular phones. Both statutes, however, were subsequently expanded in 1986 and 1988, respectively, to cover "electronic communication" in addition to wire and oral communication. The Court explained that the addition of "electronic communication" to the statutes was no mere variation on the familiar theme of wiretapping. There are necessarily variations in how the law applies to intercepts on cell phones because the underlying physics is dramatically different.

The Court then held that Judge Harrington had jurisdictional authority to permit the police to intercept a phone call made to Davis's phone while his phone was outside of Maryland's borders. The critical situs at which an interception occurs, the Court explained,
may be at either of two places: 1) where the suspect phone which is the subject of the interception ordered is located; and 2) the location of the listening post. The judge issuing the interception order must have jurisdictional authority over at least one of those places, as well as over the place where the crime has occurred and is to be prosecuted.

The Court next addressed the language of CJ § 10-408(c)(3), which permits judges to "authorize the interception of communications received or sent by a communication device anywhere within the State[.]" Davis argued that the statute should be interpreted to mean that an interception is not authorized unless the suspect phone itself, at the moment of interception, is physically located within the State. The Court rejected this interpretation, noting that it would tie jurisdictional authority over wiretapping and electronic surveillance to the random physical location of a moving cell phone, and not the broader concept that includes the location of the interception. Moreover, the Court concluded that the interpretation urged by Davis contravened the statute's legislative history and the structure of the Maryland Act on whole.

In this case, the application for the interception order satisfied the critical jurisdictional requirement found in § 10-408(c)(3), requiring the application to allege that "the offense being investigated may transpire in the jurisdiction of the court in which the application is filed." Moreover, the interception took place in Montgomery County, where the listening post was located. Accordingly, it was within the jurisdictional powers conferred onto Judge Harrington to authorize the interception of the disputed call.

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MAIF v. John, No. 2028, Sept. Term, 2009, filed April 1, 2011. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2011/2028s09.pdf

INSURANCE - COVERAGE UNDER INSURANCE POLICY TRANSFER PROVISION - ORAL MODIFICATION OF WRITTEN INSURANCE CONTRACT - ORAL WAIVER OF WRITTEN INSURANCE POLICY - AGENCY INTERPRETATION OF WRITTEN INSURANCE POLICY - COVERAGE BY ESTOPPEL

Facts: Progressive American Insurance Company, appellee, issued an automobile liability policy to Patricia Ashu for the period March 29, 2005 to September 29, 2005. Patricia Ashu died on May 4, 2005. At the time of Patricia's death, Doreen Ashu, her sister, was living with her. Two days after Patricia's death, Doreen met with Emmanuel Fomukong, one of appellee's insurance agents. She relayed the news of Patricia's death to Mr. Fomukong and explained to Mr. Fomukong that she wished to continue driving Patricia's vehicle and would like to keep appellee's insurance on it. Mr. Fomukong told Doreen that, until ownership of the car was transferred to her, she could continue driving Patricia's vehicle with continued coverage by appellee, provided that all necessary premiums were paid. Doreen continued to pay the premiums on the policy, and the policy was automatically renewed. On September 25, 2006, Doreen, while driving Patricia's vehicle, was in an accident with Charles John.

Charles John sued Doreen for injuries incurred in the accident. Because appellee denied coverage, Mr. John also named his own insurance provider, the Maryland Automobile Insurance Fund (MAIF), appellant, as a defendant. Appellant's insurance agreement with Mr. John provided Uninsured Motorists (UM) coverage.

To determine coverage, Mr. John brought a separate declaratory judgment action against Doreen, appellant, and appellee. Mr. John sought a declaration that appellee was required to cover the accident, or, alternatively, that appellant was required to provide coverage under Mr. John's own UM policy.

A bench trial for the declaratory judgment action was held. Following trial, the court issued a written order and opinion concluding that appellee was not obligated to insure Doreen.

Appellant appealed to the Court of Special Appeals, raising the following three arguments: (1) the court erred in failing to find that an oral contract arose between appellee and Doreen when the agent assured Doreen that the policy would cover her; (2) the court erred in failing to find that appellee is estopped from denying coverage to Doreen based on its acceptance of Doreen's payments; and (3) public policy requires appellee to honor its promise of coverage to Doreen.

Held: The Court of Special Appeals rejected all of appellant's arguments after considering the following additional issue, which was not broached by appellant: whether Doreen was covered under the language of the written insurance policy.

With respect to the latter issue, the Court focused on a 'transfer provision' of the written policy, which provided as follows:

> This policy may not be transferred to another person without our written consent. If a named insured dies, this policy will provide coverage until the end of the policy period for the legal representative of the named insured, while acting as such, and for persons covered under this policy on the date of the named insured's death.

The Court held that, between the time of Patricia's death and the end of the initial policy, Doreen was indeed a 'person[] covered under [the] policy.' In doing so, the Court distinguished both Oroian v. Allstate Ins. Co., 62 Md. App. 654 (1985) and Grinnell Select Ins. Co. v. Continental Western Ins. Co., 639 N.W.2d 31 (Iowa 2002), but found Nielson v. Allstate Ins. Co., 784 S.W.2d 735 (Tex. App. 1990) instructive. However, the Court concluded that, under the plain language of the provision, Doreen's coverage lapsed at 'the end of the policy period,' which was on September 29, 2005. Thus, even though Doreen Ashu was an additional insured under the policy, she was not covered at the time of the accident.

The Court then rejected appellant's first raised argument--that the lower court erred in failing to find an oral contract between appellee and Doreen. In so doing, the Court assumed that the insurance agent who guaranteed Doreen coverage was indeed an agent. The Court noted that it is unclear whether appellant's argument was that the conversation between Doreen and the agent constituted an oral modification of the written policy's terms, or that the conversation constituted a new oral contract sufficient to replace the written terms. The Court determined that it did not matter which argument was made, because the lower court rejected both possibilities. Instead, the lower court held that the agent's words amounted to nothing more than his interpretation of the written policy. The lower court then held that the agent's misinterpretation was not sufficient to change the policy's plain terms. The Court of Special Appeals agreed and held that the lower court's conclusions were far from clearly erroneous.

The Court then rejected appellant's second argument in favor of coverage by estoppel, holding that the doctrine of estoppel cannot apply to create coverage after September 29, 2005, when

coverage expired pursuant to the plain language of the policy terms.

Last, the Court disagreed with appellant's public policy argument, reasoning that its legal conclusion that Doreen was not covered was based on case law relevant to the issues raised, thus leaving the Court without any reason to believe that such case law contravened public policy.

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Bonnie L. Maddox v. Edward S. Cohn, et al., Case No. 2777, Sept. Term 2009, filed May 26, 2011. Opinion by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/2777s09.pdf

REAL PROPERTY - FINANCING

Facts: Appellant Bonnie Maddox purchased property in Wicomico County in 1993, and obtained a mortgage in 2007 with Beneficial Mortgage Co. of Maryland ("Beneficial") for $87,512.32. After making $6,469.37 in payments on the principal, she defaulted on the mortgage in 2009. Beneficial initiated foreclosure proceedings through its substituted trustees. Prior to the foreclosure sale, advertisements appeared in the local paper with the following provision: "Purchaser agrees to pay a fee of $295 to the Sellers' attorneys at the settlement for review of the settlement documents." The fee only applied to third-party purchasers, and would not apply in the case of a lender buy-in, where the mortgagor purchased the property.

At the auction, Beneficial was the highest, and only, bidder. The substituted trustees sold the property to Beneficial for $77,044. Maddox filed a timely objection to the proposed ratification of the sale. She argued that the auction was improper because the advertised fee discouraged bidding at the sale, and the fee was not authorized by the debt instrument or by the applicable rules governing foreclosures. The circuit court stated that the fee may be improper because a trustee is charging it to review documents that the trustee is already required by the court to review at a public sale, and because it was not approved by the court. However, the court held that charging the fee is common practice, it was not hidden from the purchaser, and because there was no evidence of a "chilling" effect on potential bidders. Also, the fee was not actually paid in this case because Beneficial was the purchaser. Thus, the court ratified the foreclosure sale.

Held: Although the Court of Special Appeals found that the fee advertised was not authorized, the Court affirmed the ratification of the sale because the fee was not actually paid in this case, and because the Court did not find that Maddox had shown that the mere advertisement of the $295 fee was a deterrent to potential bidders. Therefore, Maddox had no standing to raise the issue.

However, the Court held that imposition of such a fee under these circumstances would be improper. When an attorney is also acting as a trustee, that attorney may be improperly charging a party twice to accomplish a single task. Courts have the authority to control the aggregation of the fees awarded to trustees in a foreclosure proceeding, and thus may also determine whether an attorney acting as a trustee is entitled to separate

payment for each role. In addition, any valid attorney's fee must be explicitly provided for in the debt instrument by specifying the amount of the fee, such as a fixed sum or percentage of the amount recovered. The substituted trustees argued that the $295 fee was authorized by the deed of trust. However, the fee here, if charged, would have been improper because the deed of trust provides for "reasonable attorneys' fees" and does not state a specific amount or percentage. Further, a deed of trust would not ordinarily authorize a charge to a third-party because it is a contract between the lender and borrower. Finally, the fee here is also questionable because it evades review by a court. No court has the opportunity to determine whether it is equitable. Under these circumstances, where an attorney's fee is not provided for in the debt instrument or authorized by any rule, an attorney/trustee may not charge such a fee to a third-party purchaser.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated June 13, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

STEVEN MARC ASSARAF
*

By an Order of the Court of Appeals of Maryland dated June 14, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

A. RYAN LAHUTI
*

JUDICIAL APPOINTMENTS

On May 26, 2011, the Governor announced the appointment of Master **LEAH JANE SEATON** to the Circuit Court for Wicomico County. Judge Seaton was sworn in on June 17, 2011 and vills the vacancy created by the retirement of the Hon. Donald C. Davis.

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RULES ORDER AND REPORT

Two Rules Order pertaining to the One Hundred and Sixty Eighth Report of the Standing Committee on Rules of Practice and Procedure have been posted on the Judicial Website:

http://www.mdcourts.gov/rules/ruleschanges.html#168

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