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Table of Contents

COURT OF APPEALS

Administrative Law

Separation of Administrative Law and Other Powers

Sprenger v. PSC 3

Public Service Commission

Rehearings

Clipper v. Sprenger 4

COURT OF SPECIAL APPEALS

Civil Law

Civil Discovery

Dynamic Corp. v. Shan 7

Constitutional Law

Government Officials

Randall v. Peaco 8

Correctional Services

The Sundry Claims Board

Dixon v. Dept. of Corrections 9

Criminal Law

Evidence

Head v. State 10

Extortion

Rendelman v. State 11

Mandatory Discovery

Murdock v. State 11

Plea Agreement

Rankin v. State 13

Sufficiency

In Re: Ondrel M. 14

Transferred Intent

Pettigrew v. State 15

Waiver of Right to Counsel

Jones v. State 17

Financial Institutions	
Multiple-Party Accounts	
Stanley v. Stanley	18
Juvenile Law	
Juvenile Delinquency	
In Re: Roneika S.	20
Real Property	
Residential Property Disclosure	
Stratakos v. Parcels	21
Waiver of Federal and State Constitutional Right to Trial by Jury	
Westbard v. Westwood	22
Torts	
Elevators	
Johns Hopkins Hospital v. Correia	24
Maryland Tort Claims Act	
State v. Copes	26
Statute of Limitations	
Pulte v. Parex	27
Workers' Compensation	
Appeal of Workers' Compensation Commission Orders	
Chance v. WMATA	31
ATTORNEY DISCIPLINE	32

COURT OF APPEALS

ADMINISTRATIVE LAW - SEPARATION OF ADMINISTRATIVE AND OTHER POWERS - JUDICIAL POWERS - IN GENERAL - EXHAUSTION OF ADMINISTRATIVE REMEDIES - IT IS THE GENERAL RULE THAT AN ADMINISTRATIVE REMEDY PROVIDED BY THE GENERAL ASSEMBLY MUST BE EXHAUSTED BEFORE A PARTY MAY TURN TO THE COURTS FOR OTHER RELIEF.

DECLARATORY JUDGEMENT - NATURE AND GROUNDS IN GENERAL - OTHER REMEDIES - STATUTORY REMEDY - IF THE GENERAL ASSEMBLY HAS PROVIDED A SPECIAL FORM OF STATUTORY REMEDY FOR A SPECIFIC SITUATION, THEN THAT STATUTE SHOULD BE APPLIED INSTEAD OF SEEKING RELIEF THROUGH THE DECLARATORY JUDGMENT ACT.

STATUTES - CONSTRUCTION AND OPERATION - THE CARDINAL RULE OF STATUTORY INTERPRETATION IS TO ASCERTAIN AND EFFECTUATE THE INTENT OF THE LEGISLATURE. THE LANGUAGE OF THE STATUTE MUST BE GIVEN ITS NATURAL AND ORDINARY MEANING.

STATUTES - CONSTRUCTION AND OPERATION-GENERAL RULES OF CONSTRUCTION - PUBLIC UTILITIES AND PUBLIC SERVICE COMMISSIONS - PERSONAL SERVICE OF NOTICE NEED NOT BE GIVEN TO INTERESTED PERSONS TO A PUBLIC SERVICE COMMISSION CONSTRUCTION HEARING; ADVERTISEMENTS IN THE LOCAL NEWSPAPERS OF GENERAL CIRCULATION FULFILLED THE "NOTICE" REQUIREMENT.

Facts: This is the second of two cases that arose from the approval of the Public Service Commission of Maryland (the Commission) for Clipper Windpower (Clipper) to construct the Allegheny Heights Windpower Facility. The first case is *Clipper v. Sprenger*, __ Md. __ (2007) (No. 136, September Term, 2005) (filed June 8, 2007) or *Clipper I*. In 2002, Clipper filed an application with the Commission seeking approval to build a wind turbine facility for the generation of electricity. As required, Clipper notified the public of its application to build the facility and published the date, time, and location of a scheduled pre-hearing conference in two newspapers of general circulation in Garrett County. These advertisements ran for four consecutive weeks prior to the date of the conference.

In April, 2005, Paul C. Sprenger and others (hereinafter "Sprenger") filed a petition for declaratory relief in the Circuit Court for Garrett County. The petition asserted that Sprenger was an interested party to the construction of the wind turbine facility because, upon completion, it would adversely affect his property value. Sprenger claimed that the Commission

violated his constitutional rights by not providing personal notice of the Commission's hearing. Sprenger asserted that he was due such personal notice because he owned property within one half mile of the proposed facility. He also argued that, under the statute, the Commission was required to provide personal notice of the hearing.

Judge James L. Sherbin dismissed the case on the grounds that Sprenger's petition contained, in essence, the same issues that were then pending in *Clipper I* concerning the wind turbine facility. On November 1, 2006, the intermediate appellate court affirmed the decision of the Circuit Court for Garrett County. *Sprenger v. Public Service Commission of Maryland*, 171 Md. App. 444, 910 A.2d 544 (2006).

Held: Affirmed. The Court of Appeals held that the Circuit Court for Garrett County was correct in granting the Commission's motion to dismiss, thereby dismissing Sprenger's petition for declaratory relief. The petition for declaratory relief was properly dismissed because the General Assembly provided specific remedies to resolve cases of this nature and Sprenger did not exhaust those remedies. The Court also held that under the circumstances of this case, advertisement in newspapers of general circulation met the notice requirement contained in the relevant statutory provisions.

Paul C. Sprenger, et al. v. The Public Service Commission of Maryland, et al., No. 125 September Term, 2006, filed June 21, 2007. Opinion by Cathell, J.

PUBLIC SERVICE COMMISSION - REHEARINGS - JUDICIAL REVIEW - PARTY IN INTEREST

Facts: The petitioners filed an application with the Public Service Commission ("the Commission") seeking authorization to build a wind turbine facility for the purpose of generating

electricity. As required, the petitioners notified the public of its application, specifying a date, time, and location of a scheduled pre-hearing conference. The total project would be constructed on Backbone Mountain.

An adjudicatory hearing regarding the petitioners' proposal was held. The petitioners, the Department of Natural Resources's Power Plant Research Program, the staff of the Public Service Commission, and the Office of People's Counsel were the named parties to the proceeding. Pursuant to PUC § 3-106, four individual members of the public intervened and were granted party status. Among those in attendance were respondents Tribbey and Bounds, members of a group known as Friends of Backbone Mountain, who also testified. Although both Tribbey and Bounds submitted citizen comment letters following the conclusion of the hearing, neither they, nor Friends, sought to intervene.

The hearing examiner issued a proposed order that contained and recommended settlement conditions to which all of the parties had agreed, which the Commission subsequently adopted. It issued a final order approving the petitioners' plan. Tribbey, then, writing on behalf of Friends, submitted a letter to the Commission requesting a rehearing. Sprenger filed an Application to Intervene and a Motion for Reconsideration and for Modification of the Order of the Public Service Commission. The Commission denied the requests, explaining that Friends was not a "party in interest" under PUC § 3-114 because it had not properly intervened under PUC § 3-106. It also determined that Friends' filing was beyond the thirty-day period during which parties may request rehearing, and that Sprenger's filings were still further beyond the thirty-day period during which parties may request rehearing.

Tribbey, on his own behalf, and not on behalf of Friends, filed a petition for judicial review of the order; on the same day, a separate petition for judicial review of the commission's order was filed by the respondents Sprenger, Bounds, and Gnegy. The actions having been consolidated, the petitioners each filed a motion to dismiss the petitions as untimely. Before the Circuit Court, the respondents did not contend that they were "parties" to the proceeding, just that they were "persons in interest." Tribbey argued, in addition, that although Friends was not a "party in interest," its application for rehearing tolled the time for filing a petition for judicial review.

The Circuit Court dismissed both actions, ruling that none of the respondents had filed a timely request for rehearing and that their petitions for judicial review were similarly untimely.

It noted that Sprenger filed an untimely request, but even if it had been timely, however, the statute restricted petitions for re-hearing before the Commission to parties in interest. It concluded that although Friends' request for rehearing may have been timely filed, its request was invalid because Friends was not a "party in interest" and, thus, was not entitled to a rehearing under PUC § 3-114.

The respondents noted an appeal to the Court of Special Appeals, which, in an unreported opinion, reversed the judgment of the Circuit Court. The Court of Appeals granted the petitions for writ of certiorari filed by both Clipper and the Commission,

Held: Reversed with case remanded to that Court with instructions to affirm the judgment of the Circuit Court for Baltimore City. In order to seek rehearing under PUC § 3-114, the requesting entity must be a "party in interest," and only parties in interest may seek a rehearing. To become a "party" to the proceeding, pursuant to PUC § 3-106, the requesting entity must have properly intervened. The right to judicial review of orders and decisions of the Commission, however, is available to a broader spectrum of entities, providing that the review is timely requested, i.e., one may, pursuant to PUC § 3-202(a), seek judicial review if they are "a party or person in interest . . . dissatisfied by a final decision or order of the Commission . . ." and do so in a timely fashion.

Clipper Windpower, Inc., et al. v. Paul C. Sprenger, et al., No. 136, September Term, 2005. Filed June 8, 2007. Opinion by Bell, C.J.

COURT OF SPECIAL APPEALS

CIVIL LAW - CIVIL DISCOVERY - REQUEST FOR PRODUCTION OF DOCUMENTS - LEGALLY ERRONEOUS FINDING OF DISCOVERY VIOLATION

Facts: The Circuit Court for Montgomery County imposed sanctions upon the appellant ("Dynamic") precluding the use of a large number of documents at trial. Dynamic had submitted a written response to Appellee Shan's request for production of documents, indicating that the documents would be produced at a mutually convenient time and place. Dynamic produced the documents for inspection as they were kept in the usual course of business. The parties agreed that Dynamic would copy the documents that Shan marked and that Shan would pay for the copying. Shan inspected the documents, and marked some of the documents to be copied with post-it notes. Shan left additional post-it notes identifying general categories of documents it wanted copied. A few days later, Shan sent a letter requesting yet more categories of documents to be copied. Dynamic copied the documents that were specifically identified, but did not sort through the remaining documents to identify those that met Shan's general criteria. Shan filed a motion for sanctions, which was granted. The court precluded Dynamic from introducing into evidence any document which it had not copied for Shan. The court returned a verdict in favor of Shan, and Dynamic appealed.

Held: Reversed. The circuit court's finding of a discovery violation was in error. First, Dynamic complied with the requirement that the producing party submit a written response to the request for production of documents. Second, Dynamic complied with the requirement that the documents be produced for inspection by making the documents available at an agreed upon date and time, as the documents were kept in the usual course of business. Third, when the parties agreed that the "related act" of copying would be accomplished by Dynamic after Shan had marked the documents it wanted copied, Dynamic did not violate Rule 2-422 or the parties' agreement by not copying documents that were not specifically marked.

Dynamic Corp. v. Shan Enterprises, LLC, No. 1457, September Term, 2006, filed June 29, 2007. Opinion by Eyler, Deborah S., J.

CONSTITUTIONAL LAW - GOVERNMENT OFFICIALS - CIVIL LIABILITY - USE OF FORCE

Facts: The mother of 37-year-old appellant, Louis E. Randall, Jr., summoned the police to the house where she lived with appellant for assistance in transporting appellant, who was diagnosed as schizophrenic and had been off his medication for six months, to a local hospital. After a five-hour barricade at the house, several police officers entered the house and found appellant with a butcher knife in his hand. Appellant approached two officers with the knife and refused to drop the knife at the officers' repeated commands. The officers called for non-lethal force to assist them in subduing appellant, who was in his bedroom. Before the non-lethal force, located elsewhere in the house, was brought to the bedroom, one officer shot appellant several times in a two-second span of time because he continued to approach the officers with the knife. Appellant brought suit against the officer, alleging the officer's use of potentially lethal force was unreasonable. The trial court dismissed the suit on summary judgment.

Held: Affirmed. When assessing the reasonableness of a police officer's use of potentially lethal force, the court considers only the information that the officer possessed immediately prior to and at the moment the officer employed the allegedly unlawful force. The court does not consider events antecedent to the use of force that would cause the finder of fact to speculate in hindsight about the reasonableness of the conduct. In this case, it was not material to the reasonableness inquiry that the officers did not ensure that, before encountering the plaintiff, they were armed with non-lethal force. Because no reasonable jury could find that the officer acted unreasonably, the circuit court did not err in granting of summary judgment in favor of the officer.

Louis E. Randall, Jr. v. William M. Peaco, et al., No. 852, September Term, 2006, filed July 3, 2007. Opinion by Barbera, J.

CORRECTIONAL SERVICES - THE SUNDRY CLAIMS BOARD - TITLE 10,
SUBTITLE 3 OF THE CORRECTIONAL SERVICES ARTICLE - THE PRISONER
LITIGATION ACT - TITLE 5, SUBTITLE 10 OF THE COURTS AND JUDICIAL
PROCEEDINGS ARTICLE - PRISON INMATE - ADMINISTRATIVE REMEDIES.

Facts: Appellant, Melvin James Dixon, was seriously injured when he fell into a ventilation shaft while on a prison work detail at a correctional facility operated by the Department of Public Safety and Correctional Services (the "Department"), appellee. To recover for his injuries, appellant filed a tort suit against the Department in circuit court. The Department filed a motion for summary judgment, which was denied. Thereafter, the court granted the Department's motion in limine to exclude all evidence in support of appellant's claim and granted the Department's renewed motion for summary judgment. The court determined that, under C.S. § 10-308(c), appellant's exclusive remedy was with the Sundry Claims Board.

Held: Affirmed. C.S. § 10-308(c) provides that the Sundry Claims Board is the exclusive remedy for an inmate who sustains a permanent injury during the course of compensated work for a correctional facility. See C.S. § 10-304.

When read together, C.S. § 10-305(a) and C.S. § 10-308(c) indicate that an inmate who qualifies for benefits under the Sundry Claims Board statute has the right, if he or she chooses to exercise it, to pursue a claim for compensation against the State. But, if he or she chooses to pursue such a claim, the Board is the exclusive avenue to obtain compensation. The statute precludes an inmate from filing a tort action against the State. Under the plain language of C.S. § 10-308(c), and the doctrine of exhaustion of administrative remedies, it was clear that appellant satisfied the statutory criteria, and thus he was only entitled to pursue his request for compensation by filing a claim with the Sundry Claims Board. Moreover, even if appellant's claim related to a "condition of confinement," such that the Prisoner Litigation Act and the Inmate Grievance Office statute applied, the exclusive remedy provision of C.S. § 10-308 required appellant to file his claim with the Sundry Claims Board, rather than the Inmate Grievance Office.

Melvin James Dixon v. Department of Public Safety and
Correctional Services, No. 1107, September Term, 2006. Opinion
filed July 5, 2007 by Hollander, J.

CRIMINAL LAW - EVIDENCE - SIXTH AMENDMENT CONFRONTATION CLAUSE -
NON-TESTIMONIAL STATEMENTS

Facts: Police officers responded to a 911 call reporting a shooting at a residence. Officer Jeremy George, the first to arrive, smelled gunpowder in the air and found an injured man in the living room. The victim told Officer George that another man had been shot, as well. The officer followed a trail of blood into the kitchen, where he discovered Kevin Darby. Darby had been shot eight times and was yelling for help. Officer George asked Darby if he was "okay" and then asked who had shot him. Darby replied, "Bobby." Darby died approximately forty minutes later.

Police later identified "Bobby" as one Robert Eugene Head, and the State prosecuted him for murder. Over Head's objections, the trial judge allowed Officer George to testify as to Darby's identification of the shooter. Head was convicted of second-degree murder.

Held: Affirmed. Darby's statement was uttered in response to Officer George's attempt to meet an ongoing emergency, and therefore it was not testimonial in nature. Because the statement was non-testimonial, its admission did not run afoul of the Confrontation Clause of the Sixth Amendment. The Supreme Court's ruling in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), makes clear that non-testimonial statements made by an out-of-court declarant, while still subject to traditional limitations on hearsay evidence, are not governed by the Confrontation Clause. And the Supreme Court declared in *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), that the category of non-testimonial statements includes those made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. The strong odor of gunpowder and the dangerous possibility that the shooter was still nearby were circumstances objectively indicating that the primary purpose of Officer George's question was to resolve an ongoing emergency.

Robert Head v. State of Maryland, No. 499, September Term, 2005, filed December 5, 2006. Opinion by Salmon, J.

CRIMINAL LAW - EXTORTION - SUFFICIENCY OF EVIDENCE - BAD FAITH
THREAT TO FILE SUIT

Facts: In a prior criminal case, the defendant was convicted of embezzling money from his former employer and sentenced to a prison term and probation. After serving his full sentence, the defendant sent a letter to his former employer asserting that the former employer owed him money and threatening to sue him unless he paid him \$100,000 to "settle" the claim. The threat was made with actual knowledge on the part of the defendant that he had no colorable legal claim against his former employer.

On the basis of the letter, the defendant was convicted by a jury sitting in the Circuit Court for Montgomery County of two counts of statutory extortion: general extortion by threat of economic harm, pursuant to Md. Code (2002, 2006 Supp.), section 3-701 of the Criminal Law Article ("CL"), and extortion in writing by threat of economic harm, pursuant to CL section 3-706.

Held: Reversed. The evidence was legally insufficient to support the convictions. To be convicted of extortion, the defendant must both intend to achieve a wrongful goal and attempt to do so (or actually do so) by a wrongful means. The evidence was sufficient to prove that the defendant's goal - to obtain money he was not entitled to - was wrongful. It was insufficient, however, to prove that he attempted to accomplish that goal by wrongful means. Civil litigation, even if threatened in bad faith, is not a wrongful means.

Rendelman v. State, No. 2616, Sept. Term, 2005, filed July 6, 2007. Opinion by Eyler, Deborah S., J.

CRIMINAL LAW - MANDATORY DISCOVERY - PRETRIAL IDENTIFICATION OF
DEFENDANT BY WITNESS FOR THE STATE

Facts: In a robbery case involving two victims, both were shown a photographic array before trial. While the first victim positively identified the defendant from the array, the second victim told the investigating officer that she could narrow her selection down to two photographs in the array (one of which was the defendant's), but could not make a positive identification. The second victim told the prosecutor the same thing. All of this information was disclosed to the defense in pre-trial discovery.

At trial before a jury in the Circuit Court for Baltimore City, to the surprise of both the prosecutor and the defendant, the second victim made an in-court identification of the defendant on direct examination. She also testified, consistent with pretrial discovery, that when shown the array she only had been able to narrow her selection to two photographs.

On cross-examination, the second victim testified, however, that she had in fact been willing, during the array process, to make a positive identification of the defendant and that she believed that she had made such an identification.

The defense moved to impose sanctions against the State for failure to disclose the second victim's pretrial identification of the defendant in mandatory discovery. The circuit court denied the motion, ruling that there was no discovery violation and that it was up to the jury as the trier of fact to decide whether the second victim's testimony was credible.

On appeal, the defendant argued that, under *Williams v. State*, 364 Md. 160 (2001), the prosecutor violated Rule 4-263 by failing to disclose the second victim's pretrial identification of the defendant from the photographic array.

Held: Affirmed. Rule 4-263, governing discovery in criminal cases, requires that without request the State disclose to the defendant, among other things, relevant and material information regarding a pretrial identification of the defendant by a witness for the State.

In *Williams*, an investigating officer/witness made an in-court identification of the defendant and testified that he had identified the defendant pretrial despite a pretrial discovery disclosure stating that the witness could not make an identification. *Williams* is distinguishable because, under Rule 4-263(g), the witness in *Williams* was an agent of the State and his knowledge was imputed to the State.

In the instant case, the witness was a victim and was not an agent of the State. Her knowledge was not imputed to the State. The State did not violate its discovery obligations when it disclosed to the defense the information it possessed concerning the second victim's pretrial identification of the defendant. Whether the second victim made a pretrial identification of the defendant contrary to the testimony of the investigating officer and her own prior testimony was a question of fact for the jury to decide.

Murdock v. State, No. 2198, Sept. Term, 2005, filed July 2, 2007. Opinion by Eyler, Deborah S., J.

CRIMINAL LAW - PLEA AGREEMENT - SUSPENDED TIME - PROBATION
INCLUDED EVEN IF NOT STATED IN AGREEMENT.

Facts: Appellant, Donald Rankin, entered into a plea agreement with the State in which Rankin agreed to plead guilty to the charge of conspiracy to commit a second degree sex offense, the remaining charges would be *nol prossed*, and the court could impose an "active cap of no more than three years." The plea agreement stated that there was "no other sentencing limitation except provided by law." The agreement was read to Rankin and signed by all parties involved. The trial court imposed a sentence of twenty years imprisonment, with all but three years suspended, followed by a period of five years probation. Rankin was released from prison and thereafter admitted to violating his probation a few years later. Rankin was sentenced to serve ten years of the suspended sentence. The trial court denied Rankin's Motion to Correct an Illegal Sentence, finding that, although the plea agreement did not expressly provide for a term of probation, the imposition of probation did not result in an illegal sentence.

Held: Affirmed. When a plea agreement provides for a split sentence but fails to mention probation, the actual sentence of incarceration, suspended time, and probation is not an illegal

sentence. Under the statute and case law, probation must attach to the suspended portion of a sentence. Consequently, the right to impose a period of probation is included in any plea agreement that provides for a suspended sentence.

Donald E. Rankin v. State of Maryland, No. 2872, September Term 2005, filed April 30, 2007. Opinion by Woodward, J.

CRIMINAL LAW - SUFFICIENCY OF THE EVIDENCE - POSSESSION OF CONTROLLED DANGEROUS SUBSTANCE

CRIMINAL LAW - EVIDENCE - LAY OPINION TESTIMONY - ODOR OF MARIJUANA.

Facts: Appellant, Ondrel M., a juvenile, was arrested and charged with possession of marijuana. Ondrel M. was the front seat passenger in a car that fled from the police. When the car was stopped after a high speed chase, Ondrel M. and the other occupants refused to open the vehicle windows, causing the police to forcibly remove the windows. Upon approaching the vehicle, Officer Brett Tawes smelled an odor of burning marijuana emanating from inside, which he testified he was able to recognize based on his training at the police academy and his experience as a police officer in the field. A search of the car revealed a green leafy substance, later identified as marijuana, in the middle of a crumpled one-quarter or one-half sheet of newspaper lying behind the driver's seat on the floor. In an adjudicatory hearing held before a master, Ondrel M. was found to have been involved in the delinquent act. The master concluded that Ondrel M. was in possession of marijuana because Ondrel M. had knowledge of the marijuana and, further, the proximity of the marijuana to Ondrel M. indicated constructive control. The master also concluded that the opinion testimony of Officer Tawes regarding the odor of burning marijuana was proper lay opinion testimony. In an exceptions hearing, the Circuit Court for Anne Arundel County affirmed the master.

Held: Affirmed. First, the evidence was sufficient for the trier of fact to conclude that Ondrel M. was in possession of marijuana beyond a reasonable doubt. The following facts supported this conclusion: (1) The proximity of the marijuana to Ondrel M., namely, within easy reach behind the driver's seat, (2) the failure of the car's occupants to claim ownership of the marijuana, (3) the location of the marijuana in plain view of Ondrel M., (4) the odor of burning marijuana throughout the car as indicative of mutual use, and (5) Ondrel M.'s failure to roll down his window, as well as his presence in a car filled with the odor of marijuana, as indicative of a marijuana-focused common enterprise with the other occupants of the car. Second, the court did not err in admitting the testimony of Officer Tawes regarding the odor of marijuana as lay opinion testimony. As an issue of first impression, the testimony of a police officer, who is capable of identifying marijuana by smell through past experience, that he or she smelled the odor of marijuana, is proper lay opinion testimony under Maryland Rule 5-701.

In Re: Ondrel M., No. 2898, September Term 2005, filed March 12, 2007. Opinion by Woodward, J.

CRIMINAL LAW - Md. Code Ann., Criminal Law § 3-201(d) (2007): The following language does not result in the classification of first-degree assault as an inchoate crime: A person may not intentionally cause or attempt to cause serious physical injury to another; serious physical injury is defined as (1) creating a substantial risk of death or (2) causes permanent or protracted serious(i) disfigurement(ii) loss of the function of any bodily member or organ or (iii) impairment of the function of any bodily member or organ.

TRANSFERRED INTENT - *Harvey v. State*, 111 Md. App. 401, 425-428 (1996); *Ford v. State*, 330 Md. 682, 715, 625 A.2d 984 (1993); The law in Maryland is settled that there can be no transferred

intent when the unintended victim is neither killed nor injured. The trial court erred in giving jury an instruction on transferred intent where appellant, in a fit of rage, hurled several missiles during physical altercation with coworker, injuring employee of restaurant when glass shards struck her in the face, resulting in loss of sight to her eye.

CONCURRENT INTENT - *Garrett v. State*, 394 Md. 217 (2006); Because the prosecution did not present, and have the concept of concurrent intent explicitly delineated to the jury, the doctrine cannot be the basis for upholding appellant's conviction for first-degree assault on appeal.

MERGER - Because infirmity in proceedings resulting in conviction for first-degree assault did not affect appellant's conviction for reckless endangerment, conviction for reckless endangerment was not disturbed.

Facts: Appellant and a co-worker became involved in an altercation at a local Applebee's restaurant. As appellant's co-worker hid at the far end of the bar, near the kitchen entryway, i.e., appellant frenetically hurled glass projectiles, beer mugs and shot glasses at his coworker.

A twenty-three year old cook and a plumber, both working in the restaurant's kitchen, walked to the entryway of the kitchen and peered at the disturbance, when one of the glass items thrown by appellant hit a wall and shattered near the cook and plumber, striking the cook, who sustained serious cuts to her face, particularly her eye which had to be surgically removed. The plumber also sustained a very deep cut on his arm.

Appellant was arrested and charged with first-degree assault and reckless endangerment as to the cook, two counts of second-degree assault as to the plumber and the restaurant manager and malicious destruction of property. The State, in its closing argument, told the jury that "[t]he doctrine [of transferred intent] makes sense. And the reason is, the purpose of that doctrine is, so that people who have formed a criminal intent into fruition, they should not benefit from having bad aim or just being unlucky." Appellant was convicted of first-degree assault and reckless endangerment as to the cook, second-degree assault as to the plumber and the manager and malicious destruction of property and he was sentenced to twenty years for first-degree assault, two years concurrently for reckless endangerment, one year concurrently for malicious destruction of property and two consecutive sentences of three years' imprisonment for each second-degree assault conviction.

Held: Reversed. During trial, the State's theory of the case was based exclusively on the principle of transferred intent. Under *Harvey v. State*, 111 Md. App. 401, 432 (1996), the Court of Special Appeals held that the doctrine of transferred intent is only applicable to those instances where the unintended victim is killed.

The State, having relied upon the doctrine of concurrent intent and having failed to present the principle to the jury for its consideration, could not have expected it to have been incorporated into the jury's deliberative process.

Rahmat Mitchell Pettigrew v. State of Maryland, No. 154, September Term, 2006, decided July 3, 2007. Opinion by Davis, J.

CRIMINAL LAW - WAIVER OF THE RIGHT TO COUNSEL - WITHDRAWAL OF THE WAIVER.

CRIMINAL LAW - MERGER OF OFFENSES - MOVING VIOLATIONS.

Facts: Appellant, Carl Jones, Jr. was charged with kidnaping, assault, reckless driving, and related offenses. Three months before trial, appellant expressly waived the right to counsel. At several subsequent pre-trial proceedings, appellant re-asserted his desire to represent himself. On the first day of trial, appellant appeared without an attorney and asked the trial judge for a continuance to seek legal representation. The judge denied the request. After a five-day trial, in which appellant proceeded *pro se*, the jury convicted him of two counts of second degree assault, two counts of kidnaping, and one count each of resisting arrest, reckless driving, negligent driving, and failure to maintain a reasonable and prudent speed. Appellant appealed the trial court's denial of his request for a continuance to obtain counsel. He also requested the appellate court to merge his convictions of reckless driving, negligent driving, and failure to maintain a

prudent speed.

Held: Affirmed in part; vacated in part. After appellant expressly waived the right to counsel, he was not entitled to an automatic postponement of the scheduled trial in order to obtain counsel pursuant to Maryland Rule 4-215(b). Appellant failed to demonstrate to the trial court that it would be "in the interests of justice" for the court to grant a postponement.

Defendant's convictions of negligent driving and reckless driving merge under the required evidence test; negligent driving, which is defined as driving in a careless or imprudent manner that endangers people or property, is a lesser included offense of reckless driving, which is defined as a wanton or willful disregard for the safety of persons or property. Likewise, defendant's conviction of failure to maintain a reasonable and prudent speed, which this Court has construed as requiring drivers to reduce speed to that which is reasonable or prudent in light of existing conditions that present an actual or potential danger," merges with the reckless driving conviction.

Carl Eugene Jones, Jr. v. State of Maryland, No. 851, September Term, 2005, filed June 4, 2007. Opinion by Barbera, J.

FINANCIAL INSTITUTIONS - MULTIPLE-PARTY ACCOUNTS - OWNERSHIP BY SURVIVORS UPON THE DEATH OF ONE PARTY

Facts: Maryland Code (1980, 2003 Repl. Vol.), § 1-204 of the Financial Institutions Article ("FI") governs ownership of multiple-party accounts upon the death of the account holder. The present case involves ownership of the funds in five multiple-party bank accounts that were established by George W. Stanley, the Decedent. The parties to the dispute are surviving family members of the Decedent. Appellant is Hal Stanley, the Decedent's brother, and appellees are Minnie L. Stanley, Decedent's wife from a second marriage, and her children from a previous marriage, Laura Bradley

and Leslie Armstrong. The Decedent had made appellant and appellees joint owners of the five bank multiple-party bank accounts.

Upon the death of the Decedent, appellees emptied the accounts and placed the monies in a newly opened account in their names. Appellant filed an action in the Circuit Court for Wicomico County, claiming ownership of twenty-five percent of those monies. Each side urged an interpretation of FI § 1-204 different from the other. Appellant argued that although any party to a multiple-party account may withdraw funds under FI § 1-204(f), that right of withdrawal does not create an ownership interest in the withdrawn funds to the exception of the ownership interest of the remaining survivors to the account. Appellees argued to the contrary. The court disagreed with appellant, and granted summary judgment in favor of appellees.

Held: Reversed. FI § 1-204(d) provides that upon the death of one of the parties to a multiple-party account "the right to any funds in the account shall be determined in accordance with the express terms of the account agreement," (d)(1), and, if there is no account agreement the survivors own the funds in the account. (d)(2). In this case the account agreement was couched in terms of FI § 1-204(d)(2), that the survivors own the funds upon the death of one of the parties. Although any party to a multiple-party account may withdraw funds under FI § 1-204(f), the right of withdrawal does not create an ownership interest in the funds withdrawn that overrides the ownership interest of the remaining survivors to the account, established by FI § 1-204(d). The trial court erred as a matter of law by declaring disputed funds in certain multiple-party bank accounts to be owned by those surviving parties who withdrew the funds, to the exclusion of the remaining surviving party.

Hal Stanley v. Minnie L. Stanley, et al., No. 1981, September Term, 2005. Opinion filed on July 2, 2007 by Barbera, J.

JUVENILE LAW - JUVENILE DELINQUENCY - ADEQUACY OF NOTICE -
REQUIREMENT THAT PETITION CONTAIN A FACTUAL BASIS

Facts: A juvenile alleged to have committed a delinquent act is entitled to adequate notice of the allegations brought against him pursuant to Maryland Code (1973, 2002 Repl. Vol.), § 3-8A-13 of the Courts and Judicial Proceedings Article ("CJ"), the Due Process Clause of the Fourteenth Amendment, Article 21 of the Maryland Declaration of Rights and Maryland Rule 11-103. In the present case, the State filed a petition alleging that appellee, Roneika S., had made a false statement to a police officer in violation of Maryland Code (2002), § 9-501 of the Criminal Law Article. Roneika S. filed a motion to dismiss the petition on the ground that it lacked a sufficient factual basis for the allegation. The Circuit Court for St. Mary's County, sitting as the juvenile court, conducted a hearing on the motion and dismissed the petition because the petition did not set forth the allegedly false statement with sufficient particularity to allow appellee to prepare for trial.

Held: Reversed. The petition satisfied the constitutional requirement of notice and the dictates of CJ § 3-8A-13 and Md. Rule 11-103, even though the petition did not detail the substance of the false statement made by the juvenile. CJ § 3-8A-13(a) and Md. Rule 11-103a.2.(c) do not require greater factual specificity than is required by the Fourteenth Amendment, Article 21, or the Maryland Rules of Procedure.

In this case, the petition set forth the date and place of the alleged act and it stated that appellee made "a false statement to DFC Cara Grumbles, a peace officer." The petition also included the names of witnesses to the event and the language setting forth the elements of the charge, which alleged that appellee made the false statement "knowing the same to be false, with the intent to deceive and with the intent to cause an investigation or other action to be taken" Moreover, appellee was adequately apprised of the facts underlying the charge so as to permit her to defend against it. The state advised the court that it had disclosed to appellee through the discovery process the particular statement she made to the officer that formed the basis of the State's allegation of delinquency.

In re: Roneika S., No. 2719, September Term, 2005, filed April 3, 2007. Opinion by Barbera, J.

REAL PROPERTY - RESIDENTIAL PROPERTY DISCLOSURE STATEMENT -
ATTORNEY'S FEES

Facts: George Stratakos and Jami Rankin, appellants, purchased residential real property from Steven J. Parcels and Harriet Parcels, appellees, in Montgomery County, Maryland. In accordance with Maryland Code (1974, 2003 Repl. Vol., 2006 Supp.), § 10-702 of the Real Property Article ("RP"), the Parcels provided Stratakos and Rankin a Maryland Residential Property Disclosure Statement. In the disclosure statement, the Parcels stated that they were not aware of any previous infestations of wood-destroying insects or any repairs made to the home because of a previous wood-destroying insect infestation. The disclosure statement was not made part of the contract.

Three years after the sale, Stratakos and Rankin discovered extensive damage to the property, which was allegedly caused by wood-destroying insects. They filed a complaint against the Parcels alleging, *inter alia*, fraudulent misrepresentation, based on the assertions the Parcels made in the disclosure statement. Stratakos and Rankin sought compensatory and punitive damages, as well as attorney's fees pursuant to a provision of the real estate contract that entitled the prevailing party in any action "arising out of" the real estate contract to attorney's fees. The court granted summary judgment in favor of the Parcels on the ground that Stratakos and Rankin failed to show that they had incurred actual injury from the alleged misrepresentations, such as increased renovation costs. The court also granted the Parcels' motions for attorney's fees pursuant to the provision in the real estate contract allowing for attorney's fees. Stratakos and Rankin appealed, arguing that because the parties' dispute did not arise out of the real estate contract, the provision of the contract allowing for attorney's fees did not apply.

Held: Affirmed. A cause of action based on alleged misrepresentations by a seller of real property in a Maryland Residential Property Disclosure Statement, given to the purchaser of property in accordance with RP § 10-702, "arises out of" the contract for sale of real property. When a contract for sale of real property provides for an award of attorney's fees to the prevailing party in any dispute arising out of the contract, the prevailing party in an action based on the alleged misrepresentations in a Disclosure Statement is entitled to recover attorney's fees.

Because the dispute in this case relates to misrepresentations made in the disclosure statement, it arises out of the real estate contract. The Parcels, as the prevailing party in the dispute,

were entitled to attorney's fees.

George Stratakos, et ux. v. Steven J. Parcels, et ux., No. 253, September Term, 2006, filed January 30, 2007. Opinion by Barbera, J.

REAL PROPERTY - WAIVER OF FEDERAL AND STATE CONSTITUTIONAL RIGHT TO TRIAL BY JURY; *Anne Arundel County v. Fraternal Order of Anne Arundel Detention Officers & Pers.*, 313 Md. 98, 107 (1988); *Park Constr. Co. v. Indep. School Dist.* No. 32, 296 N. W. 475, 477 (1941); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999); trial court did not err in finding that appellants, who were either parties to operating agreement, who derived standing from the fact of their relationship to a party to the Agreement and who assumed benefits, rights or privileges under Agreement are bound by provision waiving right to demand trial by jury;

SELF DEALING - CONTRACTUAL MODIFICATION OF FIDUCIARY DUTIES; *R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, 790 A.2d 478, 497 (Del. Ch. 2001); under Delaware law, parties altering fiduciary duties by contract must make their intentions plain; test, established by Delaware courts, provides that any error should be on the side of flexibility regarding whether such intention to alter duties existed; trial court erred in finding ambiguous a provision in operating agreement of joint venturer (Westbard) which granted affiliates of principal member of appellant (Cohen) the right to pursue investment opportunities "in addition to those relating to the Company"; exercise of right of first refusal to purchase Park Bethesda, an investment "relating to the Company," by affiliate of principal member of appellant was in contravention of operating agreement and, hence, not a proper exercise of fiduciary duties of principal member; case remanded to circuit court to determine if exercise of right of first refusal by affiliate of principal member of joint venturer was nevertheless proper based on modification of fiduciary duties by encouragement of co-joint venturer to "chase the deal."

Facts: NEBF entered into protracted negotiations with Cohen to develop Park Bethesda. Westbard Apartments LLC, a joint venture between National Electrical Benefit Fund (NEBF) and Westbard Investments LLC (Investments), and Westwood Joint Ventures LLC were parties to a lease (the Lease) of one (Park Bethesda) of nine parcels wherein Westbard was granted several rights, including right of first refusal to buy Park Bethesda. Westwood owned all nine parcels. Cohen owned and controlled Investments, the managing member of Westbard, as well as CAP Acquisition LLC.

Westwood sold the parcels to a Cohen-controlled entity after Cohen waived the right of first refusal granted in the Lease and purchased the property through CAP Acquisition and appellants filed suit seeking specific performance, monetary damages, declaratory judgment and injunctive relief. The trial court granted appellees' motion to strike a jury trial and entered summary judgment in favor of Westwood, but denied summary judgment as to appellees and, subsequent to a bench trial, the court ruled in appellees' favor.

Appellants contended that Cohen violated his fiduciary duties when he unilaterally entered negotiations to purchase the nine parcels in derogation of the Agreement and to the exclusion of appellants.

Held: Vacated and remanded. Because NEBF intended to assume the benefits, rights or privileges of the Lease and brought its suit derivatively on behalf of Westbard, the Lease and Agreement provided for a valid contractual waiver to the right of trial by jury.

Regarding self-dealing, the trial court was clearly erroneous in its finding that testimony was not credible that Cohen (Westbard's co-joint venturer) brought the deal to NEBF and was told, due to NEBF's inability to quickly move, to chase the deal.

Case vacated and remanded for a determination as to whether NEBF waived, or is estopped from objecting to, Cohen's purchase of the property upon a consideration of Cohen's fiduciary duties under the Agreement in light of the determination by the Court of Special Appeals that the Agreement unambiguously permitted Cohen and his entities to pursue ventures other than those relating to Westbard. Additionally, determinations must be made on remand as to whether the conduct of its managing director for real estate can bind NEBF and the proper valuation of the individual parcels.

Westbard Apartments, LLC et al. v. Westwood Joint Venture, LLC et al., No. 1471, September Term, 2006, decided May 25, 2007. Opinion by Davis, J.

TORTS - ELEVATORS - ELEVATOR OWNERS OR OPERATORS MUST EXPERIENCE THE "HIGHEST DEGREE" FOR PASSENGERS

EVIDENCE - TRIAL COURT'S INSTRUCTIONS TO DISREGARD THE MENTION OF THE REPLACEMENT OF ELEVATOR PARTS WERE SUFFICIENT TO CURE ANY DAMAGE CAUSED BY INADMISSIBLE REFERENCES TO SUBSEQUENT REMEDIAL PROCEDURES

CIVIL PROCEDURE - TRIAL COURT HAS BROAD DISCRETION IN DENYING A MOTION FOR A NEW TRIAL

Facts: Jane Correia was visiting her stepfather in the Nelson Building of the Johns Hopkins' hospital. On her way out, she took an elevator down to the ground floor. Due to a mechanical defect, the elevator came to a stop with a sudden jolt. Correia, who had previous back problems, immediately experienced pain and eventually underwent two surgeries on her lower back and hip. She sued Hopkins and Schindler Elevator Company, the company hired by Hopkins to maintain the elevators.

A jury trial was held in the Baltimore City Circuit Court. Evidence introduced by the plaintiffs showed that, in the six-month period prior to the accident, Hopkins had received thirty-two complaints about the Nelson Building elevators. Hopkins' co-defendant, Schindler Elevator Company, called one of its employees to testify on its behalf. The employee, Charles Stump, was the supervisor of the maintenance on all Hopkins elevators. He testified that he made a planned inspection of the Nelson Building elevator shortly after the incident and that he found the presence of longstanding mechanical defects, including "worn" and "damaged" door interlocks. Stump's report of the findings was not introduced into evidence, but the court allowed plaintiffs' counsel to examine him about his written observations and opinions. On cross-examination, however, counsel for Schindler Elevator Company mentioned the fact that several parts of the elevator had been replaced. Hopkins moved for a mistrial on the basis of inadmissible evidence of subsequent remedial measures. The trial judge denied the motion and instructed the jury to disregard any mention of replacements. He also instructed the jury that the owner/operator of an elevator owes a duty of the highest degree to its passengers.

The jury found Hopkins liable and awarded plaintiffs \$300,000 but found that co-defendant, Schindler, was not responsible for the accident. Hopkins appealed, asking, *inter alia*, whether the owner/operator of an elevator owes its passengers the same "highest degree of care" that is owed by a common carrier to its passengers.

Held: Affirmed. The standard of care for owners/operators of elevators towards passengers in Maryland is that of the highest degree. The Court pointed out that over one hundred years ago, in *Belvedere Bldg. Co. v. Bryan*, 103 Md. 514, 539-40 (1906), the Court held "that one who is 'engaged in the undertaking of running an elevator as a means of personal transportation' is required to use the 'highest degree of care and diligence practicable under the circumstances,' which is the same standard that common carriers are required to meet."

Hopkins urged this Court to reconsider the "highest degree of care" standard in light of the advances in technology in the field of elevator construction and maintenance, and to opt for a "reasonable care" standard instead. The Court held, however, that advancement in elevator technology should not lessen the duty owed by owners/operators of elevators to the passengers because "[s]uch scientific advancements have not changed the fact that an elevator, if not maintained and operated with the highest degree of care, is now, as it was when *Belvedere* was decided, 'in many respects a dangerous machine.'"

Maryland is among the twenty-one states that impose the highest degree of care upon owners/operators of elevators. In addition, California has imposed this standard by statute; fourteen states and the District of Columbia hold that only a standard of reasonable care is owed to the passengers of elevators.

Hopkins also contended that the trial judge erred in denying its motion for a mistrial. This contention was rejected, however, because the trial judge repeatedly instructed the jury to "disregard any reference to anything that should be replaced or anything that should be done." The instructions were given immediately after Schindler's attorney mentioned that elevator replacements and/or repairs were needed. The Court noted that jurors are presumed to understand and follow the judge's instructions. Therefore, any damage that might otherwise have been caused by the mention of the replacements was cured by the prompt and effective curative instructions.

The Johns Hopkins Hospital, et al. v. Jane E. S. Correia, et ux., No. 2453, September Term, 2005, filed April 30, 2007. Opinion by Salmon, J.

TORTS - MARYLAND TORT CLAIMS ACT - WRITTEN CLAIM REQUIREMENT -
WRONGFUL DEATH ACTION - SURVIVAL ACTION

Facts: In 2003, Gladys Copes died while a patient at a State-operated long-term nursing facility. She was survived by three adult daughters.

Less than a year after Gladys's death, Corethia Copes, one of her daughters and the personal representative of her estate, notified the State Treasurer in writing that Gladys's death resulted from medical malpractice by health care providers at the State facility. Four months later, in the Circuit Court for Wicomico County, Corethia sued the State, both individually and in her capacity as personal representative, for medical malpractice. She eventually amended her complaint to include one count for wrongful death and one for survival and to join her two sisters, Christal and Chantel Copes, as plaintiffs.

The State moved for summary judgment on both counts, arguing that the survival action was barred by sovereign immunity because Corethia did not give timely notice of claim to the State Treasurer under the Maryland Tort Claims Act, Md. Code (2004 Repl. Vol., 2006 Supp.), section 12-101, *et. seq.*, of the State Government Article ("MTCA"); that Christal and Chantel's wrongful death claims also were barred by sovereign immunity because they did not give any notice under the MCTA; and that, although Corethia gave timely notice of her wrongful death claim, she could not pursue it because either all of the wrongful death beneficiaries could recover or none of them could.

The circuit court granted summary judgment in favor of the State on the survival action and on Christal and Chantel's wrongful death claims. Corethia's wrongful death claim was tried to a jury that found in her favor and awarded her \$175,000 in damages.

The State noted an appeal and Corethia, on her own behalf and on behalf of her sisters, noted a cross-appeal. The State asserted that the circuit court erred in not granting summary judgment in its favor on Corethia's wrongful death claim. Corethia contended that the circuit court erred in granting summary judgment on the survival action and as to Christal and Chantel's wrongful death claims.

Held: Affirmed in part and reversed in part; judgment vacated as to Christal and Chantel's wrongful death claims and case remanded to the circuit court for further proceedings.

The Court held that, in a wrongful death action against the

State, the personal representative of the decedent's estate or any beneficiary under the Maryland wrongful death act may submit the written notice required by the MTCA. If one such person submits the claim, the requirement is satisfied for all wrongful death beneficiaries. Corethia filed her written notice as the personal representative of the decedent's estate and satisfied the MTCA requirement for all of the wrongful death beneficiaries. The circuit court erred in ruling that the other wrongful death beneficiaries, Christal and Chantel, could not pursue their wrongful death claims.

In a survival action against the State, the written claim required by the MTCA must be submitted within one year of the injury that is the basis of the claim. The one-year period is triggered when the facts underlying the elements of the tort action come into existence. The circuit court properly granted summary judgment in the survival action because the facts underlying the tort of medical negligence came into existence more than a year before written notice was submitted.

State v. Copes, No. 1063, Sept. Term, 2006, filed July 5, 2007. Opinion by Eyler, Deborah S., J.

TORTS - STATUTE OF LIMITATIONS ON ASSIGNED CLAIMS OF APPLICATORS:
Because manufacturer only argued that the only statute of limitations was for the indemnity claims, any challenge to the date on which the statute began to run has been waived.

ASSIGNED INDEMNITY CLAIMS OF SUPPLIERS/DISTRIBUTORS: despite manufacturer's contention that the jury had no way to determine how to apportion damages between two distributors, there was sufficient evidence for the jury to make that determination.

PULTE'S BREACH OF EXPRESS WARRANTIES CLAIM AGAINST MANUFACTURER:
Trial court properly dismissed express warranty claims on the basis that no representations were made by manufacturer or any privity

between manufacturer and builder or homeowners.

PULTE'S BREACH OF IMPLIED WARRANTIES CLAIM: Trial court properly granted summary judgment on builder's claim of breach of implied warranties for merchantability and fitness for a particular purpose, no evidence having been proffered that manufacturer, at the time of the relevant sales, was aware of the particular purpose, for which the Barrier EIFS would be used.

TORT CLAIMS: ECONOMIC LOSS RULE: Rejecting the builder's claim that, "there was clear evidence that other property [in the affected homes] had been damaged by a defect in the product sold by [manufacturer]," the court, relying on *Morris*, 340 Md. 519(1995), properly granted summary judgment in manufacturer's favor based on its application of the economic loss rule, which "prohibits a plaintiff from recovering in tort for purely economic losses - losses that involve neither a clear danger or physical injury or death, nor damage to property other than the product itself.

LEGAL SUBROGATION: The trial court properly granted manufacturer's Motion for Summary Judgment, rejecting builder's claim that, because it had represented to homeowners that, "the homes were constructed with quality building materials," it had been compelled to replace the leaky Barrier EIFS and repair the damages it caused and, in doing so, it had "discharge[d] the obligations owed by Defendants to the Homeowners," and "become, by operation of law, subrogated to the rights and claims of such owners and . . . entitled to recover from Defendants for its discharge of their duties." Armed with the information that builder had filed suit against the applicators, that the latter, in turn, had sued the manufacturer and that the applicators had assigned their claims against the manufacturer to the builder, the jury properly determined that the applicators could be liable to the builder on a breach of warranty theory for the \$3,800,000 that the builder paid on behalf of the homeowners to repair the effective systems.

MANUFACTURERS'S CROSS-APPEAL: SUFFICIENCY OF THE EVIDENCE AS TO DAMAGES: Trial court properly found that there was sufficient evidence to submit the implied warranty claims assigned by the applicators to the builder to the jury, rejecting manufacturer's claim that the evidence as to damages was insufficient to establish that applicators suffered any damages or to establish which distributor sold the Barrier EIFS to which applicator.

PRIVITY BETWEEN APPLICATORS AND MANUFACTURER: Notwithstanding manufacturer's claim that the trial court erred by failing to

determine that applicators could not have recovered on their cross-claim against Parex for breach of the implied warranty of fitness because there was no privity of contract or its equivalent between the applicators and manufacturer, the jury's determination that the goods were defective may well have reflected a belief that the goods did not "[p]ass without objection in the trade under the contract description," or were not "of fair or average quality within the description." Md. Code Ann., Com. Law I § 2-314(2)(a) and (b).

STATUTE OF LIMITATIONS: FOUR HOMES DELIVERED PRIOR TO JUNE 14, 1997: Having failed to make a motion for judgment on the basis that the certificates of occupancy, issued prior to June 14, 1997, demonstrate that, as to the four model homes, suit is barred by limitations, manufacturer is precluded from pursuing that claim.

SETTLEMENT AGREEMENT: EFFECT ON DAMAGE AWARD: Trial court properly rejected assertion by manufacturer that any recovery by the builder on the assigned claims of the applicators should be barred because of the admissions of fault made by the applicators under the terms of the sum of agreement; trial court erred in permitting builder to recover an amount in excess of the \$725,000 settlement amount paid to applicators. ([i]f the contract is an "indemnity against liability," recovery from the indemnitor is allowed when judgment is entered against the indemnitee, even though it has not been paid, (the judgment rule), but if the contract is an "indemnity against loss or damage" (strict indemnity), the *indemnitee cannot recover from the indemnitor until payment is made or he has otherwise suffered actual loss or damage* (the prepayment rule)). *Roebuck v. Steuart*, 76 Md. App. 298, 307-08 (1988). See also 42 C.J.S. Indemnity §§ 22 and 23 (1991).

EXCLUSION OF IMPLIED WARRANTIES: Because manufacturer failed to provide a citation(s) to the record extract that demonstrates that it raised the issue before the trial judge, it has waived the contention, on appeal, that, "In agreeing to the 'General Conditions of Sale' which were appended to the contract and included in Exhibit 41, American EIFS "waived all warranties and agreed to indemnify [manufacturer] if suit were instituted against [it]."

REFERENCES TO SUBSEQUENT REMEDIAL MEASURES: In light of the curative instruction given to the jury and the fact that it was probably no secret, because of the abundant evidence that the Barrier EIFS system was defective, that its use would probably be discontinued, the trial judge did not abuse his discretion in denying manufacturer's motion for mistrial based on repeated references during the examination of witnesses, as well as

arguments to the jury, by counsel for builder, regarding remedial measures, including discontinuance of the use of the Barrier EIFS and regulations prohibiting its future use.

PRE-JUDGMENT INTEREST: Although there was evidence from which the jury could determine that the applicator were liable to the builder for damage to the subject homes, the jury was never informed as to whether the applicators paid builder for repairs or how much and, accordingly, there was no basis for the jury's award of interest for the loss of income from funds paid by the builder to the applicators.

Facts: In suit by builder for damage to seventy-seven newly constructed luxury homes against manufacturer of synthetic stucco material, the suppliers/distributors and the applicators, when the Barrier Exterior Insulation and Finish System (Barrier EIFS), which had been applied to the exterior of the homes, trapped water between the (Barrier EIFS) cladding and the wooden substrate, causing the wood to rot, for which the builder paid \$3,800,000 in damages to the homeowners. Having entered into a settlement with the suppliers/distributors and the applicators and received assignment of their claims against the manufacturer on the morning the matter was scheduled to go to trial, the builder proceeded against the manufacturer on the assigned claims of the suppliers/distributors and the applicators as well as in its own right. The following issues, presented at trial, were reviewed on this appeal.

Held: Pulte Home Corp.'s \$ 1.4 million verdict against the manufacturer of synthetic stucco used in some of its luxury houses was reduced in half.

Pulte's damages against Parex Inc. were capped by a deal Pulte had negotiated with suppliers, distributors and installers.

The agreement called for a consent judgment of \$ 5.2 million against the settling defendants, payment by their insurers of \$725,000, and an assignment of their rights against Parex. In exchange, Pulte agreed not to execute on the judgment.

Pulte's damages are limited to the recovery that [the suppliers, distributors and installers] could recover - that is, the amount they paid to settle the claims against them.

Pulte Home Corporation v. Parex, Inc. et al., No. 2122, September Term, 2005, decided May 24, 2007. Opinion by Davis, J.

WORKERS' COMPENSATION - CIRCUIT COURT APPEALS OF WORKER'S COMPENSATION COMMISSION ORDERS - RULE 1-203(c) DOES NOT APPLY TO SECTION 9-737 OF THE LABOR AND EMPLOYMENT ARTICLE TO EXTEND THE THIRTY-DAY PERIOD FOR FILLING A PETITION FOR JUDICIAL REVIEW OF THE COMMISSION'S ORDER.

Facts: Appellant, Rena Chance, was injured during the course of her employment with Washington Metropolitan Area Transit Authority ("WMATA"), appellee. Due to a mistake by her counsel, two identical claims for her injury were submitted to the Worker's Compensation Commission ("Commission"). Due to another mistake by her counsel, Chance's first and timely claim was then voluntarily dismissed. Upon realizing the error, Chance filed a motion with the Commission to reinstate the claim, which the Commission granted. Upon a petition for judicial review, the Circuit Court for Montgomery County vacated the Commission's order and remanded the matter for a new hearing on whether the Commission had the authority to reinstate the claim. The Commission held a hearing, found that it had the authority to reinstate the claim, and reinstated Chance's claim. The Commission's order reinstating Chance's claim was mailed on January 6, 2005. WMATA filed a second petition for judicial review on February 8, 2005, thirty-three days after the mailing of the Commission's order. Chance filed a motion to dismiss the petition, arguing that it was untimely filed. The circuit court denied the motion and then granted WMATA's motion for summary judgment.

Held: Reversed and remanded to the circuit court with the instructions to dismiss WMATA's petition for judicial review and to remand the case to the Commission. This Court held that Maryland Rule 1-203(c), which grants an additional 3 days to a prescribed time period, does not apply to Section 9-737 of the Labor and Employment Article, which provides an appealing party thirty days after "the date of the mailing of the Commission's order" to file a petition for judicial review in the circuit court. Rule 1-203(c) applies only when "service by mail" triggers the running of the prescribed time period. This Court determined that the "date of mailing," not "service by mail," commenced the running of the thirty-day appeal period under Section 9-737. Accordingly, because WMATA did not file its petition for judicial review within thirty days of the Commission's January 6, 2005 order, the petition was untimely and should have been dismissed.

Rena Chance v. Washington Metropolitan Area Transit Authority, No. 240, September Term 2006, filed April 4, 2007. Opinion by Woodward, J.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated May 30, 2007, the following attorney has been suspended for 60 days by consent to commence on July 1, 2007, from the further practice of law in this State:

LINDA SUE SPEVACK

*

By an Order of the Court of Appeals of Maryland dated July 2, 2007, the following attorney has been disbarred by consent from the further practice of law in this State:

GEOFFREY SEMMES HAMILL

*

By an Order of the Court of Appeals of Maryland dated July 2, 2007, the following attorney has been replaced upon the register of attorneys in this Court as of July 12, 2007:

CLARENCE F. STANBACK, JR.

*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective July 24, 2007:

RANDALL E. GOFF

*

By an Opinion and Order of the Court of Appeals of Maryland dated July 30, 2007, the following attorney has been disbarred from the further practice of law in this State:

REX B. WINGERTER

*

By an Opinion and Order of the Court of Appeals of Maryland dated July 30, 2007, the following attorney has been suspended for ninety days from the further practice of law in this State:

ANGELA THERESE FLOYD

*