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Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Renard D. Johnson and Will Purcell - Misc. Docket AG No. 11 September Term, 2008
Opinion filed on July 21, 2009 by Adkins, J.

http://mdcourts.gov/opinions/coa/2009/11a08ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS - DISBARMENT

Facts: Respondents violated the Maryland Rules of Professional Conduct ("MRPC") based on their involvement with a fraudulent, equity-stripping lease/buyback arrangement for homeowners Calvin and Christine Barnes. Respondent Purcell conducted a closing as an independent contractor with Apple Title, where he utilized a false occupancy statement and signed a HUD-1 that misrepresented the manner in which settlement funds for Mr. and Mrs. Barnes would be distributed. Johnson, in his management capacity at Apple Title, violated his fiduciary duties to distribute the funds to which Mr. and Mrs. Barnes were entitled in a manner consistent with the forms that Apple Title prepared.

Held: Disbarment. These fraudulent acts, as well as Johnson's acts as a supervisor of Purcell and Apple Title's staff, constituted clear misappropriation of Mr. and Mrs. Barnes's funds as well as misrepresentations about the nature of the agreement and the way that money would be distributed. The Court of Appeals held that Johnson violated MRPC 1.15(b), 8.4(a) and (c), 5.1(c), and 5.3(c) and Purcell violated MRPC 1.15(b) and 8.4(a) and (c). Disbarment was warranted because of the dishonest and fraudulent nature of these violations.

Attorney Grievance Commission of Maryland v. Donald Paul McLaughlin - Misc. Docket AG No. 70, September Term, 2007. Opinion filed on June 18, 2009 by Adkins, J.

http://mdcourts.gov/opinions/coa/2009/70a07ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS - INDEFINITE SUSPENSION

Facts: This case involved two matters. In the first matter, Respondent made loans to a client and her family and was found to have violated Maryland Rules of Professional Conduct ("MRPC") regarding Conflict of Interest, Safekeeping of Property, Prohibited Transactions, and a statutory provision regarding misuse of trust property, but was not found to have made corresponding misrepresentations in connection with these violations, per MRPC 8.4(c). In the second matter, Respondent made trust account overdrafts and was found to have made misrepresentations to bar counsel in connection with the overdrafts in violation of MRPC 8.4(c). Respondent proposed a reprimand sanction and Bar Counsel proposed disbarment.

Held: Indefinite suspension. Although Respondent has retired, the goal of attorney discipline is to protect the public and the public's confidence in the legal profession rather than punish the attorney. The Circuit Court found that Respondent acted "negligently" rather than intentionally with regard to the misappropriation. The Circuit Court also found that Respondent "did not act with dishonest or selfish motives." Respondent's misconduct was tempered by the fact that "[a]t the hearing, Respondent appeared to recognize the seriousness of his improper use of his escrow account, and was genuinely remorseful" and, with regard to the overdrafts and misrepresentations, "credibly testified that his original business operating account was closed because he was in the process of winding down his law practice, and planning shortly to vacate his office. However, that process took much longer than expected." The Court has declined to order disbarment in cases where the misappropriation of funds was due to negligence, rather than intentional misconduct. McLaughlin's violation of MRCP 8.4(c) does not warrant disbarment because his misrepresentations were not dishonest, deceitful nor intentional. Therefore, Respondent's misrepresentations to Bar Counsel were misunderstandings rather than abject lies.

The impropriety stemming from Respondent's loans to Fitzgerald and her kin also did not warrant disbarment. McLaughlin made the loans upon the request of Fitzgerald, in light of her pressing circumstances. This conduct does not rise to the level of an MRPC 8.4 violation. The nature of this misconduct supports a suspension sanction.

Pamela Blackwell, et al., v. Wyeth d/b/a Wyeth, Inc. et al., No. 112, September Term 2008, filed May 7, 2009. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2009/112a08.pdf

COURTS AND JUDICIAL PROCEEDING - EXPERT TESTIMONY - MARYLAND RULE 5-702

Facts: Pamela and Ernest Blackwell, parents and next friends of Jamarr Blackwell, sued the drug manufacturer Wyeth, Inc., its affiliates, and others, alleging that Jamarr's autism and mental retardation were caused by thimerosal-laden vaccines administered to Jamarr when he was a baby. When the Blackwells proffered the testimony of five experts witnesses to support their theory of causation, Wyeth moved *in limine* to preclude the five experts' testimony, primarily arguing that the causal connection between thimerosal and autism is not generally accepted in the relevant scientific community and that the experts were not qualified to testify to such a causal connection. A 10-day evidentiary hearing was held on the *in limine* motions in the Circuit Court for Baltimore City to address "whether the plaintiffs' [experts] can support their claim of general causation with science that utilized methods and theories that are generally accepted in the relevant disciplines." After hearing the Blackwells' and Wyeths' experts' testimony, the judge concluded that the Blackwells had failed to demonstrate that the bases of their proffered experts' opinions, including the theory of causation and the analytical framework in support thereof, were generally accepted as reliable in the relevant scientific community. The judge also concluded that the Blackwells' experts were not qualified to testify under Maryland Rule 5-702. Summary judgment was entered in favor of Wyeth, and the Blackwells appealed; the Court of Appeals granted certiorari prior to any proceedings in the Court of Special Appeals.

Held: The Court of Appeals affirmed. Addressing the theory of causation, the Court concluded that although Dr. Geier, the Blackwells' expert in epidemiology, may have used data that was collected in generally accepted ways, the "analytical gap" between the data and the conclusion was too great to justify the results. The Court, moreover, concluded that neither Dr. Geier's methods nor his theory of causation were generally accepted in the relative scientific community. In holding that the Blackwells' experts were not qualified under Maryland Rule 5-702, the Court held that none of their experts had sufficient knowledge, skill, experience, training, or education, primarily in the field of epidemiology, to proffer reliable expert testimony on matters of complex and novel scientific inquiry, such as whether a causal connection exists between the preservative thimerosal and autism.

Francis Eugene Wilson v. State of Maryland, No. 91, September Term, 2007. Opinion filed on July 20, 2009 by Raker, J.

http://mdcourts.gov/opinions/coa/2009/91a07.pdf

CRIMINAL LAW - REASONABLE SEARCH AND SEIZURE - COMMUNITY CARETAKING

Facts: Francis Eugene Wilson was convicted of second degree assault, resisting arrest, possession of marijuana, and disorderly conduct. Prior to trial, Wilson filed a motion to suppress the search and seizure by police. Wilson contended that the law enforcement officer's decision to arrest him in order to provide emergency assistance and to transport him to the hospital amounted to an unreasonable seizure, and any evidence resulting therefrom was the "fruit of the poisonous tree."

The trial court considered Wilson's motion as part of the trial proceedings rather than hold a separate hearing on the motion. The trial court denied Wilson's motion. Wilson noted a timely appeal to the Court of Special Appeals, which affirmed his conviction and held that Wilson was detained properly by the police in the exercise of their community caretaking function.

The Court of Appeals granted certiorari.

Held: The Court of Appeals reversed the trial court's decision denying Wilson's motion to suppress, holding that the officer's seizure of Wilson was unreasonable under the Fourth Amendment to the United States Constitution. The Court of Appeals also held that the State could present its alternative argument related to intervening factors and attenuation of the evidence to the trial court in further proceedings, because it did not have the opportunity to do so when the trial court denied Wilson's motion.

The Court of Appeals first delineated police officers' community caretaking functions. Community caretaking involves actions by the police that are non-criminal and non-investigatory in nature, and that are aimed at ensuring the safety of the general public, rather than uncovering evidence related to crime detection. The Court of Appeals explained that community caretaking encompasses three doctrines: (1) the emergency-aid doctrine, (2) the automobile impoundment/inventory doctrine, and (3) the public servant exception.

The Court of Appeals then adopted a test to assess the reasonableness of a police officer's actions pursuant to community caretaking functions. To enable a police officer to stop a citizen in order to investigate whether that person is in apparent peril,

distress or in need or aid, the officer must have objective, specific and articulable facts to support his or her concern. If the citizen is in need of aid, the officer may take reasonable and appropriate steps to provide assistance or to mitigate the peril. Once the officer is assured that the citizen is no longer in need of assistance, or that the peril has been mitigated, the officer's caretaking function is complete and over. Further contact must be supported by a warrant, reasonable articulable suspicion of criminal activity, or another exception to the warrant requirement.

The Court held that the officer's efforts to provide emergency aid to a citizen must be reasonable. To assess the reasonableness of law enforcement's actions, the court must consider the availability, feasibility and effectiveness of alternatives to the type of intrusion effected by law enforcement.

The Court of Appeals concluded that the law enforcement officer's arrest of Wilson was unreasonable. The officer's encounter with Wilson was conducted to provide emergency aid to Wilson or in the officer's capacity to protect the public welfare. The officer had no indication or reason to suspect that Wilson was involved in criminal activity and did not have sufficient probable cause to arrest him. Thus, the officer's decision to place Wilson in handcuffs and to transport him to the hospital in his police cruiser was not carefully tailored to the underlying justification for the seizure.

In re Faith H., No. 35, September Term 2009. Opinion filed July 22, 2009 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2009/35a09.pdf

FAMILY LAW – COURTS AND JUDICIAL PROCEEDINGS – PERMANENCY PLANNING REPORTS

Facts: Faith H. was adjudicated a child in need of assistance. Before her permanency planning review hearing, and pursuant to Section 5-525(b)(2) of the Family Law Article, Maryland Code (1984, 2006 Repl. Vol.) and Sections 3-823(d) and 3-826(a) of the Courts and Judicial Proceedings Article, Maryland Code (1974, 2006 Repl. Vol.), the Montgomery County Department of Health and Human Services timely filed three permanency planning reports, and the Reginald S. Lourie Center filed its court ordered bonding study. At the permanency planning hearing, the Department presented its case case-in-chief by offering into evidence its most recent status report and the Lourie Center Report in lieu of live testimony.

Both reports suggested a permanency plan of adoption by a non-relative and the judge properly admitted the reports into evidence. Faith's parents cross-examined the reports' authors, but did not take the stand or present any evidence on their own behalf. Faith's father, Mr. B., objected to the Department's mode of presentation, but never raised any objection regarding the admissibility of the reports. After the hearing, the judge filed a fourteen page opinion, in which he adopted the findings of the Department's reports, found that the witnesses testified credibly at the hearing, applied the factors set forth in Sections 5-525(e)(1) and 5-525(e)(2) of the Family Law Article, and concluded that it would not be in Faith's best interest to remain in foster care indefinitely and ordered that Faith's permanency plan be changed to a plan of adoption by a non-relative. Mr. B. appealed the decision to the Court of Special Appeals, and before any proceedings in the intermediate appellate court, the Court of Appeals granted certiorari on its own initiative.

On appeal, Mr. B. argued that he was entitled to a mode of presentation at the hearing that included live testimony, because he had a right to confront witnesses. He maintained that without in-person testimony, the judge had no way to assess witness credibility and demeanor. He also claimed that his due process rights were violated by the mode of presentation and that he was prejudiced by the lack of direct testimony by the authors of the reports. The State argued that the reports were admissible under Sections 3-823, 3-826, and 3-816 of the Courts and Judicial

Proceedings Article, none of which, they argued, required them to present live testimony as a condition precedent to admissibility. They also maintained that the parents were permitted to challenge the reports' findings through cross-examination of the reports' authors.

Held: The Court of Appeals reviewed the statutory scheme governing dispositional and review hearings in CINA cases and held that once the reports were admitted into evidence, they became available for consideration for any purpose and could be accorded any weight by the court, depending on any extrinsic challenge of reliability by admission of other evidence. In affirming, the Court concluded that live testimony was not required to support the reliability of the admitted reports, and Mr. B.'s due process rights did not require the Department to follow a certain mode of trial.

In re Joseph N., No. 25, September Term, 2008. Opinion filed on February 19, 2009 by Adkins, J.

http://mdcourts.gov/opinions/coa/2009/25a08.pdf

FAMILY LAW - INFANTS – DEPENDENT AND NEGLECTED CHILDREN – REVIEW – RIGHT OF REVIEW, PARTIES, AND DECISIONS REVIEWABLE.

INFANTS – DEPENDENT AND NEGLECTED CHILDREN – REVIEW – DISMISSAL, HEARING, AND REHEARING – MOOTNESS.

Facts: Representatives of Child Welfare Services ("CWS"), a division of the Montgomery County Department of Health and Human Services ("the Department"), visited the apartment of Petitioner Ms. N. After observing that the apartment was in poor condition and that Ms. N. had covered the heating vents with plastic sheeting to prevent emanations of imagined poisonous gas, Ms. N. was evaluated and diagnosed with "major depressive disorder with psychotic features." As a condition to retaining custody of her son Joseph, she agreed to participate in a treatment program. However, in December 2006, ten-year-old Joseph was declared a child in need of assistance ("CINA") after CWS representatives observed that Ms. N. had not improved her living conditions, attended therapy, or taken her medication. Joseph remained in Ms. N.'s custody, but under the Department's supervision.

In March 2007, representatives of the Department visited Ms. N. and, noting the condition of her apartment, petitioned the juvenile court to place Joseph in emergency shelter care. Finding that Ms. N. was mentally unstable and incapable of caring for Joseph, the court ordered that Joseph remain placed in foster care, granting temporary guardianship to the Department.

In June 2007, the court moved Joseph from foster care to the custody of Joseph's father, Mr. E. Ordering weekly visitation for Ms. N., the court reaffirmed the permanency plan of reunification. Under this order, the Department retained guardianship of Joseph and supervisory authority over his care.

Ms. N. appealed to the Court of Special Appeals ("CSA") and argued that the court abused its discretion by ordering that Joseph remain a CINA and be placed with Mr. E. While her appeal was pending, the juvenile court held another permanency planning hearing in December 2007 and ordered that Joseph remain a CINA in the care and custody of his father under the Department's protective supervision. The CSA dismissed Ms. N.'s appeal as moot because the juvenile court had decided at the subsequent hearing that Ms. N. had not made sufficient progress to award her custody and the CSA's decision, if in her favor, would not provide her with

any effective remedy.

In February 2008, the juvenile court granted full custody of Joseph to Mr. E. and terminated its jurisdiction and Joseph's status as a CINA. The Court of Appeals issued a writ of certiorari to review the CSA's dismissal of Ms. N.'s appeal concerning the June 2007 order. While this appeal was pending, Ms. N. appealed the February 2008 order to the CSA, and the CSA affirmed.

Held: Reversed and remanded. As a preliminary matter, the Department challenged Ms. N.'s right to interlocutory appellate review of the June 2007 order under Maryland Code (1974, 2006 Repl. Vol., 2008 Supp.), Section 12-303(3)(x) of the Courts and Judicial Proceedings Article ("CJP"), which authorizes review of orders "[d]epriving a parent . . . of the care and custody of [her] child, or changing the terms of such an order[.]" Explaining that an interlocutory order that does not deprive a parent of care and custody of the child is only appealable if it changes the terms of care and custody to the parent's detriment, the Court held that the June order did, in fact, change the terms to Ms. N.'s detriment and was therefore appealable.

The Court explained that the juvenile court's reaffirmation of the permanency plan of reunification changed the status quo by introducing Mr. E. as a candidate for obtaining permanent custody of Joseph, which implicitly changed the permanency plan from reunification with Ms. N. to reunification with Ms. N. or Mr. E. By recognizing Mr. E.'s availability, willingness, and provisional ability to care for Joseph, the June order was appealable under CJP Section 12-303(3)(x) because it had the potential to facilitate and accelerate a grant of full custody to Mr. E. CJP Section 3-819(e) calls for the closing of a CINA case when there is a second parent who is able and willing to care for a child, even if the Department does not provide its full unification services to the first parent. Furthermore, Joseph's increased interaction with Mr. E. would strengthen the pair's bonding and attachment, a factor that the court would later consider in evaluating the permanency plan and awarding custody.

Turning to the issue of mootness, the Court held that a subsequent hearing did not render Ms. N.'s interlocutory appeal moot because the June 2007 hearing had long-term consequences for Ms. N. that may have influenced the December 2007 and February 2008 orders. Moreover, allowing a later hearing to render an earlier appeal moot would allow the juvenile court to "frustrate the actions of [the] appellate court." On remand, the Court directed the CSA to decide the June 2007 interlocutory appeal on the merits and reconsider its affirmance of the February 2008 appeal. The Court directed the CSA to remand the case to the juvenile court for further proceedings if the CSA found error in the juvenile court's

June 2007 order.

People's Insurance Counsel Division, et al. v. Allstate, Inc., et al., No. 86, filed April 15, 2009, September Term 2008.

http://mdcourts.gov/opinions/coa/2009/86a08.pdf

INSURANCE - ADMINISTRATIVE LAW/INSURANCE LAW – PEOPLE'S INSURANCE COUNSEL DIVISION

Facts: In 2006, Allstate Insurance Company, Respondent, advised the Insurance Commissioner that it had planned to cease writing new homeowners and mobile-home insurance policies in certain "catastrophe-prone" areas. The Maryland Insurance Administration reviewed Allstate's filing and on May 31, 2007, issued a position that, "the Administration has concluded that the [non-write zone] designation has an objective basis and is neither arbitrary nor unreasonable." The next day, the People's Insurance Counsel Division requested a hearing before the Insurance Administration based on the Commissioner's "non-write" action, which was granted. After a hearing was held, an Order was issued on February 2, 2008, by the Associate Deputy Commissioner, deciding that the Division had standing to request a hearing under the requirements set forth in Sections § 19-107 of the Insurance Article, that Allstate's filing did not violate the non-discrimination provisions of § 27-501 of the Insurance Article, and that "a final decision on the hearing is rendered in favor of Allstate." From this Order, the People's Insurance Counsel Division sought judicial review in the Circuit Court for Baltimore City. Allstate moved for dismissal, arguing that the Division lacked standing to seek judicial review primarily because it was not a "party" to the hearing before the Commissioner and because the Commissioner's approval of a file-and-use notification was not an action from which judicial review could be sought. The judge granted Allstate's motion, holding that because the Division was not a "party" to the hearing before the Commissioner, it could not seek review under the judicial review provision of the Insurance Article, Section 2-215. The Division appealed to the Court of Special Appeals, and Allstate petition for certiorari to the Court of Appeals was granted prior to any proceedings before the intermediate appellate court.

Held: The Court of Appeals reversed and remanded. The Court held that the general powers conferred upon the People's Insurance Counsel Division in Sections 6-301 *et seq.* of the State Government Article, which defines the Division's powers and duties, gave the Division the ability to be a "party" to hearings before the Commissioner and to seek judicial review therefrom. In so holding the Court recognized that the legislature had intended to create the People's Insurance Counsel Division in the likeness of the Maryland People's Counsel to the Public Service Commission and that

on a previous occasion, it had held that the Maryland People's Counsel had standing to appear as a party before the Public Service Commission based on the inherent powers conferred upon it by the legislature. Applying this same principle to the People's Insurance Counsel Division, the Court held that it could appear as a party even when no specific insured party was aggrieved. With respect to Allstate's argument that a non-write "approval" constitutes a non-action from which judicial review cannot be sought, the Court held that the approval was not a non-action. The Court also dismissed Allstate's argument that permitting the People's Insurance Counsel Division to seek judicial review would create a conflict of interest in the Attorney General's Office, stating that it would not.

Pittway Corporation, et al. and the Ryland Group v. Stephon Collins, et al., No. 128, September Term, 2007. Opinion filed on June 12, 2009 by Raker, J.

http://mdcourts.gov/opinions/coa/2009/128a07.pdf

NEGLIGENCE - PROXIMATE CAUSE - SUPERSEDING CAUSATION

MOTION TO DISMISS - PROXIMATE CAUSE

Facts: This case arose out of a house fire in June 1998, at the residence of Michael Chapman and his wife, Carolyn Hill, a property which they rented from Mr. and Mrs. Gui-Fu Li. Samuel Juster and Stephon Collins, Jr., overnight guests of the Chapmans, died in the fire, and three Chapman children were seriously injured in the fire. The fire was caused by a burning candle in the basement, where the children were sleeping. The children lit the candle during an area-wide electrical outage caused by thunderstorms. The AC powered smoke detector, which did not have a back up battery system, was not activated by the smoke or fire.

Numerous parties were involved in the ensuing litigation. The plaintiffs included the parents of the Chapman children and two of the Chapman children, and the parents of Stephon Collins, Jr. and Samuel Juster, as the personal representatives of their respective estates. The plaintiffs filed suit in the Circuit Court for Montgomery County claiming, *inter alia*, negligence, strict liability for manufacturing and design defects in the smoke detector, and breach of implied and express warranties pertaining to the smoke detector. Defendants included, *inter alia*, the landlords of the dwelling, the manufacturers of the smoke detectors in the home, the builder of the home, the electrical subcontractor who procured the smoke detectors and installed them in 1989 for the home builder, and the contractors responsible for renovating the basement of the home in 1994.

Before the Court of Appeals only two defendants appeared as petitioners: (1) the manufacturers of the smoke detector, the Pittway Corporation and its subsidiary company, BRK Electronics, and successors in interest; and, (2) the home builder responsible for installing the smoke detector, the Ryland Group.

The Circuit Court granted a motion to dismiss to the home builder and manufacturers of the smoke detector on the grounds that numerous acts, alleged in the Complaint filed by the plaintiffs, that transpired between the manufacture and installation of the smoke detector in 1989, and the fatal fire in 1998, constituted unforeseeable intervening acts amounting to a superseding cause of the ultimate injuries.

Plaintiffs noted a timely appeal to the Court of Special Appeals, which held that the Circuit Court erred in dismissing the Complaint against the homebuilders and manufacturers of the smoke detector because the Circuit Court could not determine, as a matter of law, that intervening acts constituted superseding causes of the plaintiffs' injuries.

The Court of Appeals granted certiorari.

Held: The Court of Appeals affirmed the Court of Special Appeals, holding that a motion to dismiss should not have been granted to the home builder or manufacturer of the smoke detector.

The Court of Appeals first reviewed the principles of proximate causation and superseding cause. A tortfeasor is not liable for plaintiffs' injuries when the injuries were not a foreseeable result of the tortfeasor's actions or omissions, or when intervening negligent acts rise to the level of a superseding cause of plaintiffs' injuries. Sections 442 and 447 of the Restatement (Second) of Torts set forth the test for determining superseding causation. A superseding cause arises primarily when "unusual" and "extraordinary" independent intervening negligent acts occur that could not have been anticipated by the original tortfeasor.

The Court of Appeals noted that while foreseeability is ordinarily a question of fact, to be decided by the trier of fact, proximate cause may only be decided as a matter of law on a motion to dismiss if the facts alleged in the complaint are susceptible of but one inference that gravitates so close to the polar extreme that the issue of causation is rendered as a matter of law.

The Court of Appeals agreed with the Court of Special Appeals that, on its face, the Complaint led to different, and contrary, inferences. On the one hand, the facts alleged in the Complaint suggested that the deaths and injuries that resulted from the fire were the ordinary and foreseeable result of the home builder and manufacturers' negligence in manufacturing and installing a single-powered smoke detector. On the other hand, the Court of Appeals viewed the facts alleged in the Complaint as suggesting that the deaths and injuries that resulted from the fire were the extraordinary and unforeseeable result of a confluence of events that spanned ten years.

The Court of Appeals concluded that a motion for summary judgment or a trial on the merits was needed to determine if the intervening acts alleged in the Complaint constituted superseding causes of the plaintiffs' deaths and injuries, and that the Circuit Court erred in granting a motion to dismiss to the manufacturer

defendants and the defendant home builder.

COURT OF SPECIAL APPEALS

State v. Maryland State Family Child Care Assoc., No. 1572, September Term 2007. Opinion filed on March 5, 2009 by Salmon, J.

http://mdcourts.gov/opinions/cosa/2009/1572s07.pdf

ADMINISTRATIVE LAW - ADMINISTRATIVE PROCEDURE ACT – THE GOVERNOR OF THIS STATE IS NOT REQUIRED TO FOLLOW THE RULE-MAKING PROVISIONS OF THE APA PRIOR TO ISSUING AN EXECUTIVE ORDER BECAUSE HE IS NOT A "UNIT" AS DEFINED IN SG, SECTION 10-101(I).

Facts: Executive Order 01.01.2007.14 was signed by Governor Martin O'Malley on August 7, 2007, and published in the Maryland Register on August 31, 2007. It concerned Maryland's Purchase of Care Program (POC Program), which was designed to allow the State to give financial support to working families with child care expenses. The POC Program was administered by the local departments of social services. *See* COMAR 13A.14.06.06 A-B11H.

The Executive Order said, *inter alia*, "[t]he State shall recognize a provider organization designated by a majority of the registered and registration exempt family child care providers who participate in the [POC]. " The Order further provides that a "provider organization may petition for certification by submitting a petition for representation to the official or officials designated by the Governor to administer this Order. "

After issuance of the Order, the Service Employees International Union (SEIU), through its affiliate Kids First Maryland, SEIU Local 500, petitioned to be certified as the negotiating representative of POC providers. SEIU Local 500 supplied the requisite documentation of support (at least 30% of all POC providers), whereupon the Secretary of the Department of Labor, Licensing and Regulations (DLLR) notified the Maryland State Family Child Care Association (MSFCCA) and other provider organizations of SEIU's petition.

Meanwhile, on September 20, 2007, the MSFCCA filed a complaint in circuit court to prevent the designation of a rival labor organization as the representative of POC providers under the Executive Order. MSFCCA sought a temporary restraining order (TRO), a preliminary injunction against implementation of the Executive Order, as well as a judgment declaring that the Executive Order was "void ab initio and unenforceable. "

The circuit court found that MFSCCA had a "real probability"

of obtaining a permanent injunction because the executive order issued by the Governor constituted a "regulation" within the meaning of the APA, yet the Governor had not complied with the requirements of the APA.

The circuit court granted the preliminary injunction, prohibiting the enforcement of the Order, upon finding that the Order constituted a regulation as defined in the Administrative Procedure Act (APA), and that, because the Order had not been enacted in compliance with the APA, it was invalid.

Held: Reversed. The Court noted that in order to preliminarily enjoin the Governor's chosen approach to obtain the input of child care providers concerning the POC Program, it was necessary to find that MFSCCA met four requirements: 1) MFSCCA had a "real probability of prevailing on the merits, not merely a remote possibility of doing so"; 2) lesser injury would be done to the Governor by granting the injunction than would result to MFSCCA by denying it; 3) that MFSCCA would suffer irreparable injury unless the injunction was granted; and 4) that the public interest favored an injunction. *Fogle v. H & G Rest., Inc.*, 337 Md. 441, 455-56 (1995).

The Court pointed out that the APA's definition of a regulation is set forth in SG §10-101(g), which provides that "'Regulation' means a statement or an amendment or repeal of a statement that: (iii) is adopted by a unit. " According to SG §10-101(i), "Unit" means an officer or unit authorized by law to adopt regulations. "

The parts of the APA dealing with rule-making are set forth in SG §10-101-139 (hereinafter subtitle 1). Section 10-102(a) provides that "[e]xcept as otherwise expressly provided by law, this subtitle applies to: (1) each unit in the Executive Branch of the State government; and (2) each unit that: (i) is created by public general law; and (ii) operates in at least 2 counties. " Subsection (b), dealing with exclusions, provides that the subtitled does not apply to "(1) a unit in the Legislative Branch of the State government; (2) a unit in the Judicial Branch of the State government; (3) the Injured Workers' Insurance Fund; (4) a board of license commissioners; or (5) the Rural Maryland Council. " The question presented therefore required that the court determine whether the Governor was a “unit” of the Executive Branch.

MFSSCA argued that the sections of the APA dealing with rule-making (SG §§10-101-139) all applied to the Governor. However, the Court held that the legislative history of the APA gives no indication that the rule-making sections of the APA were intended to apply to the Governor, as opposed to agencies under his

or her control. *See Chimes*, 343 Md. 346 (1996). And, when other sections of subtitle 1 of the APA are read in tandem with the pertinent definition section (§10-101(g) and (i)), of the APA, it becomes clear that subtitle 1 of the APA does not apply to the Governor.

For example, the Court pointed out that §10-111.1(c) provides: "(1) Within 5 working days after the Committee votes to oppose the adoption of a proposed regulation, it shall provide written notice to the Governor and the promulgating unit of its action. " The "promulgating unit" may then either: 1) withdraw the regulation; 2) modify it; or 3) send it to the Governor with (a justification for its refusal to withdraw or modify the regulation. §10-111.1(c)(2).

The Court said that, if read literally, this would mean that the Governor would have to send a letter to himself justifying his actions. Then, he would be required to either consult with the Committee of the General Assembly or send himself a letter instructing himself to either withdraw or modify the regulation. In short, the Court held that this would all amount to a total waste of time and effort because no Governor would disapprove a regulation he or she proposed. *See Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129, 135 (2000).

The Court also said that the language of §10-111.1 shows that the "Promulgating unit" and the "Governor" can never be one and the same. This strongly suggests, according to Court, that the legislature did not intend the Governor to be covered by subtitle 1 of the APA. Other sections of subtitle 1 of the APA likewise indicate that the rule-making sections of the APA were not intended to cover the Governor. *See, e.g.,* SG §§10-133 and 10-134. Thus, the Court held that within the meaning of subtitle 1 of the APA, the Governor is not a "unit. " Therefore, any statement contained in his Executive Order is not a regulation, because it is not a statement "adopted by a unit. " *See* SG §10-101(g)(1)(iii).

Because subtitle 1 of the APA does not apply to the Governor, the Court held that the circuit court erred when it opined that the Executive Order was void for failure to comply with the requirements of the APA.

Bethel World Outreach Church v. Montgomery County, Maryland, et al., No. 3082, September Term, 2007, filed March 8, 2009. Opinion by Eyler, J.R., J.

http://mdcourts.gov/opinions/cosa/2009/3082s07.pdf

ADMINISTRATIVE LAW - LEGISLATIVE VERSUS QUASI - JUDICIAL ACTION

Facts: Bethel World Outreach Church, appellant, wished to construct a church and ancillary facilities on an approximately 120 acre parcel in a rural area of Montgomery County. Appellant's property was located in a zone not slated for public water and sewer service under the County's water and sewer plan ("plan"). Thus, appellant requested that the Montgomery County Council ("Council") amend the plan to allow it to receive the water and sewer service necessary for the proposed facility. The amendment request was submitted pursuant to the plan's Private Institutionalized Facilities ("PIF") Policy, which allowed the County to extend service to certain institutions outside the water and sewer envelope, subject to certain conditions. After a protracted review, the Council denied the request.

Appellant responded by filing a petition for Administrative Mandamus in the Circuit Court for Montgomery County seeking judicial review of the Council's action. The circuit court found that the Council acted in a legislative, rather than quasi-judicial, capacity in denying the amendment, and thus dismissed appellant's petition without prejudice. Appellant subsequently filed an amended petition containing counts for certiorari, judicial review, mandamus, declaratory judgment, injunctive relief, and violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and Article 24 of the Maryland Declaration of Rights. The circuit court reversed its earlier determination and found the Council acted in a quasi-judicial capacity when it denied appellant's request, but nonetheless concluded that the Council's action was supported by substantial evidence. The circuit court additionally found that the non-administrative mandamus counts were improper in the context of an administrative appeal, and that the RLUIPA and Article 24 claims were unsupported by the evidence. Consequently, the circuit court granted summary judgment in favor of the County.

Held: Judgment affirmed. The Court of Special Appeals held the Council acted in a legislative capacity in denying the water and sewer category change request. The Court deemed the Council's action legislative because it was based on general policy considerations, rather than facts specific to appellant's property. The Court then determined that the Council had a rational basis for denying appellant's request because the water and sewer plan

gave the Council considerable discretion to approve or deny such requests, and it was unclear whether water and sewer service could be extended to appellant's property in a manner that complied with the PIF policy. The Court additionally concluded that appellant was not treated differently from similarly situated applicants.

Addressing Bethel's RLUIPA claimed, the Court concluded that even assuming RLUIPA applied to a water and sewer category change request, appellant had not presented facts sufficient to demonstrate that the Council's action substantially burdened its religious exercise.

Montgomery County, Maryland, et al. v. Jodi Longo, et al., No. 1075, September Term, 2008, filed July 7, 2009. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2009/1075s08.pdf.

ADMINISTRATIVE LAW - ZONING - APPEALABILITY - STANDING.

Facts: Montgomery County Department of Permitting Services (DPS) issued a building permit to Jodi Longo for an "addition" to a residence, which entailed expanding the footprint of the existing one story residence, adding a second story onto the expanded living area, and adding an attached garage.

After construction began on the Property, Ms. Placek, a neighbor, filed several complaints with DPS regarding alleged permitting violations. In October 2006, DPS issued a stop work order. Ms. Longo filed a revised site plan, which DPS approved, and the stop work order was lifted. In November 2006, DPS issued another stop work order. Ms. Longo submitted a second revised site plan, as well as a revised building permit application. DPS approved the revisions to the site plan, lifted the stop work order, and issued a revised building permit.

On November 9, 2006, Ms. Placek noted an appeal to the Board of Appeals for Montgomery County ("Board"). Ms. Placek appealed the issuance of the revised building permit and the recission of the stop work orders. Following a hearing, the Board concluded that DPS erred in lifting the stop work orders, and it ordered DPS to reinstate the stop work orders "insofar as they concern the retention of existing exterior walls."

Ms. Longo filed a Petition for Judicial Review in the Circuit Court for Montgomery County. The circuit court reversed the Board's order, concluding that the Board did not have jurisdiction to consider Ms. Placek's appeal because neither the decision to lift a stop work order nor a revision to a building permit is an appealable decision. Ms. Longo and the County appealed.

Held: Judgment of the circuit court reversed, and the case remanded to that court with instructions to affirm the decision of the Board. DPS' decision to lift the stop work order constituted an appealable "decision or order" under § 8-23(a) of the Montgomery County Code. Based on Ms. Placek's complaint, and a preliminary assessment that the house, as it was being constructed, did not qualify as an addition, the County had to decide whether the permit issued would be voided, or whether the stop work order would be lifted and construction would be allowed to proceed. Its decision was not a reiteration of its earlier decision to issue the permit,

but rather, it was a decision made in response to new facts, *i.e.*, demolition to the front wall that was not depicted clearly in the plans that DPS relied upon in issuing the permit. Under these circumstances, the decision to lift the stop work order was an appealable decision or order pursuant to § 8-23(a).

Appellant, a property owner that lived six houses or 250 away from the property that was the subject of the zoning dispute, was an aggrieved party who has standing to appeal based on her status as a nearby property owner.

Based on the testimony and photographic evidence submitted to the Board, there was substantial evidence in the record to support the Board's finding that the front wall did not meet the requirements for an "addition."

Maryland-National Capital Park and Planning Commission et al. v. Aris Mardirossian et al., No. 2078, September Term, 2007,. Opinion filed February 5, 2009 by Salmon, J.

http://mdcourts.gov/opinions/cosa/2009/2078s07.pdf

APPEAL AND ERROR - COURTS - DISCOVERY - WHEN A MOTION IS FILED TO QUASH A SUBPOENA *DUCES TECUM* REQUIRING A HIGH-RANKING OFFICIAL TO ATTEND A DEPOSITION, THE BURDEN IS ON THE MOVANT TO SHOW THAT THE SUBPOENA IS UNREASONABLE OR OPPRESSIVE.

Facts: In August 2006 Aris Mardirossian and his development company, 12000 River Road Property, LLC (Mardirossian), filed the first of several forest conservation plans concerning his property at 12000 River Road with the Environmental Planning staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC). The staff rejected his plans.

On October 8, 2006, Wayne Goldstein, president of Montgomery Preservation, Inc., wrote a letter to Mardirossian in which he said that Mardirossian's plan had come to his (Goldstein's) attention. Stating that his primary concern was the potential negative impact of the deforestation upon the nearby C&O National Historic Park, Goldstein warned Mardirossian that he was attempting to do what Dan Snyder had done, i.e., illegally remove large numbers of trees on his property, which had caused Montgomery County to raise the maximum available administrative civil penalty for unlawful tree cutting from $1/foot to $9/foot, levy a large fine on Snyder, and require him to replant hundreds of trees and place a perpetual easement on his property.

The aforementioned letter was disseminated by Goldstein to numerous third parties. Shortly after receiving the letter, Mardirossian sued Goldstein in the Circuit Court for Montgomery County for private nuisance, false light invasion of privacy, and interference with prospective advantage, claiming that the wide circulation of the letter, and its "false, incendiary, and misleading communications" had derailed Mardirossian's development of his property.

Mardirossian's latest plan for his property was rejected by the Environmental Planning staff in the summer of 2007, and Mardirossian appealed its denial to the Planning Board, which voted unanimously to deny the plan because it proposed removing over 50 native species of trees, many of which were located on extremely steep slopes and within stream valley buffer areas where tree removal is usually not permitted.

In mid-August 2007 Mardirossian served a subpoena *duces tecum*

upon five M-NCPPC commissioners, in order to determine what, if any, verbal, written, or electronic contact they had with Goldstein and anyone else allegedly engaged in tortious conduct against Mardirossian. The commissioners moved to suppress on the grounds that agency decision makers could not be deposed except when there has been a strong showing of fraud or extreme circumstances, and that Mardirossian had already deposed an Environmental Planning staff member.

At a hearing on the commissioners' motion for a protective order, counsel for the commissioners cited cases in support of the proposition that high-ranking government officials may only be deposed upon a showing that (1) the information to be gained is unavailable through any other source, and (2) the deposition is necessary in order to obtain relevant information that would not significantly interfere with the ability of the official to carry out his governmental responsibilities. Mardirossian's attorney maintained that he was not seeking information as to how the commissioners arrived at their decision, which he agreed would be improper but, rather, was seeking information regarding the communications between the commissioners, Goldstein, and other individuals concerning an alleged dispatch of aircraft and park rangers to surround Mardirossian's property. The circuit judge denied the commissioners' motion for a protective order, and the commissioners appealed.

Held: Affirmed. The Court of Special Appeals held that the very broad rule advocated by the commissioners—that high-ranking administrative officials may not be deposed except upon a showing that the information is necessary and cannot be obtained from another source—has not been adopted by the Court of Appeals and should not be. The court noted that the Court of Appeals, citing two U.S. Supreme Court cases, has held that a party challenging agency action is ordinarily forbidden from inquiring into the mental processes of an administrative official, with the exception that where administrative findings are not made, a trial court may require those officials who participated in the decision to testify explaining their action. Nevertheless, if findings were made, then only a strong showing of bad faith or improper behavior will allow such an inquiry, and even under these circumstances, circuit court discovery should not be permitted when remand to another administrative agency is a viable option.

Here, Mardirossian was not challenging any action or finding by the M-NCPPC or its commissioners, and his attorney had expressly disavowed any intention of inquiring into the commissioners' mental processes.

Further, the Court held that even under the broad rule

espoused by the commissioners,, Mardirossian had proved that the information he sought was relevant and necessary to his suit against Goldstein. The Court acknowledged that Mardirossian had failed to show that the information sought was not otherwise available from lower-ranking officials, but held that the burden of proving that the issuance of the subpoena *duces tecum* was unreasonable or oppressive (because the same information is otherwise available) is on the party seeking to quash the subpoena. To shift this burden to the non-moving party would be unfair because the party seeking to quash the subpoena is usually the party in the best position to know what other sources are available.

Hamot v. Telos Corp., No. 1079, Sept. Term, 2008. Opinion filed on May 6, 2009 by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2009/1079s08.pdf

APPEAL AND ERROR - MOOTNESS - PRELIMINARY INJUNCTION

Facts: A circuit court order prohibiting appellants from making certain contacts or communication with the auditor of a corporation, including threats of future litigation, had expired by its own terms. Because the specific factual premise for the issuance of the court order was no longer controlling, the Court of Special Appeals concluded that the question of whether the preliminary injunction should have been issued was moot. The Court also found there was no applicable exception to the mootness doctrine and dismissed the appeal.

Held: Appeal dismissed as moot. When review is sought of an expired preliminary injunction, there remains no controversy between the parties for which the appellate court can fashion an effective remedy. The exception to the mootness doctrine for issues "capable of repetition, yet evading review" does not preserve for appellate review the propriety of issuance of a preliminary injunction that has expired. The issues mooted are still alive in the circuit court. Although an appellate court may express its view on a moot issue in order to prevent harm to the public interest, such an interest is not presented in private litigation between private parties seeking mostly private relief. When a circuit court has granted a preliminary injunction, the parties will generally not have had the benefit of a full opportunity to present their cases or a final judicial decision based on the actual merits of the controversy.

Abramson v. Wildman, No. 1768, Sept. Term, 2007. Opinion filed February 4, 2009 by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2009/1768s07.pdf

ATTORNEY AND CLIENT - MALPRACTICE - BREACH OF CONTRACT- ARBITRATION - WAIVER - JURY INSTRUCTIONS - EVIDENCE - DAMAGES

Facts: Plaintiff attorney was denied damages on his breach of contract claim against client for failing to pay $13,000 in unpaid legal fees. Client, in turn, was awarded $24,525 for legal fees already paid, on his counterclaim that attorney breached a contract to represent client in a "professionally responsive" manner in connection with the law firm's handling of a child custody dispute. Because plaintiff had previously brought suit, sought a jury trial, propounded interrogatories, and sought the production of documents, his belated motions to compel arbitration and to stay proceedings were denied after a hearing.

Held: Affirmed. Legal malpractice may give rise to breach of contract action where attorney expressly promised to represent client in a "professionally responsive" manner. Attorney waived his right to arbitrate malpractice issue by the extent of his participation in the judicial forum. The circuit court did not err in instructing jury on lawyer competence. The circuit court also did not err in admitting evidence of lawyer competence. Where the jury found that fees received by an attorney were unearned as a result of his breach of an express contract to act in a "professionally responsive" manner, an award of damages in the amount of the fees paid was proper.

William Blondell v. Diane Littlepage, No. 16, September Term, 2008 . Opinion filed March 30, 2009 by Eyler, James .R., J.

http://mdcourts.gov/opinions/cosa/2009/16s08.pdf

ATTORNEYS - TORT AND CONTRACTUAL LIABILITY BETWEEN CO-COUNSEL FOR CONDUCT COMMITTED IN THE COURSE OF REPRESENTING THE JOINT CLIENT

Facts: William J. Blondell, Jr., Esq., appellant, representing a plaintiff ("client") in a medical malpractice action, referred the matter to Diane M. Littlepage, Esq., appellee. The attorneys and the client agreed that the attorneys would represent the client as co-counsel, with the attorney to whom the matter was referred having primary responsibility for the representation, and the referring attorney rendering services if requested by the other attorney. The attorneys agreed to split any contingency fee 50-50. The client, acting on the advice of the attorney to whom the matter had been referred, ultimately settled the claim for an amount less than anticipated by the referring attorney. Referring counsel sued co-counsel, asserting negligence, fraud, breach of fiduciary duty, intentional interference with contract, and breach of contract. The counts were based on allegations that defendant co-counsel failed to consult and communicate with referring consul, improperly advised the client that there was a meritorious limitations defense to the malpractice action, and suggested that the client sue referring counsel for malpractice. The Circuit Court for Baltimore County granted defendant co-counsel summary judgment on all counts.

Held: Judgment affirmed. The Court of Special Appeals first held that neither the co-counsel relationship, nor the fee sharing agreement, gave rise to actionable tort duty between co-counsel with respect to legal advice rendered to the joint client. The Court reasoned that the recognition of such a duty was inconsistent with Maryland's requirement of strict privity in attorney malpractice actions, and could interfere with an attorney's duty of undivided loyalty to the client.

The Court additionally held that defendant co-counsel fulfilled her contractual obligation to the referring attorney. The terms of the agreement did not require defendant co-counsel to consult and communicate with referring counsel, and referring counsel received his proportionate share of the settlement. Moreover, no Maryland law stands for the proposition that a fee sharing agreement like the one in this case creates a joint venture between co-counsel. Even if a joint venture existed, defendant co-counsel fulfilled her fiduciary duty to the referring attorney by disbursing the agreed upon fee.

The Court further held that the referring attorney's independent breach of fiduciary duty claim failed because Maryland does not recognize a generic cause of action for breach of fiduciary duty.

Finally, the Court held that the defendant co-counsel did not tortiously interfere with the representation agreement with the client because the defendant co-counsel was a party to the representation agreement with the client.

Wooldridge v. Price, No. 45, September Term, 2008. Opinion filed on March 5, 2009 by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/45s08.pdf

AUTOMOBILE NEGLIGENCE - RULES OF THE ROAD - BOULEVARD RULE - LAST CLEAR CHANCE DOCTRINE - SUMMARY JUDGMENT.

Facts: On July 15, 2006, at approximately 12:49 p.m., Robert H. Wooldridge, Jr. (the "decedent") was riding a skateboard down the driveway of his in-laws' house, across the street, and up his own driveway when he was struck by a car in which Richard Price and Linda Price, the appellees, were traveling. The Prices lived in the same neighborhood as the decedent, and were traveling south on the road where the decedent was hit. They were driving at 15 miles per hour, which was less than the posted speed limit of 25 miles per hour. The accident happened when the decedent, heading westerly on his skateboard, fell in front of the Prices' car. The car struck the decedent, and he ended up underneath of the car, behind the front wheels. He died from the injuries sustained in the accident. According to the Prices, Mr. Price was driving the car, and Mrs. Price was sitting in the front passenger seat. According to the decedent's mother-in-law and sister-in-law, they saw evidence after the accident that indicated that Mrs. Price was driving the car when the decedent was hit.

In the Circuit Court for Montgomery County, Valerie Wooldridge, the decedent's surviving wife and personal representative of his estate, the appellant, brought a wrongful death and survival action on behalf of herself, their minor children, and the decedent's parents, alleging that her husband's death was the result of negligence on the part of the Prices. After discovery was undertaken, the Prices moved for summary judgment. The court granted summary judgment because 1) the boulevard rule provision of the Transportation Article governed the accident; 2) under that rule, the decedent was contributorily negligent as a matter of law; 3) the doctrine of last clear chance did not apply; and 4) whether Mr. Price or Mrs. Price was driving the car at the time of the accident was not a material fact, and therefore the parties' dispute over that fact did not preclude the grant of summary judgment. Mrs. Wooldridge appealed, presenting three arguments as to why the circuit court erred in granting summary judgment in favor of the Prices: 1) the decedent was not a pedestrian and the skateboard he was riding was not a vehicle, and therefore the boulevard rule does not apply as a matter of law, and even if it does apply, the decedent was not contributorily negligent as a matter of law; 2) the doctrine of last clear chance applied; and 3) the dispute over whether Mr. Price or Mrs. Price was driving was material to the

issue of liability.

Held: Judgment affirmed. The Court of Special Appeals held that the decedent was contributorily negligent as a matter of law, and that the last clear chance doctrine did not apply, and therefore the grant of summary judgment was appropriate. The boulevard rule states that a driver of a vehicle entering or crossing a highway from a driveway must stop and yield the right of way to any other vehicle approaching on the highway. The Court concluded that a skateboard is a vehicle within the meaning of the Maryland rules of the road, and a person entering a highway from a driveway on a skateboard is an unfavored driver under the boulevard rule. Thus, the decedent was contributorily negligent as a matter of law when he rode his skateboard into the road from the driveway without stopping or yielding the right of way to the favored drivers, the Prices. The Court further concluded that the doctrine of last clear chance did not apply, as a matter of law, because the Prices, if negligent at all, did not have a fresh opportunity to save the decedent from peril. The Court also found that the identity of the driver was not a material fact that would affect the outcome of the case, and thus the court was free to grant summary judgment even though the fact was in dispute.

All State Home Mortgage, Inc. v. Francis A. Daniel, et al., No. 579 September Term, 2008, filed June 9, 2009. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2009/579s08.pdf

CIVIL LAW - CONTRACTS - CONDITION PRECEDENT - ARBITRATION.

Facts: Plaintiffs contracted with All State Home Mortgage, Inc. to refinance their home. The plaintiffs signed, among other documents, an arbitration agreement, which stated that "[t]his agreement is effective and binding . . . when both parties sign it." All State did not sign the agreement.

When All State failed to disburse the loan, the plaintiffs filed suit against All State. All State moved to compel arbitration. The circuit court initially granted All State's motion to compel arbitration. On a motion for reconsideration, however, the court concluded that the arbitration agreement was unenforceable because All State did not sign the agreement. All State appealed.

Held: Judgment affirmed. Ordinarily, "'a signature is not required in order to bring a contract into existence, *nor is a signature always necessary to the execution of a written contract*.'" *Stern v. Bd. of Regents*, 380 Md. 691, 731 (2004) (quoting *Porter v. Gen. Boiler Casing Co.*, 284 Md. 402, 410 (1979)). There is an exception to this rule, however, when the terms of the contract make the parties' signatures a condition precedent to the formation of the contract. *See Porter*, 284 Md. at 410-11 ("[T]he making of a valid contract requires . . . no signatures unless the parties have made them necessary at the time they expressed their assent and as a condition modifying that assent.") (quoting 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 31, at 114 (1963)).

A condition precedent in a contract is "a fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance of a promise arises." *Chirichella v. Erwin*, 270 Md. 178, 182 (1973) (citation omitted). "'[W]here a contractual duty is subject to a condition precedent, whether express or implied, there is no duty of performance and there can be no breach by non-performance until the condition precedent is either

performed or excused.'" *Pradhan v. Maisel*, 26 Md. App. 671, 677 (quoting *Laurel Race Course, Inc. v. Regal Constr. Co., Inc.*, 274 Md. 142, 154 (1975)), *cert. denied* 276 Md. 748 (1975).

Here, the contract provided that "[t]his agreement is effective and binding . . . **when** both parties sign it." (Emphasis added). This language in the contract provided, as a condition precedent to an effective agreement, that both parties sign the agreement. Because All State did not sign the agreement, there was no binding arbitration agreement. Accordingly, the circuit court properly denied All State's motion to compel arbitration.

Service Transport, Inc. v. Hurricane Express, Inc., et al., No. 2054, September Term, 2008, filed March 27, 2009. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2009/2054s07.pdf

CIVIL PROCEDURE-DECLARATORY JUDGMENT-SPECIAL STATUTORY REMEDY-COMPULSORY JOINDER-STANDARD OF REVIEW-JOINT TORTFEASORS-"DAY-IN-COURT" EXEMPTION

Facts: Appellant, Service Transport, Inc., filed suit against former employees Neil I. Brooke and Alan D. Glessner, seeking a declaratory judgment, damages, and injunctive and other relief for alleged violations of the Maryland Uniform Trade Secrets Act, Md. Code (1975, 2005 Repl. Vol.), Commercial Law Article, §§11-201 *et seq.* Service alleged that Brooke and Glessner misappropriated confidential information, diverted funds or account receivables from Service to other persons or entities, and caused damages and losses to Service. Service later amended its complaint to add Advance Transport, Inc. and appellees Hurricane Express, Inc., Hurricane Express Logistics, Inc., Kaedon Steinert, president of the Hurricane entities, and Sheldon Steinert, Kaedon's brother. Just prior to the scheduled trial, Service Transport filed a motion to permit amendment to its complaint to add Kaedon Steinert, Inc. as a previously undisclosed necessary party, which the court denied.

Held: Court of Special Appeals affirmed the circuit court's denial of the motion to permit the amendment. The denial of a plaintiff's motion to add a claimed necessary party defendant is immediately appealable. In this case, there was no need to decide whether the denial of the proposed addition of a claimed necessary party was reviewable *de novo* or under an abuse of discretion standard, because, under either standard, the circuit court was correct. An action under the Uniform Trade Secrets Act is a "special statutory remedy" under §3-409(b) of the Courts & Judicial Proceedings (CJ&P) Article. Thus, appellant is not entitled to a declaratory judgment with respect to the allegations of misappropriation or the proposed addition of the alleged necessary party under §3-405(a) of the CJ&P Article. When a court determines whether a party should be joined based on the factors in Md. Rule 2-211(a), it determines whether the party is necessary. If the court finds that an absent necessary party cannot be joined, however it must determine under Rule 2-211(c) whether the case should be continued or dismissed. If the court concludes that the case must be dismissed, then the party is labeled indispensible. A joint tortfeasor, even one alleged to have violated a statute like the Uniform Trade Secrets Act, is neither a necessary nor an indispensable party required to be

joined. Complete relief could still be accorded among the existing parties without joining the proposed party. In addition, because the absent party had notice of the suit and did not enter its appearance, it will be bound by the results.

George McDermott et al. v. BB&T Bankcard Corp., No. 2561 September Term, 2007, filed March 31, 2009. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2009/2561s07.pdf

CIVIL PROCEDURE - RIGHT TO JURY TRIAL - COUNTERCLAIMS.

Facts: BB&T filed a collection action for $5,885.43, plus interest, attorney's fees, and costs, in the District Court of Maryland for Prince George's County. The McDermotts demanded a jury trial, and the District Court transferred the case to the Circuit Court for Prince George's County. The McDermotts subsequently filed counterclaims against BB&T, which sought damages exceeding $1,000,000. Upon motion by BB&T, the circuit court remanded the case to the District Court, concluding that it failed to acquire jurisdiction over the case because the amount in controversy alleged in the complaint did not exceed $10,000. The McDermotts appealed.

Held: Judgment affirmed. The circuit court's order remanding this case to the District Court constituted a final appealable order because it terminated the McDermotts' ability to litigate in the circuit court. There is no right to a jury trial for civil claims in the District Court that do not exceed $10,000. The McDermotts request for a jury trial did not vest jurisdiction in the circuit court because the amount in controversy set forth in the complaint did not exceed $10,000. Counterclaims filed after a case is improperly transferred to the circuit court should not be considered in determining whether the amount in controversy is sufficient to entitle a litigant to a jury trial.

Saxon Mortgage Services, Inc. v. Paula Harrison et al., No. 891, September Term, 2008, decided on June 11, 2009. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2009/891s08.pdf

COMMERCIAL LAW - MARYLAND COMMERCIAL LAW ARTICLE - Commercial Law Article (C.L.) § 3-420 (providing that (a) The law applicable to conversion of personal property applies to instruments . . . [which is] converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. . . . (b) In an action under subsection (a), *the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument*.).

Facts: Subsequent to a fire on a property, an insurance company issued a check naming appellant, a servicing agent for a mortgagee, as a co-payee on the check. Three other co-payees were named on the check. The check was deposited and paid over the forged indorsement of appellant, who neither authorized the indorsement nor collected any of the proceeds. Appellant sued the depositary bank and the drawee bank for conversion and contended that, by producing the converted check, it was entitled to the presumption that the measure of damages was the face amount payable on the check, *i.e.*, $140,000. Thus, appellant asserted, appellees bore the burden of rebutting that presumption by establishing that appellant was entitled to less than that amount. Appellant also sued the depositary bank for negligence.

Prior to trial, the court granted appellee banks' motions *in limine*, thus precluding appellant from introducing, in any proceeding before the court, any reference to documents and information produced after the discovery deadline. At the close of appellant's case, the trial court granted appellees' motions for judgment against appellant, ruling that appellant was required under the Commercial Code to prove the actual amount of damages incurred and, having failed to do so, had not proven damages. The trial court further ruled that appellant failed to prove the standard of care applicable to the depositary bank in relation to the negligence claim.

Held: The plain language of § 3-420(b) of the Maryland Uniform Commercial Code establishes that, in a conversion action brought under § 3-420(a), the measure of liability is rebuttably

presumed to be the amount payable on the instrument and that this presumption may be rebutted by evidence that a payee is entitled to a lesser amount; because this rebuttable presumption applies in cases involving single or multiple payees, the circuit court erroneously required appellant to prove its actual amount of damages without giving appellant the benefit of the C.L. § 3-420(b) rebuttable presumption that its damages were equal to the face amount of the check.

The circuit court erroneously granted appellee bank's motion for judgment as to appellant's negligence claim on the grounds that there was "absolutely no evidence of what the standard is" for the banking industry. The issue of whether a bank violated a standard of care because it failed to follow its own internal training guidelines or the express instruction on the check was not so particularly related to some science or profession that it required the testimony of an expert. While appellant was required to show that the bank failed to exercise the degree of care that a reasonably prudent bank would have exercised under the circumstances, and while evidence of an industry standard may be adduced to establish an applicable standard of care, it was not, under the circumstances of this case, necessary.

The case was remanded to the circuit court to articulate whether appellees, depositary and drawee banks, through evidence introduced in appellant's case, rebutted the presumption that appellant was entitled to the face amount of the instrument and, if so, whether appellant was then able to prove its monetary interest in the draft. If the circuit court, on remand, determines that the depositary and drawee banks are unable to rebut the presumption that appellant's interest is the face amount of the instrument, appellant, in that event, should prevail.

John Doe v. Dept. of Corrections, No. 00022, September Term, 2007, filed May 12, 2009. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2009/22s08.pdf

CONSTITUTIONAL LAW – BILL OF RIGHTS – FUNDAMENTAL RIGHTS – PROCEDURAL DUE PROCESS – SCOPE OF PROTECTION

EQUAL PROTECTION – LEVEL OF REVIEW

SCOPE OF PROTECTION – SUBSTANTIVE DUE PROCESS – PRIVACY – PERSONAL INFORMATION

Facts: John Doe was convicted of rape in 1977 and, thus, must register as a sex offender for the rest of his life. He filed a declaratory judgment action challenging the constitutionality of this requirement under both the United States and the Maryland constitutions. First, he argued that his procedural due process rights were violated when he was denied the opportunity to prove that he is no longer a danger to society. Second, he argued that, by failing to make distinctions based on an individual offender's characteristics, the sex offender registration law is so arbitrary that it violates his right to equal protection of the laws. Third, Doe argued that his right to privacy is violated by the dissemination of the registry on the internet. The Circuit Court for Baltimore City rejected his claims on summary judgment, and Doe appealed.

Held: Affirmed. The case of *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), which held that Connecticut's sex offender registration law did not violate procedural due process requirements, governs on the federal constitutional issue and is persuasive on the state constitutional issue. Further, rational basis review applies because sex offenders are not a protected class, as they enter the class through voluntary illegal activity and no fundamental right is implicated by the registration law. The legislature's decision to use a prior conviction as a proxy for dangerousness, while perhaps under- and over-inclusive, is not irrational and therefore does not violate the equal protection clause. Finally, Doe's right to privacy is not violated because the information at issue is either not private or already a matter of public record. As such, the circuit court did not err in rejecting Doe's claims on summary judgment.

Charles Gross v. State of Maryland, No. 1180, September Term 2008, filed June 11, 2009. Opinion by J. Salmon.

http://mdcourts.gov/opinions/cosa/2009/1180s08.pdf

CONSTITUTIONAL LAW – VALIDITY OF GUILTY PLEA – DEFENDANT'S KNOWLEDGE OF THE NATURE AND ELEMENTS OF THE CRIME ON WHICH THE PLEA IS ENTERED. A REPRESENTATION TO THE PLEA JUDGE BY A DEFENDANT THAT HE HAS DISCUSSED WITH HIS COUNSEL THE ELEMENTS OF THE CHARGES TO WHICH HE IS ABOUT TO PLEAD GUILTY WILL SUFFICE TO SHOW THAT THE DEFENDANT'S PLEA IS VOLUNTARILY AND KNOWINGLY ENTERED EVEN THOUGH: 1) THE PLEA JUDGE DOES NOT REVIEW WITH THE DEFENDANT THE ELEMENTS OF THE OFFENSE OR 2) ASK DEFENSE COUNSEL IF HE OR SHE HAS ADVISED THE DEFENDANT AS TO THE ELEMENTS OF THE CHARGE.

Facts: In July 2000, Charles Gross pled guilty to possession with intent to distribute 50 grams or more of cocaine. Pursuant to a plea, Gross was promised a sentence of five years imprisonment. Gross was represented by counsel at the plea hearing.

The court asked Gross whether he had reviewed the charges and their elements with his attorney. Gross responded that he had. In further questioning, Gross indicated that he had received a copy of the charging document and that he had discussed the charges with his attorney. He further indicated that he was satisfied with the service provided by his attorney.

The court then advised Gross of his trial rights and that he would be forfeiting those rights by pleading guilty. Gross stated that he understood that he was giving up those rights. The prosecutor then read into the record the factual predicate for the plea. According to the prosecutor, the State's evidence would have showed that police found 390 grams of cocaine and a loaded gun in Gross' bedroom, and, in various parts of the house, which Gross shared with four other people, PCP, $21,339.00 in cash, scales, and documents linking Gross to the house.

The court then advised Gross that while he was giving up his right to a direct appeal of his case, he retained the right to ask for leave to appeal. Gross acknowledged that and indicated that he had nothing further to discuss with his attorney, nor any questions for the court. The court then accepted Gross' plea.

Sentencing took place in November 2000. The court advised Gross that he had 30 days to appeal his sentence. Gross was then sentenced to five years imprisonment pursuant to the plea agreement.

Gross did not file a petition for leave to appeal. Instead,

more than six years later, in February 2008, he filed a petition seeking a writ of error *coram nobis* in the circuit court, alleging, *inter alia*, that he was denied due process because the record failed to show that his plea was entered knowingly and intelligently. Gross said that he had been convicted in federal court on a conspiracy charge and that, if his State conviction were set aside, he would receive a lesser sentence under federal sentencing guidelines. The circuit court denied Gross' *coram nobis* petition.

Held: Affirmed. The Court of Special Appeals pointed out that under Rule §4-242(c), which sets forth the standards controlling when a guilty plea may be accepted by a judge, there are four basic prerequisites to a valid guilty plea. First, the court must determine that the defendant is entering the plea "voluntarily. " Second, the defendant must have an "understanding of the nature of the charge" to which he is pleading guilty. Third, the defendant must understand "the consequences of the plea. " Fourth, the record must show the "factual basis for the plea. " The Court noted that Rule 4-242(c) requires that the court make all of these findings based on "an examination of the defendant on the record in open court. "

The Court explained that in determining whether a defendant knowingly pled guilty, the totality of relevant circumstances must be considered. *Hanson v. Phillips*, 442 F.3d 789, 793 (2d. Cir. 2006). One of the relevant circumstances is whether the charge to which a guilty plea is entered is simple or complex. The more complex, the more care necessary to ensure the defendant understands the nature of the charges to which he is pleading guilty. *See United States v. James*, 210 F.3d 1342, 1345 (11th Cir. 2000).

Here, the Court observed that the charge to which Gross pled guilty was straightforward and simple. Furthermore, in open court, the judge questioned Gross and received his assurance that all the answers he gave were truthful, which included his affirmation that he had "gone over the charges with [his] attorney in [his case] and the elements of the [charged] offenses. " Thus, the Court held that the totality of circumstances surrounding Gross' plea clearly indicated that he understood that he was charged with, and pleaded guilty to, possession with intent to distribute 50 grams or more of cocaine.

ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals of Maryland dated July 21, 2009, the following attorney has been disbarred from the further practice of law in this State:

RENARD DEXTER JOHNSON
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By an Opinion and Order of the Court of Appeals of Maryland dated July 21, 2009, the following attorney has been disbarred from the further practice of law in this State”

WILL PURCELL
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