Amicus Curiarum

VOLUME 25
ISSUE 8 AUGUST 2008
A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

APPEAL AND ERROR - REVIEW - PRESERVATION

Facts: David Robinson was convicted in the Circuit Court for Montgomery County of sexual abuse of V.O., a minor. At the time of the incident, Robinson was V.O.'s mother's sister's husband – her uncle by marriage. After the incident, but before trial, Robinson and V.O.'s aunt divorced.

The issue before Court of Appeals was the interpretation of the statutory definition of "family member" and whether a divorced uncle is a family member. Before the Court of Appeals, appellant argued that the definition of "family member" as contained in § 3-601 of the Criminal Law Article, Md. Code (2002, 2006 Cum. Supp.) is unconstitutionally vague. "Family member" is defined as "a relative of a child by blood, adoption, or marriage." *Id.* Appellant also contended that there was insufficient evidence to convict him of child sexual abuse because he does not fall within the definition of "family member." Lastly, in the alternative, appellant argues that, if the Court were to find his argument was not preserved, he received ineffective assistance of counsel.

Held: Judgment of the Circuit Court for Montgomery County affirmed. The Court of Appeals held that neither the statutory construction question raised on appeal by appellant nor the sufficiency of the evidence argument was preserved for appellate review.

A reviewing court, ordinarily, will not consider any point or question unless it was clearly raised in and decided by the trial court. Md. Rule 8-131 (a). The trial court did not have a chance to decide whether or not defendant's status as an uncle by marriage brought him within the definition of "family member." Also, the Court's strong general policy against unnecessarily deciding constitutional questions means that, except in very limited circumstances not present in this case, the Court will not address constitutional issues not raised below. *Burch v. United Cable,* 391 Md. 687, 695, 895 A.2d 980, 984 (2006). Therefore, this Court found appellant's argument that the definition of "family member" contained in § 3-601 and his sufficiency of the evidence argument were not preserved for appellate review. Finally, the Court declined to address appellant's claim of ineffective assistance of counsel on direct review, following the long-standing preference for consideration

of ineffective assistance of counsel claims on post-conviction.

David Robinson v. State of Maryland, No. 71, September Term, 2007, filed April 15, 2008. Opinion by Raker, J.

***

ATTORNEYS - DISCIPLINE - MARYLAND RULES OF PROFESSIONAL CONDUCT: 1.1 (COMPETENCE), 1.3 (DILIGENCE), 1.5 (FEES), 1.15 (DECLINING OR TERMINATING REPRESENTATION), 8.1 (BAR ADMISSION AND DISCIPLINARY MATTERS), AND 8.4 (MISCONDUCT).

Facts: The Attorney Grievance Commission of Maryland, Petitioner, acting through Bar Counsel, filed a Petition For Disciplinary or Remedial Action against Respondent, Ernest S. Nichols on August 14, 2007. The Petition alleged that Nichols violated Rules 1.1 (Competence), 1.3 (Diligence), 1.5 (Fees), 1.15 (Safekeeping Property), 1.16 (d) (Declining or Terminating Representation), Rule 8.1 (b) (Bar Admission and Disciplinary Matters), and 8.4 (c) (Misconduct) of the Maryland Rules of Professional Conduct ("MRPC") during his representation of Charles Caralle in connection with a personal injury claim and in Chapter 7 bankruptcy proceedings.

The Circuit Court for Baltimore County held an evidentiary hearing and issued an opinion rendering its findings of fact and conclusions of law. The hearing judge found that Charles Caralle retained Nichols to represent him in connection with personal injuries sustained in an automobile accident and, later, to file a petition for discharge in bankruptcy.
Nichols prepared and filed the bankruptcy petition, which did not list Mr. Caralle's personal injury claim as an asset. Nichols later disclosed the personal injury claim to the Bankruptcy Trustee at the meeting of creditors. The Trustee later followed up with Nichols regarding the settlement of the personal injury claim. Nichols communicated to the Trustee that it was unlikely that Mr. Caralle would receive any money from the settlement

because his medical bills had exceeded his insurance policy limits. Thereafter, the Bankruptcy Court discharged Mr. Caralle's debts in late 2003, prior to the settlement of Mr. Caralle's personal injury claim.

The Trustee later learned from Nichols that Nichols had negotiated a settlement for $100,000.00, disbursed $43,279.29 to himself for attorney's fees and expenses, disbursed $30,000.00 to Mr. Caralle, and retained the remaining portion of the settlement proceeds in his escrow account to pay medical bills. The Trustee informed Nichols that the proceeds of the settlement of the personal injury claim were an asset of the Bankruptcy estate and that Nichols could not take a fee without approval of the Bankruptcy Court. Nichols later turned over the remaining funds to the Trustee, but did not return his fee or seek Bankruptcy Court approval of his fee.

In August 2005, Mr. Caralle discharged Nichols and directed him to send a copy of his file to Mr. Caralle's new attorney. The hearing judge found that Nichols took an inordinate amount of time to forward a copy of his files to the new attorney.

During the Attorney Grievance Commission's investigation of Mr. Caralle's complaint of Nichols, Nichols failed to produce requested documentation regarding his escrow account and the transactions relating to Mr. Caralle's case.

The Circuit Court determined that Nichols had violated Rules 1.1, 1.3, 1.5, 1.15, 1.16, and 8.1, but not Rule 8.4 (c). Neither Nichols nor Bar Counsel filed exceptions to the hearing court's findings of fact or conclusions of law.

Held: Indefinite Suspension. In considering the proper sanction, the Court of Appeals relied on prior cases concerning the unauthorized taking of fees. The Court noted that Nichols' misconduct was due neither to dishonesty nor to criminal conduct, but rather due to lack of diligence as well as incompetence in bankruptcy matters. The Court also noted that Nichols had acknowledged his misconduct during the course of the proceedings and has never been sanctioned by the Court of Appeals for professional misconduct. The Court, however, was concerned that Nichols had not taken adequate steps to remediate his conduct, including seeking approval from the Bankruptcy Court for the payment of his fee.

Attorney Grievance Commission v. Ernest S. Nichols, Misc. Docket, AG No. 25, September Term 2007, Opinion by Greene, J., filed June 17, 2008.

***

CONTRACT LAW - MUTUAL MISTAKE - A MUTUAL MISTAKE OF LAW IS NOT GROUNDS FOR RESCINDING A CONTRACT.

CONTRACT LAW - UNJUST ENRICHMENT - WHERE A CONTRACT FULLY ADDRESSES A SUBJECT MATTER, A PARTY TO THE CONTRACT CANNOT CLAIM UNJUST ENRICHMENT.

CONTRACT LAW - WAIVER OF RIGHTS - A WAIVER OF RIGHTS CONTAINED WITHIN A CONTRACT WILL NOT BE INTERPRETED TO WAIVE THE RIGHT TO ENFORCE THE VERY CONTRACT IN WHICH IT IS CONTAINED.

Facts: Margaret Virginia Janusz and Francis Peter Gilliam were married on August 5, 1996. The parties entered into a voluntary separation agreement on February 14, 2000. On March 1, 2000, the Circuit Court for Montgomery County entered a Judgment of Absolute Divorce, and the agreement was incorporated, but not merged into the Judgment. Under the agreement, Mr. Gilliam was to maintain in effect his survivor's annuity through the federal Civil Service Retirement System, so that the monthly benefits would be available to Ms. Gilliam upon his death. It also provided that the agreement may be not be modified, except in writing and executed with the same formality as the original agreement. On April 13, 2000, the Court executed a Court Order Acceptable for Processing ("COAP"), intended to implement the survivor's annuity clause, which provided, in part, that if the order was found to be unacceptable for processing, the parties would renegotiate their agreement to comply with their intent.

Subsequently, Ms. Janusz discovered that she was ineligible to become a beneficiary under the survivor's annuity because she was a former, and not a current, spouse of Mr. Gilliam. On January 25, 2006, Ms. Janusz filed claims in the Circuit Court for Montgomery County, for rescission, unjust enrichment, and attorney's fees. The trial court determined that a mistake of law was not a proper basis for rescission, and that Ms. Janusz relinquished her claim to enforce the contract as a result of a waiver provision contained in the agreement. Ms. Janusz filed an appeal to the Court of Special Appeals, but before any proceedings in that Court, the Court of Appeals granted certiorari.

Held: The Court of Appeals neither affirmed nor reversed, and remanded to the Circuit Court for further proceedings. The Court of Appeals held that a mutual mistake of law was not grounds for rescinding, or reforming the contract at issue. Because the trial court did not determine whether the COAP was an effective modification, the Court did not determine whether or not the agreement expressly provided for the situation at hand, in which case the claim of unjust enrichment would be barred.

Finally, the court addressed the trial court's contention that the claim was barred by the waiver language in the agreement. As the Court reasoned, contracts are to be interpreted as a whole, and because the waiver language was contained in the agreement, it could not be interpreted to waive any right to enforce the very agreement in which it was contained. The Court of Appeals remanded the case to the trial court to determine whether the COAP was an effective modification of the agreement and whether Mr. Gilliam's attorney had authority to sign the COAP on his client's behalf.

Janusz v. Gilliam, No. 95, September Term, 2007. Opinion filed on May 9, 2008 by Greene, J.

***

CRIMINAL LAW - EVIDENCE - HEARSAY EXCEPTION - WHERE THE CIRCUMSTANCES INDICATE THAT A DECLARANT DID NOT UNDERSTAND THAT HER STATEMENTS WERE BEING GIVEN IN CONTEMPLATION OF MEDICAL DIAGNOSIS OR TREATMENT, THEY WILL NOT BE ADMISSIBLE UNDER THE HEARSAY EXCEPTION FOR MEDICAL DIAGNOSIS OR TREATMENT, EVEN IF GIVEN TO A MEDICAL PRACTITIONER.

EVIDENCE - HEARSAY EXCEPTION - A STATEMENT TO A FORENSIC NURSE AS TO THE IDENTITY OF THE PERSON WHO ALLEGEDLY ASSAULTED A DECLARANT DOES NOT QUALIFY UNDER THE HEARSAY EXCEPTION FOR MEDICAL DIAGNOSIS OR TREATMENT BECAUSE IT IS RARELY RELEVANT TO TREATMENT OR DIAGNOSIS.

Facts: On October 7, 2004, Frederick Roscoe Coates was indicted for Rape in the Second Degree, Sexual Offense in the Second Degree, and Child Abuse. The alleged victim, Jazmyne T., was a minor who testified at trial. Another witness at trial was a forensic nurse, Heidi Bresee, who had previously interviewed and examined Jazmyne T. Bresee testified that, during her interview of Jazmyne T., the child told her that Coates "put his private inside [her] private." The State attempted to offer this evidence pursuant to Md. Rule 5-803 (b) (4), which allows hearsay made for the purpose of medical diagnosis or treatment. Coates

objected, but the trial court allowed the testimony, and Coates was convicted on May 25, 2005.

Coates filed an appeal in the Court of Special Appeals, which reversed the conviction on the grounds that Bresee's testimony regarding Jazmyne T.'s statements was improperly admitted, and prejudicial. Thereafter, the State filed a petition for writ of certiorari in the Court of Appeals, which it granted.

Held: Affirmed. The Court held that because Jazmyne T. did not present to nurse Bresee with outward signs of injury, that the examination took place over one year after the alleged abuse ended, and her young age, it was unlikely that Jazmyne T. understood that her statements were to be used for medical treatment or diagnosis. As a result, the statements did not qualify under the hearsay exception embodied in Md. Rule 5-803 (b) (4). Furthermore, the Court held that, since the identity of an alleged abuser is rarely of medical importance, Jazmyne T.'s statement identifying Coates was inadmissible under Md. Rule 5-803 (b) (4).

State of Maryland v. Frederick Roscoe Coates, No. 104, September Term, 2007. Opinion filed on June 13, 2008 by Greene, J.

***

CRIMINAL LAW - FIRST DEGREE ASSAULT - MITIGATION DEFENSES

Facts: These consolidated cases present the question of whether, in light of the 1996 assault statutes and the recognition of first degree assault as a proper foundation for felony murder in *Roary v. State*, 385 Md. 217, 867 A.2d 1095 (2005), the Court of Appeals should recognize the mitigation defenses of imperfect self-defense and hot-blooded response to adequate provocation as applicable to the crime of first degree assault.

Petitioner Christian was charged with first degree assault

and related charges in the Circuit Court for Baltimore County. The charges arose out of a confrontation in a parking lot that resulted in Christian stabbing another person with a knife. At a jury trial, petitioner requested a jury instruction on imperfect self-defense as a defense to the first degree assault charge. The trial court denied the request. Petitioner was found guilty of first degree assault, second degree assault, and carrying a dangerous and deadly weapon openly with the intent to injure, and the court sentenced him to a term of incarceration of ten years. Christian noted a timely appeal. In an unreported opinion, the Court of Special Appeals affirmed the conviction, holding that the denial of the requested instruction was not error because imperfect self-defense was inapplicable to the crime of first degree assault.

Petitioner Kalilah Romika Stevenson was charged with first degree assault and related charges in the Circuit Court for Wicomico County. The charges arose after a disagreement between Stevenson and her husband, from whom she was separated, that resulted in the stabbing of her husband. The case proceeded to trial before a jury. The trial court instructed the jury on self-defense, but denied petitioner's request that the jury be instructed on the mitigation defense of hot-blooded response to mutual combat, a form of legally adequate provocation, on the basis that the defense was inapplicable to the charge of first degree assault. The jury convicted Stevenson of first degree assault, second degree assault, reckless endangerment, and malicious destruction of property, and the court sentenced her to a term of incarceration of ten years for first degree assault. Petitioner noted a timely appeal. The Court of Special Appeals affirmed the conviction, holding that hot-blooded response to adequate provocation was not a recognized defense to first-degree assault. *Stevenson v. State*, 163 Md. App. 691, 696, 882 A.2d 323, 326 (2005). The Court of Special Appeals stated as follows:

> "Although we acknowledge that appellant's position is neither illogical nor unreasonable and that other states have legislatively approved adequate provocation as a mitigating circumstance in assault cases, we cannot ignore the unwavering line of appellate decisions confining this mitigation defense to murder and its 'shadow' offenses. Maryland, at least for now, confines consideration of mitigation in assault cases to the discretion of the court at sentencing. If any change is to be made, it must be done by the Court of Appeals or the legislature. We shall affirm the judgments of the circuit court, confident

> that we have not heard the last of this matter."

Id. at 693, 882 A.2d at 324-25 (footnote omitted).

Held: Reversed and remanded to Court of Special Appeals with directions to remand to the Circuit Court for Baltimore City and Wicomico County for a new trial. The Court of Appeals held that the mitigation defenses of imperfect self-defense and hot-blooded response to adequate provocation may apply to mitigate first degree assault to second degree assault.

The Court first noted that traditionally, the mitigation defenses of imperfect self-defense and hot-blooded response to adequate provocation have applied only to cases of criminal homicide and its shadow forms, such as attempted murder, as well as the former crime of assault with intent to murder. The reasoning behind the limited application of mitigation defenses is that mitigation defenses, in effect, serve to negate malice, and thus are applicable only to crimes where the intent of malice is relevant. In *Richmond v. State*, 330 Md. 223, 231, 623 A.2d 630, 634 (1993), the Court explained as follows:

> "In the context of murder cases, this Court has said that malice means the presence of the required malevolent state of mind coupled with the absence of legally adequate justification, excuse, or circumstances of mitigation. When correctly defined in criminal cases not involving murder, malice does not involve proof of the absence of mitigation. Simply put, mitigation that will reduce one offense to another is a concept peculiar to homicide cases."

The Court of Appeals reasoned that the landscape with respect to *Richmond's* limitation on mitigation defenses for assault changed significantly after *Roary v. State*, 385 Md. 217, 867 A.2d 1095 (2005). *Roary* held that first degree assault could serve as a predicate crime to support felony murder. The application of the felony murder rule relies on the imputation of malice from the underlying predicate felony, thus the result of *Roary* is that the statutory crime of first degree assault could supply the malice necessary to charge a defendant with murder if the victim dies. Where the intent to commit first degree assault suffices to imply the malice required for a murder conviction, the limitations of *Richmond* are no longer viable, and mitigation defenses should be available for charges of first degree assault.

Daniel M. Christian v. State of Maryland, No. 26, and *Kalilah Romika Stevenson v. State of Maryland*, No. 95, September Term, 2005, filed June 30, 2008. Opinion by Raker, J.

***

CRIMINAL LAW - JURY INSTRUCTIONS - REFUSAL TO GIVE A REQUESTED INSTRUCTION ON DRUG USER OR ADDICT CREDIBILITY

Facts: This case presents the question of whether a trial court erred in refusing to give a jury instruction requested by the defendant as to the evaluation of the testimony of a witness who uses or is addicted to drugs. The requested instruction stated that the testimony of a particular witness "must be examined with greater scrutiny than the testimony of any other witness."

Petitioner Dickey was charged with first degree murder, attempted first degree murder, conspiracy to commit murder, and related charges in the Circuit Court for Baltimore City. Identification of the shooter was the primary issue in the case. The State called four witnesses, one of whom testified that he was a drug addict and used heroin on the day on which the shooting took place. At the close of evidence, defense counsel requested that the following instruction be given:

> "There has been evidence introduced at the trial that the government (or defendant) called as a witness a person who was using (or addicted to) drugs when the events he observed took place or who is now using drugs. I instruct you that there is nothing improper about calling such a witness to testify about events within his personal knowledge.
>
> "On the other hand, *his testimony must be examined with greater scrutiny than the testimony of any other witness.* The testimony of a witness who was using drugs at the time

> of the events he is testifying about, or who is using drugs (or an addict) at the time of his testimony may be less believable because of the effect the drugs may have on his ability to perceive or relate the events in question.
>
> "If you decide to accept his testimony, after considering it in light of all the evidence in this case, then you may give it whatever weight, if any, you find it deserves."

The Circuit Court declined to give the jury the proposed instruction, reasoning that other instructions given, on witness credibility and accuracy of a witness's memory, fairly covered the material of the requested instruction. Dickey was convicted and appealed to the Court of Special Appeals. In an unreported opinion, the Court of Special Appeals affirmed, holding that the refusal to grant the instruction was error, but that the error was harmless. Dickey appealed to the Court of Appeals and argued that the error was not harmless. The State cross-petitioned and argued that the trial court did not err in refusing to give the requested instruction.

Held: Affirmed. The Court of Appeals held that the trial court did not err in refusing to give the requested instruction. Maryland Rule 4-325 requires that a requested jury instruction be given only where: 1) the instruction is a correct statement of law; 2) the instruction is applicable to the facts of the case; and 3) the content of the instruction is not fairly covered elsewhere in instructions actually given. The Court found that the instruction was not a correct statement of law and was fairly covered by other instructions given on witness credibility and identification of the defendant. This view comports with the majority of federal courts, where the refusal to give a drug user or addict instruction is not error.

The Court of Appeals reasoned that the instruction's language stating that the testimony of a drug user or addict "must be examined with greater scrutiny than the testimony of any other witness" was not correct as a matter of law. There is no rational reason for examining the testimony of a drug user or addict witness with greater scrutiny than any other witness; other instructions on factors affecting witness credibility call for the jury to examine such testimony merely "with caution."

In addition, a requested instruction on the ability of a drug user or drug addict witness's ability to perceive and recall events

was fairly covered by other instructions on witness credibility given by the trial court. Instructions given asked the jury to consider the witness's opportunity to see or hear events, the accuracy of the witness's memory, the witness's state of mind, and any other circumstances surrounding the event.

The Court of Appeals noted that, on the other hand, had defense counsel submitted a properly worded instruction advising the jury that if the jury found that a witness was addicted to drugs and had been using drugs during the relevant time in question, the jury should consider the witness's testimony with care and caution, it would have been within the court's discretion to do give the instruction and would not have been error.

Desmond Ellison Dickey v. State of Maryland, No. 23, September Term, 2007, filed April 15, 2008. Opinion by Raker, J.

***

LABOR & EMPLOYMENT - ATTORNEYS' FEES - A PLAINTIFF MAY RECOVER ADDITIONAL ATTORNEYS' FEES INCURRED WHILE APPEALING FROM THE METHODOLOGY USED TO DETERMINE THE ORIGINAL ATTORNEYS' FEE AWARD.

Facts: In 2001, an employee sued her employer in the Circuit Court for Montgomery County for violating Maryland's Wage and Payment Laws, §§ 3-501 et seq. and §§ 3-401 et seq. of the Labor and Employment Article, seeking recovery of unpaid bonuses, overtime, and damages. A jury returned a verdict in favor of the employee for $6,841 in bonuses and $4,937 in overtime pay. The employer satisfied the judgment. Thereafter, pursuant to the fee-shifting provisions of the Wage and Payment Laws, the employee filed a motion for attorneys' fees amounting to $63,399.50. The court granted the motion, ordering the employer to pay 40% of the judgment, $4,711, as attorneys' fees, plus $1,552 in costs.

The employee noted an appeal to the Court of Special Appeals, but the Court of Appeals, on its own motion and in advance of proceedings in that court, issued a writ of certiorari, Friolo v. Frankel, 371 Md. 261, 808 A.2d 806 (Table) (2002), and reversed.

Friolo v. Frankel, 373 Md. 501, 819 A.2d 354 (2003). The Court of Appeals held that the lodestar approach was the proper method of determining a reasonable attorneys' fee under the Wage and Payment Laws. On remand, in addition to fees incurred during initial litigation, the employee also sought attorneys' fees incurred during the appeals process, to a total of $127,810. The circuit court ordered the employer to pay attorneys' fees in the amount of $65,348. Both parties filed motions to alter or amend the judgment, and the employer additionally moved to stay its enforcement. The court denied all post-trial motions, whereupon the parties appealed.

The Court of Special Appeals vacated the attorneys' fee award, remanding the case once again, for proper and clear application of the lodestar approach, and concluding that a plaintiff is not entitled to an award of attorneys' fees under the applicable fee-shifting statutes for post-judgment services that solely dispute the amount of a trial court's award. Frankel v. Friolo, 170 Md.App. 441, 452, 907 A.2d 363, 370 (2006).

The petitioner filed a petition for writ of certiorari with the Court of Appeals, seeking reversal of the judgment of the Court of Special Appeals insofar as it denied the petitioner attorneys' fees incurred during the appellate process; the petition was granted. Friolo v. Frankel, 396 Md. 11, 912 A.2d 648 (Table) (2006).

Held: Affirmed. Remanded to the Court of Special Appeals for Remand to the Circuit Court for Montgomery County for Further Proceedings. Where trial has concluded, judgment has been satisfied, and attorneys' fees for those proceedings have been awarded, a plaintiff may, consistent with the purpose of Maryland's Wage and Payment Laws, recover additional attorneys' fees incurred while appealing from the methodology used to determine the original attorneys' fee award.

Joy Friolo v. Douglas Frankel, M.D., et al., No. 107, September Term, 2006, filed February 27, 2008. Opinion by Bell, C.J.

***

MECHANICS'LIEN - DESCRIPTION OF PROPERTY

Facts: Appellants, the Arfaas, contracted with a general contractor, a nonparty to this case, who in turn contracted with Appellee, Martino d/b/a Do-It-All Construction, Inc., to perform repairs to their fire-damaged residence. When the general contractor failed to pay Appellee, Appellee filed a petition for a mechanics' lien against the Appellants' property, which consists of 73.77 acres of land, on which the residence is situated, along with two secondary structures. Appellee attached to the petition as exhibits, (1) the Maryland SDAT record describing the property; (2) Appellee's affidavit; (3) Appellee's notice, to Appellants, of his intention to claim a lien; (4) construction notes, invoices and change orders; and (5) 141 photocopies of photographs of the Appellants' residence at various stages of construction, from different angles and showing unique agricultural features, e.g., columns. The trial court dismissed the petition for failure to adequately identify the building upon which the lien was sought as required by Maryland Code (1974, 2003 Repl. Vol.) § 9-105 of the Real Property Article ("RP"). The Court of Special Appeals vacated the judgment of the lower court, holding that the petition adequately identified the residence, which, on the basis of the petition exhibits, could not be confused with the secondary structures.

Held: Judgment Affirmed, with Costs. Under RP § 9-105, a petition for a mechanics' lien, together with attached documents, may cumulatively satisfy its requirements. The failure of a property owner to challenge notice by way of posting, which, under RP § 9-104(e), is valid only if placed on the "door or other front part of the building" subject to the lien, is persuasive, supplemental, evidence that property has been adequately identified. A subcontractor who does work on a building situated on a large lot of land may, under RP § 9-106, apply to the circuit court for the county to designate the boundaries of land appurtenant to the building. See Attorney Grievance Comm'n v. Whitehead, 390 Md. 663, 671, 890 A.2d 751, 756 (2006); Board of Physician Quality Assur. v. Mullan, 381 Md. 157, 166, 848 A.2d 642, 648 (2004); Brodsky v. Brodsky, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990). The failure to do so, however, is not a fatal defect in a petition for a mechanics' lien. See Fulton v. Partlett, 104 Md. 62, 71, 64 A. 58, 61 (1906); Caltrider v. Isberg, 148 Md. 657, 663, 130 A.5, 55 (1925)

This case presented two issues for resolution: (1) whether the Petition for Mechanics' Lien, filed by Appellee, sufficiently, adequately and legally described and identified the building to be subjected to the lien, as required by RP § 9-105, so as to

withstand Appellants' motion to dismiss; and (2) whether, pursuant to RP § 9-103 and its implementing rule, Maryland Rule 12-308, when the building that is subject to a mechanics' lien arguably is situated on more land than reasonably necessary for its use and enjoyment, the party seeking the mechanics' lien has a duty to designate the boundaries of land. We decide that, in this case, Appellee's petition for a mechanics' lien satisfied RP § 9-105, and Appellee had no duty, pursuant to RP § 9-103, to designate the boundaries of land adjacent to the subject building that is "necessary for the ordinary and useful purposes of the building." Either an owner or a subcontractor may designate such boundaries under RP § 9-103(b). Moreover, to interpret boundary designation as mandatory for subcontractors would contradict RP § 9-106.

Manoochehr Arfaa et ux. v. Christopher Martino, d/b/a Do-It-All Construction, Inc., No. 101, September Term, 2006, filed April 18, 2008. Opinion by Bell, C.J.

***

TAXATION - TAX REFUNDS - INTEREST ON A REFUND

Facts: Science Applications International Corporation (SAIC) filed an amendment of its 1999 Maryland corporate income tax return seeking the exclusion of capital gains received from the sale of shares of stock of Network Solutions, Inc. that it had held for investment purposes. The Comptroller initially denied SAIC's request for a refund on the grounds that "the State of Maryland does not allow" the exclusion. The Tax Court reversed the Comptroller and allowed the refund and the Comptroller paid the refund without interest. SAIC filed a motion in the Tax Court to compel the Comptroller to pay interest on the refund, relying on the provisions of § 13-603(b)(2)(1) of the Tax General Article, Md. Code (1988, 2004 Repl. Vol.). The Tax Court held that interest was due on the refund because SAIC's mistake on its original return was "attributable to the State" within the meaning of § 13-603(b)(2)(1) of the Tax General Article, Md. Code (1988, 2004 Repl. Vol.).

The Comptroller petitioned for judicial review in the Circuit

Court for Baltimore City, arguing that the Tax Court did not have jurisdiction over a motion to compel interest on a refund, that SAIC's claim was barred by the principles of *res judicata*, and that the Tax Court erred in finding SAIC's mistake was "attributable to the State." The Circuit Court affirmed the Tax Court. The Comptroller noted a timely appeal to the Court of Special Appeals and the Court of Appeals granted certiorari on its own initiative.

Held: Affirmed. The Court of Appeals held that the Tax Court did not err in finding it had jurisdiction to hear SAIC's motion to compel interest on the refund because §§ 3-103 and 13-603 of the Tax General Article, Md. Code (1988, 2004 Repl. Vol.), when read together, indicate a direct relationship between a disallowance of a refund and the question of whether or not interest on the refund is due. The Court held also that SAIC's claim was not barred by principles of *res judicata*, reasoning that because § 13-603 provides interest "shall" be paid on the refund unless a statutory exception applies, SAIC could not have known it needed to litigate a possible denial of interest in the first action when it believed it was entitled to that interest, and, thus, believed it would receive the interest payment along with the refund payment.

Finally, the Court of Appeals held that the Tax Court did not err in finding that SAIC's mistake in including the gain in its original return was "attributable to the State," thus requiring the Comptroller to pay interest on the refund. The Tax Court concluded that SAIC's mistake was "attributable to the State" because SAIC used "reasonable judgment under the circumstances, was led by the laws, regulations, or policies expressed by the State to the mistaken conclusion that tax was owed."

The Court of Appeals examined the plain language of the statute and its prior cases, concluding that for an exception to the general rule that interest must be paid on a refund to apply, the claimant must have both 1) made a mistake in its original filing and 2) the mistake is not attributable to the State or a unit of State government. The Comptroller argued that, unless the State compelled the mistake through assessment or other direct intervention, any taxpayer mistake would not be attributable to the State. The Court considered its prior reasoning, in dicta, in *Davidson v. Comptroller*, 234 Md. 269, 270, 199 A.2d 360, 360 (1964), a case in which the taxpayer was required to pay the amount because of an assessment. The Davidson Court opined that such an overpayment was not a mistake because it was compelled by the State. The Court of Appeals, finding the Davidson Court's reasoning sound, found the Comptroller's interpretation of § 13-603 would render the phrase "not attributable to the State" superfluous. The Court reasoned that if an assessment means there was no taxpayer mistake, there would be no case in which a taxpayer

mistake *would* be attributable to the State under the Comptroller's interpretation.

The Court of Appeals deferred to the factual inferences the Tax Court made in reaching its conclusion that SAIC's mistake was "attributable to the State." The Tax Court is a state agency. §3-102 of the Tax General Article, Md. Code (1988, 2004 Repl. Vol.). The Court defers to agencies' factual inferences. *Comptroller v. Citicorp*, 389 Md. 156, 163, 884 A.2d 112, 116 (2005). The Court held that the Tax Court did not err in finding the Comptroller owed SAIC interest on the refund.

Comptroller of the Treasury v. Science Applications International Corporation, No. 101, September Term, 2007, filed June 16, 2008. Opinion by Raker, J.

***

TAXATION – MARYLAND SALES AND USE TAXES – COMMERCE CLAUSE – COLLECTION OF TAX BY COMMON CARRIER FOR INTERSTATE TRANSACTION – IF A COMMON CARRIER EXCEEDS ITS DELIVERY ROLE BY TAKING ACTIONS NOT NORMALLY ASSOCIATED WITH OR REQUIRED OF A COMMON CARRIER WITH REGARD TO AN INTERSTATE DELIVERY OF GOODS OR INFORMATION, IT MAY BE DEEMED AN AGENT OR CO-VENDOR WITH AN OUT-OF-STATE VENDOR AND BECOME CO- RESPONSIBLE FOR COLLECTION AND REMITTANCE OF A SALES AND USE TAX CORRESPONDING TO THE DELIVERY.

Facts: Telephone numbers beginning with the 900 area code are assigned by the Federal Communications Commission (FCC) to telecommunications service providers, such as AT&T. Designation of a 900 area code reflects that information or services are being transferred over the carrier's lines. The telecommunications provider markets these lines to information providers who pay a tariffed rate to the telecommunications provider for carriage of the information services over an assigned line. When the end-consumer dials a 900 number, he or she is charged a fee by the information vendor. Typically, this fee is included on, or as an

insert to, the consumer's monthly telephone bill.

Four parties participated in the transmission of each of the 900 number calls at issue in this case: the out-of-state information vendor, the local exchange carrier, the long distance carrier (AT&T), and a Maryland consumer who placed the call. The out-of-state information vendor is the party who offered the information for sale and decided what that information would be, created the content of the messages (including advertisements and scripts used by the persons providing the information to the consumers), determined the price to charge for the information, and marketed the 900 service to customers. The out-of-state information vendor purchased telecommunications services (transport) from the long distance carrier, AT&T. The out-of-state information vendor was responsible for payment to AT&T of a preset rate, found in and prescribed by tariffs published with either or both the FCC and the Maryland Public Service Commission. In short, the consumer dialed an AT&T-distributed 900-type number, a local carrier (such as Verizon) relayed the call to AT&T who, at a tariffed rate, relayed it to the out-of-state information vendor, and the out-of-state information vendor charged the customer for providing information.

As an option, an out-of-state information vendor also may use the carrier for billing and collection services for the 900-line services. In a majority of the transactions at issue here, AT&T generated a bill by combining its records of the length of the call made by the Maryland consumer with the information vendor's charge to the consumer. This charge was then included on, or with, the customer's telephone bill and labeled non-telecommunication charges. When the customer paid for the information services, the carrier passed on the funds to the information vendor, less the fees AT&T charged for carrier, billing/collection, and arbitration services.

Since 1992, the Maryland General Assembly imposed a tax on the sale or use in Maryland of area code 900 telecommunication services. The consumer/purchaser of the taxed goods or services is obligated to pay the tax and the "vendor" of the service is obligated to collect and remit it to the Comptroller. Failure to collect the tax may result in the vendor being responsible itself for payment of the tax. According to the statute, an out-of-state vendor may be liable if, although located outside of Maryland, it has an agent, canvasser, representative, salesman, or solicitor operating in the state for the purpose of delivering, selling, or taking orders for tangible personal property or a taxable service. The Comptroller is authorized to hold an agent jointly responsible for collection of the tax.

On 17 May 2001, the Maryland Comptroller of the Treasury completed an audit and assessed to AT&T $5,160,899.45, plus interest, in sales and use taxes for 900 number services completed over its network from 1 January 1992 to 28 February 2001. AT&T applied for a revision (elimination) of the assessment, arguing that it was not a vendor or an agent of a vendor. Instead, according to AT&T, the out-of-state information vendors were the sole statutory parties responsible for collecting and remitting the tax. The Comptroller held a hearing on 12 July 2001 at which AT&T's application for revision was denied. The Comptroller found that AT&T was a co-vendor, or at least the agent of a vendor, of 900 telecommunication services responsible for collecting and remitting the sales tax, together with the information vendor.

AT&T appealed the assessment to the Maryland Tax Court and, on 17 and 18 March 2004, a hearing was held. The Comptroller asked the Tax Court to affirm his decision to assess to AT&T the tax because AT&T was either a co-vendor of the 900 number services or an agent of the information service vendors. AT&T advanced several counter-arguments: 1) it was not a vendor or an agent, but merely a regulated provider of telecommunication services (common carrier) to the content vendors; 2) it was exempt from any responsibility for the tax, pursuant to the Commerce Clause of the United States Constitution, as a common carrier; 3) for taxing purposes, an insufficient nexus existed between AT&T's 900 number activities and the State of Maryland; and 4) the taxing statute was unconstitutionally vague. On 3 January 2005, the Tax Court rejected each of AT&T's contentions, concluding instead that AT&T's "function greatly exceeded that of a common carrier" and that AT&T "acted with the content providers in every step of the transaction[s]." The administrative agency determined further that the taxing statute was not unconstitutionally vague and that a sufficient nexus existed between AT&T and Maryland because AT&T has many connections with the State, although none specifically with regard to the 900 number services.

AT&T sought judicial review in the Circuit Court for Baltimore City. It again argued that it was a common carrier that could not be burdened constitutionally with either collection or remittance responsibilities for the state tax. Alternatively, AT&T argued that the statute was unconstitutionally vague and that the Tax Court's decision did not set out clearly the law and facts on which it relied to conclude that AT&T acted as a co-vendor or an agent of a vendor. Although the Circuit Court agreed that the Tax Court's opinion was not a "model of clarity," it affirmed the agency decision on the grounds that AT&T was both a co-vendor and an agent of a vendor. The court rejected AT&T's constitutional claims.

AT&T appealed to the Court of Special Appeals. It repeated

its argument that it acted merely as a common carrier, exempt by virtue of the Commerce Clause from Maryland tax collection or remittance responsibilities. The intermediate appellate court concluded, however, that AT&T's role exceeded that of a common carrier. To support this result, the Court of Special Appeals relied on a summary of factual findings rendered by the Tax Court. According to the summary, AT&T 1) contracted with the information providers to provide a 900 number; 2) reviewed the advertisements of any information provider with whom it contracted; 3) reviewed the preamble messages and content that the information provider delivered to the consumers; 4) provided transport of the information providers' messages over part of its network; 5) provided billing and collection services for many (but not all) of the information providers with which it contracted; 6) provided dispute resolution services for the information providers and Maryland consumers; and 7) received funds for the transport, dispute resolution, and billing/collection services it provided. Thus, the court determined that AT&T's total involvement in providing the 900 number services was adequate to support the Comptroller's and Tax Court's conclusion that AT&T acted as an agent of the out-of-state vendors (information service providers), creating a nexus between the service providers and Maryland sufficient for the State to require AT&T to collect and remit the tax on the information service sales.

The Court of Appeals granted AT&T's petition for a writ of certiorari to consider whether, in light of the Supreme Court's "bright-line" test in *National Bellas Hess Inc. v. Department of Revenue of Illinois*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), a substantial nexus was created, thereby permitting Maryland to require a common carrier to collect a use tax on a sale from an out-of-state seller to a Maryland customer, when the out-of-state seller uses the common carrier to deliver its product (or service), and when the common carrier provides the out-of-state seller with services ancillary to, and in addition to, the delivery of the product (or service).

Held: Reversed. The Court of Appeals first noted that the Maryland Tax Court acts as an administrative agency. With regard to its resolution of purely legal issues, a degree of deference to the Tax Court's interpretation and application of a statute that it administers is often appropriate to be accorded by a reviewing court. The Court noted that AT&T did not dispute the factual findings by the courts below as they related to the transactions at issue before the Court, but instead argued that these connections, as a matter of law, did not suffice to distinguish those connections from those of the entities in U.S. Supreme Court's decisions in *Quill* and *National Bellas Hess.* The Court determined

that it would approach its analysis as one involving a question of law.

The Court next reviewed the applicable principles of law. The Supreme Court established a four-prong test for assessing the validity, under the Commerce Clause, of a state tax imposed on a transaction where an out-of-state entity is one of the essential parties. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326 (1977), the Court stated that a tax is valid when it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." According to the Court, the present case implicated the first prong of this analysis.

In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753, 753, 87 S. Ct. 1389, 1389, 18 L. Ed. 2d 505 (1967), the petitioner, National, was a mail order company incorporated in Delaware, but with its principal place of business located in North Kansas City, Missouri. At issue was an Illinois use tax that, according to the Illinois Department of Revenue and the Illinois Supreme Court, National was required to collect from Illinois purchasers of its products and pay over to Illinois. The U.S. Supreme Court explained that National did not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it did not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sold; it did not own any tangible property, real or personal, in Illinois; it had no telephone listing in Illinois and it did not advertise its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.

The Supreme Court found that all of the contacts National had with the State were via the United States mail or common carrier. Twice a year catalogues were mailed to the company's active or recent customers throughout the Nation, including Illinois. This mailing was supplemented by advertising 'flyers' which were occasionally mailed to past and potential customers. Orders for merchandise were mailed by the customers to National and were accepted at its Missouri plant. The ordered goods were then sent to the customers either by mail or by common carrier. Justice Fortas, in dissent, noted that many of the goods were purchased on credit or C.O.D.

The Supreme Court, in reflecting on its earlier relevant cases, observed that it had never held that a State may impose the

duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail. The Supreme Court found that to uphold the power of Illinois to impose use tax burdens on National, it would have to repudiate totally the sharp distinction it had drawn previously between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. The Supreme Court declined to do so.

In *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), the Supreme Court reconsidered *Bellas Hess* in light of its Commerce Clause decisions rendered between 1967, when *Bellas Hess* was decided, and 1992. The Supreme Court detected in the more recent decisions a movement away from a "stringent physical presence test" toward a "more flexible substantive approach"; nonetheless, the Court refused to overturn entirely *Bellas Hess*. The Supreme Court reasoned that, although it had not, in its review of other types of taxes, articulated with regard to other types of taxes the same physical-presence requirement that *Bellas Hess* established for sales and use taxes, that silence did not imply repudiation of the *Bellas Hess* rule. The Supreme Court then applied the analysis of *Bellas Hess* to the facts before it. *Quill*, like *Bellas Hess*, involved a large mail order house (a Delaware corporation with offices and warehouses in Illinois, California, and Georgia) that solicited business and sold merchandise in North Dakota (among other places) by sending by common carrier and the U.S. mail catalogs, solicitations, and merchandise to, among others, customers in North Dakota. The Court found no substantial nexus between Quill and North Dakota; therefore, North Dakota could not impose sales and use tax collection duties on Quill.

Before the Court of Appeals, AT&T, in this case, asserted that an unspoken, but necessary, corollary to the Supreme Court decisions is that a common carrier cannot be deemed to be the agent of the out-of-state seller for the purpose of creating nexus and permitting state taxation of the interstate sale (or use) in the State. The Court of Appeals agreed with AT&T on the point, but found that the view birthed two additional issues requiring resolution. First, the Court determined that it must consider whether a telecommunications provider is a common carrier for purposes of *Quill* and *Bellas Hess*. Second, if it answered that query in the affirmative, it would have to inquire as to whether AT&T acted in a manner placing it beyond the role of a common carrier with regard to the taxed 900 number transactions.

The Court of Appeals determined that AT&T was a common carrier because it made a public offering to provide 900 number carriage by filing tariffs with the FCC and state public service commissions. Through these tariffs, AT&T agreed to provide transport service over its 900 number designated lines to any 900 number information vendor willing to pay for such services, at set prices.

The Court, however, went on to agree with the Tax Court's and the Court of Special Appeals's analytical premise that, although an entity may meet the requirements for classification as a common-carrier, it may transcend that classification by taking actions in a given context that exceed those normally required by or associated with acting as a common carrier. By its actions, an entity normally deemed a common carrier may associate itself so much with a transaction as to lose the cloak that protects it and the transaction, under *Bellas Hess* and *Quill*, from a State's power to tax (or impose the duty to collect a tax). The Court held that in that circumstance, the State may require both the out-of-state vendor and the interested common-carrier to collect a sales or use tax, provided that the tax otherwise complied with *Complete Auto's* four prong test.

The Court of Appeals then considered each of the seven factors relied on by the Tax Court and the Court of Special Appeals to find that AT&T exceeded the customary role of the common carrier by having substantial involvement with the taxed 900-number transactions. The Court found that the services, taken in whole or in part, did not suffice to distinguish AT&T from a telecommunications or any other type of common carrier embraced within the saving analysis of *Quill* and *Bellas Hess*. Regarding the first and the fourth considerations (assignment of a number and carriage of information), the Court found that these functions are those normally associated with a telecommunications common carrier. Addressing the second, third, and sixth considerations (advertisement and preamble review, and provision of arbitration services), the Court of Appeals found that these considerations represent duties imposed on AT&T, with regard to 900 number carriage, under the Telephone Disclosure and Dispute Resolution Act (TDDRA). The Court determined that AT&T, in carrying out these particular functions, did not act to promote or in some other way assume a vested interest in the success of the contracting information vendors' ventures such that AT&T exceeded its role as a common carrier. Instead, the Court observed that AT&T's role more closely resembled that of a compliance overseer under TDDRA. With regard to the fifth prong (AT&T's billing and limited collection services on behalf of the information service providers), the Court determined that AT&T's role was analogous to that of the common carrier in *Bellas Hess* because, in that case,

some goods were shipped, by common carrier, C.O.D.

The Court went on to note that, in fact, all of the types of services provided by AT&T in the circumstances of the case appeared to be services typically provided by common carriers in analogous contexts. The Court noted that when the common carrier, FedEx, ships a package C.O.D., it charges $9.00 plus 2% of the C.O.D. amount if it is in excess of $450.00 for currency C.O.D.s. In the case of electronically-collected C.O.D. deliveries, FedEx collects money and places it directly into the shipper's bank account, while collecting a service charge and a C.O.D. delivery charge. FedEx is required to comply with federal law concerning any shipment of hazardous materials. Additionally, FedEx has internal policies, under which it may also refuse to act as carrier of materials over a certain size, animals, and other goods, though it is not prohibited from doing so by federal law. Finally, FedEx provides dispute resolution services associated with its C.O.D. services. The Court observed that if FedEx is to comply with federal law and its own internal policies, it too must take on, to an extent, the role of regulatory compliance overseer. The Court further noted that other common carriers, such as UPS and USPS, offer the same or similar services and act in a compliance overseer role. According to the Court, there could be no real dispute that FedEx, UPS, and USPS are common carriers of the type embraced by *Bellas Hess* and *Quill*. In comparison, the Court was unable to distinguish meaningfully AT&T's activities at issue from those activities.

Addressing the final consideration relied on by the Tax Court (the fact that AT&T collected money for the services it provided), the Court observed that AT&T collected a share of the total revenue in the same sense that FedEx, UPS, or USPS do for common carrier services.

The Court concluded that the uncontested factual findings in the case established only that AT&T acted as a common carrier with regard to the 900 number transactions at issue. Thus, under *Bellas Hess* and *Quill*, AT&T could not be held responsible for the 900 number sales and use tax on transactions between Maryland consumers and the information services vendors without violating the Commerce Clause of the U.S. Constitution. The Court held that the Comptroller's assessment against AT&T in the case was not permissible.

AT&T Communications of Maryland v. Comptroller of the Treasury, No. 111, September Term, 2007, filed 12 June 2008. Opinion by Harrell, J.

***

COURT OF SPECIAL APPEALS

CIVIL PROCEDURE – MOOTNESS – RES JUDICATA

CIVIL PROCEDURE – JURISDICTION – DISTRICT COURT

JUDGMENTS – JUDGMENT IN REM

Facts: The Council of Unit Owners for Collington Center III ("the Council"), as landlord of a commercial condominium complex, instituted repossession proceedings in the District Court against Angela Trading Company, Inc. ("Angela Trading"), as the tenant of Condominium Unit 104 ("the Unit"). A default judgment of possession of the Unit was entered for the Council.

Angela Trading filed a motion for a new trial, which included an affidavit that was signed by Eui Kim, "as principal for Angela Trading[.]" In its amended motion for a new trial, Angela Trading argued that "[n]either [it] nor [Eui Kim and Sook Ja Kim ("the Kims")] had any knowledge of the pending action for breach of lease[.]" At the hearing, Eui Kim testified that he did not receive notice of the repossession proceedings. Counsel for Angela Trading argues that the Kims were the owners of the Unit.

While Angela Trading's motion for new trial was pending in the District Court, the Kims sought a declaratory judgment in the circuit court that they owned the Unit. The circuit court granted summary judgment in favor of the Council. The court stated that Angela Trading's attempt to convey a fee simple interest in the Unit to the Kims was ineffective because Angela Trading "received no more than an assignment of a sublease" and it could not convey a greater interest than it possessed.

Held: Dismissed as moot. Because the issue of ownership of the Unit was decided by the District Court in the landlord-tenant proceeding, *res judicata* bars the Kims' claims. The Kims were in privity with Angela Trading. As Angela Trading's counsel, who also served as counsel for the Kims, stated during the hearing, the Kims had a property interest that went towards the merits of the Council's breach of lease action. The Kims took an active role in the District Court proceeding: Eui Kim provided an affidavit of "non-service" to accompany Angela Trading's motion for a new trial; Eui Kim testified at the hearing; and Angela Trading's counsel clearly represented the Kims' interest at the hearing. Furthermore, Eui Kim served as president of Angela Trading for

thirty-five years.

The District Court determined both ownership and possession of the Unit. It made its decision regarding the property rights pursuant to its exclusive jurisdiction in landlord and tenant actions found in Maryland Code Annotated (1974, 2004 Repl. Vol.), § 4-401(4) of the Courts and Judicial Proceedings Article ("CJ"). CJ § 4-402(b)'s general limitation on the District Court's jurisdiction is not applicable in instances arising under CJ § 4-401, including an action involving a landlord and tenant as provided in CJ § 4-401(4).

The District Court's judgment awarding possession of the Unit to the Council was a judgment in rem. Because the title to or interest with respect to the Unit was directly at issue, it was tried and determined and the judgment is conclusive in all further litigation between the same parties or their privies, regardless of the purpose of the action in which the judgment was rendered.

Eui Kim, et al. v. Council of Unit Owners for Collington Center III Condominium, No. 734, September Term, 2007, filed July 2, 2008. Opinion by Kenney, J.

***

CONTRACTS - COVENANTS NOT TO COMPETE — ENFORCEABILITY OF COVENANT IN EMPLOYMENT CONTRACT

Facts: Ecology Services, Inc., appellant, filed a complaint in the Circuit Court for Frederick County against Robert Volkert, Kenneth Eubanks, Jerriel Neloms, and Osborne Raymond, all former employees of appellant, and Clym Environmental Services, LLC ("Clym"), appellees. In the complaint, appellant alleged that Clym's employment of appellees Volkert, Eubanks, Neloms, and Raymond at the campus of the National Institutes of Health (NIH) in Bethesda, Maryland, violated covenants not to compete that the appellee-employees had executed during their prior employment with appellant. Based upon these covenants not to compete, appellant

requested that appellees Volkert, Eubanks, Neloms, and Raymond be enjoined from working for Clym at the NIH. Appellees filed a motion for summary judgment, which the circuit court granted.

Appellant, a Maryland corporation headquartered in Columbia, Maryland, is in the business of providing waste management services related to the treatment and disposal of low-level radioactive waste and hazardous waste materials. Appellee Clym, a Maryland limited liability company based in Frederick, Maryland, is in the same business and is a competitor of appellant. Appellant's case revolved around two contracts that appellant previously held with the NIH. Under the first contract, appellant was in charge of managing the delivery of radioactive waste and medical pathological materials to and from research buildings located on the NIH campus in Bethesda, Maryland, and from satellite facilities in the Baltimore-Washington metropolitan area ("Package Delivery Contract"). Under the other contract, appellant managed the transportation, processing and disposal of nuclear waste from research buildings on the NIH campus ("Radioactive Waste Contract").

The Package Delivery and Radioactive Waste contracts with the NIH are competitively-bid contracts. Companies submitting bids on these contracts have to submit cost proposals as well as technical proposals to the NIH describing the practices and procedures to be applied in performing the contracts. These proposals are kept confidential by the NIH. In 2004, when the term of appellant's Package Delivery Contract was about to expire, the NIH started accepting bids on the contract. The Package Delivery Contract was designated to be set aside for a small business, and due to appellant's growth, by 2004 appellant no longer qualified as a small business. Therefore, it could not bid on the Package Delivery Contract. Clym successfully bid on the Package Delivery Contract and the NIH awarded the contract to Clym. In 2005, the term of appellant's Radioactive Waste Contract was about to expire when the NIH started accepting bids on the contract. Appellant submitted a bid to renew its contract term, but appellant lost the bidding to Clym.

Appellee Neloms, while employed by appellant, worked at the NIH pursuant to the Package Delivery Contract, and his job title was "Delivery Person and Radioactive Materials Technician." Mr. Neloms' employment with appellant ended in December 2004, after the Package Delivery Contract expired. After Mr. Neloms' employment ended with appellant, he was hired to work as a truck driver for a paper disposal company, "Shred-It." In February 2005, Mr. Neloms was contacted by a representative at Clym about working for Clym at the NIH in the same capacity that he had worked for appellant. Mr.

Neloms started working for Clym at the NIH shortly thereafter.

Appellees Raymond, Eubanks, and Volkert were employed by appellant to work at the NIH pursuant to the Radioactive Waste Contract. Appellee Raymond's term of employment with appellant started around 1995, and he worked in the position of "Radioactive Waste Specialist" at the NIH campus. Appellees Eubanks and Volkert both worked for appellant in the same position of "Radioactive Waste Technician" at the NIH campus. Before working for appellant, both Messrs. Eubanks and Volkert had originally worked at the NIH for "Radiation Services Organization" (RSO), the predecessor company to appellant on the Radioactive Waste Contract. When appellant first won the Radioactive Waste contract in 1992, Messrs. Eubanks and Volkert continued in their positions at the NIH, while employed by appellant.

Appellees Raymond, Eubanks, and Volkert stopped working for appellant in August 2005, when the Radioactive Waste Contract expired. Prior to expiration of the Radioactive Waste Contract, appellees Raymond, Eubanks, and Volkert were all informed of other employment opportunities with appellant. Mr. Eubanks was unemployed for a week until he was contacted by Clym and offered a job to continue working as a Radioactive Waste Technician at the NIH, and Mr. Eubanks accepted the job offer. Mr. Volkert started working for Clym as a Radioactive Waste Technician at the NIH in August 2005, after his employment with appellant ended. In December 2005, Mr. Raymond started working for Clym as a Radioactive Waste Specialist at the NIH.

In 1997, as a condition of their continued employment with appellant, appellees Raymond, Eubanks, Volkert and Neloms were required to execute covenants of "non-disclosure and non-competition" with appellant ("non-competition covenants"). All four employees signed the covenants.

On December 6, 2005, appellant filed a verified complaint, motion for temporary restraining order, motion for preliminary injunction, and motion for permanent injunction in the circuit court against appellees alleging breach of the non-competition covenants. On January 31, 2006, appellant filed an amended complaint alleging Messrs. Raymond, Eubanks, Volkert, and Neloms were violating their respective non-competition covenants with appellant by working for Clym.

On February 27, 2006, appellees answered appellant's amended complaint. On April 13, 2007, appellees filed motions for summary judgment on all of the claims in appellant's amended complaint. Appellant opposed appellees' motions for summary judgment. On July

2, 2007, the circuit court entered an opinion and order granting appellees' motions for summary judgment as to all claims in appellant's amended complaint. Appellant filed a timely notice of appeal to the Court of Special Appeals.

Held: Affirmed. The Court of Special Appeals explained there was no dispute between the parties about whether the non-competition covenants were reasonable on their face as to time or place. When a covenant not to compete is reasonable on its face as to both time and space, the factors for determining the enforceability of the covenant based upon the facts and circumstances of the case are: whether the person sought to be enjoined is an unskilled worker whose services are not unique; whether the covenant is necessary to prevent the solicitation of customers or the use of trade secrets; whether there is any exploitation of personal contacts between the employee and customer; and whether enforcement of the clause would impose an undue hardship on the employee or disregard the interests of the public. Budget Rent A Car of Wash., Inc. v. Raab, 268 Md. 478, 482 (1973).

In reviewing whether the circuit court was legally correct in granting summary judgment against appellant and holding that the non-competition covenants were unenforceable, the Court considered the following issues: first, whether the covenants were necessary to protect appellant's business interests, and specifically—whether appellant presented evidence to raise an issue of fact regarding appellees' exploitation of personal contacts between appellees Raymond, Eubanks, Volkert, and Neloms and the NIH; second, whether appellant presented evidence to raise an issue of fact that appellees Raymond, Eubanks, Volkert, and Neloms possessed unique or specialized skills; and finally, whether appellant presented evidence to raise an issue of fact that enforcement of the covenants would not impose undue hardship on appellees Raymond, Eubanks, Volkert, and Neloms.

On the issue of whether the non-competition covenants were necessary to protect appellant's business interests, the Court held appellant failed to establish an issue of fact regarding appellees' exploitation of personal contacts with the NIH. The Court explained based on the facts in the record, appellant's success on the Package Delivery and Radioactive Waste contracts was attributable to price and the quality of its product, not the personal contacts between the appellee-employees and the NIH, and therefore, there was no opportunity for exploitation of such contacts.

The Court held appellant failed to establish an issue of fact

as to whether the appellee-employees possessed unique or specialized skills in the context of covenants not to compete. The Court explained that while the positions of appellees Raymond, Eubanks, and Volkert required education and training, those job qualifications, in of themselves, were insufficient to create an issue of fact that the skills of the employees were unique and specialized to the extent that it would be difficult for appellant to find replacements for each employee.

The Court held enforcement of the non-competition covenants would impose undue hardship for appellees Volkert, Raymond, and Eubanks based on the following facts: that each had been employed in their positions at the NIH for long periods of time, which in the case of Messrs. Volkert and Eubanks, dated back to the early 1990s; that the opportunity at appellant's Gaithersburg office offered to Messrs. Volkert and Raymond involved a different job function (i.e. trash removal instead of radioactive waste removal); that Mr. Raymond pursued the opportunity at the Gaithersburg office but learned he could not do the job and was subsequently unemployed for several months before he was hired by Clym; and that Mr. Eubanks' opportunity entailed a $8,000-$9,000 pay cut. The Court also concluded, based on the lack of any job opportunities for Mr. Neloms following expiration of the Package Delivery Contract, and his subsequent employment with a different company that involved heavy-lifting, that enforcement of the non-competition covenant against Mr. Neloms would impose undue hardship.

The Court emphasized the three factors discussed were just that—factors—that go into the process of determining whether non-competition covenants were enforceable as a matter of law. The Court explained the factors considered all weighed heavily in favor of appellees. Based on those conclusions, in addition to considerations of market competition, the Court concluded invalidating the non-competition covenants also served the public interest.

Based on the lack of evidence showing exploitation of personal contacts between the appellee-employees and the NIH, or that the appellee-employees possessed unique or specialized skills; and based on the evidence of undue hardship, the Court held the non-competition covenants were unreasonable and, therefore, unenforceable. The Court held the circuit court's grant of summary judgment as to all the claims in appellant's amended complaint was proper.

Ecology Services, Inc. v. Clym Environmental Services, LLC, No. 1287, September Term, 2007, filed July 7, 2008. Opinion by Eyler, James R., J.

***

CONTRACTS – DEEDS OF TRUST – STATUTES OF LIMITATION; SPECIALTIES/SEALED INSTRUMENTS – COURTS AND JUDICIAL PROCEEDINGS ARTICLE, § 5-102 – RULE 14-108(b).

Facts: On September 7, 2001, the Wellington Company, Inc. Profit Sharing Plan and Trust ("Wellington"), appellant, loaned $53,000 to Hosein M. Shakiba and Roya M. Shakiba, appellees. The Shakibas jointly executed a promissory note and a Deed of Trust secured by real property in Anne Arundel County. The Note matured on May 1, 2002. On October 12, 2005, Wellington filed suit against the Shakibas, alleging that they had defaulted on their debt obligation. Mr. Shakiba moved to dismiss the suit, contending that it was barred by the three-year statute of limitations set forth in Maryland Code (1974, 2002 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article ("C.J."). After the court denied the motion, the matter proceeded to a bench trial in February of 2007.

At trial, Wellington's trustee, Delbert Ashby, testified about the loan, and the circuit court received in evidence the note and Deed of Trust, both of which recited the Shakibas' promise to repay the full amount of the debt. The note had the signatures of both appellees, but no seals. The Deed of Trust was also signed by both appellees, and contained their seals next to these signatures. Ashby further recalled that Wellington had attempted to foreclose on the property secured by the Deed of Trust, but that a more senior lienholder came in and foreclosed, wiping out Wellington's interest. Consequently, Wellington did not receive any funds from the sale of the property.

At the close of Wellington's case, Mr. Shakiba moved for judgment, which the trial court granted, reasoning that the three-year statute of limitations had elapsed on the note, and that Wellington could not bring an action on the Deed of Trust.

Held: Reversed. The Court of Special Appeals concluded that the parties intended for both the note and Deed of Trust to evidence the Shakibas' debt obligation, as both instruments contained the debtors' promise to repay the loan. Wellington's remedy to enforce this covenant was not limited to a deficiency judgment in a foreclosure proceeding under Rule 14-208(b), because that Rule did not eliminate the common law remedy of a creditor to

file an action at law to enforce a covenant made by a debtor in a Deed of Trust or mortgage. Moreover, because the Deed of Trust was executed under seal, it was a speciality. Therefore, the twelve year statute of limitations in C.J. § 5-102 applied to Wellington's suit to recover on the Shakibas' promise to repay, which was contained in the Deed of Trust.

The Wellington Company, Inc. Profit Sharing Plan and Trust v. Hosein M. Shakiba, et al., No. 521, September Term, 2007. Opinion by Hollander, J. filed on July 2, 2008.

***

CONTRACTS - MARYLAND CONSTRUCTION TRUST STATUTE—DAMAGES FOR BREACH

Facts: Atlantic Builders Group, Inc., a general contractor, appellee, and Harford County entered into a contract dated August 8, 2002, pursuant to which appellee agreed to construct the Abingdon Branch of the Harford County Public Library. The contract amount was $5,022,256.00. Appellee entered into a subcontract with United Aluminum dated September 17, 2002, pursuant to which United Aluminum agreed to supply, inter alia, labor and materials for the construction of "metal wall panels" and "glazed aluminum curtain walls." Keith A. Walter, appellant, is the managing agent of United Aluminum. The contract amount was $775,000.00. United Aluminum issued a purchase order to Alply, Inc. ("Alply") to supply the materials for the wall panels, issued a purchase order to X-Clad, Inc. ("X-Clad") to supply materials for the curtainwalls, and subcontracted with another company to install the wall panels and curtainwalls.

The contract between appellee and Harford County provided for monthly progress payments to appellee, subject to a retainage amount, and similarly, the contract between appellee and United Aluminum provided for progress payments to United Aluminum, subject to a retainage amount. The contracts detailed the amount of payments and when they would be due.

In September 2003, appellee advised United Aluminum that it

had breached its contract with appellee in failing to provide labor and materials on schedule. In January 2004, appellee sent a final notice of termination of contract to United Aluminum. Thereafter, appellee dealt directly with Alply and X-Clad. The arrangements between appellee and Alply and between appellee and X-Clad were performed to all parties' satisfaction. Appellee paid Alply $115,000.00, which Alply agreed to accept even though it was owed $159,426.48. Appellee paid X-Clad $31,532.80 even though it was owed $39,416.00.

On June 8, 2004, appellee filed suit in the Circuit Court for Harford County and obtained a judgment against United Aluminum for breach of contract and a judgment against appellant for violation of the Maryland Construction Trust Statute, Maryland Code (2003 Repl. Vol., 2007 Supp.) §§ 9-201, *et seq.*, of the Real Property Article ("R.P."). The judgment against appellant was based on a finding by the circuit court, after a bench trial, that appellant misused funds received by United Aluminum for the benefit of United Aluminum's suppliers, Alply and X-Clad. The court awarded damages against appellant in the amount of $146,533.00.

On appeal to the Court of Special Appeals, appellant contended the court was clearly erroneous in finding that (1) appellee had sustained damages as a result of a violation of R.P. § 9-201; (2) appellee had not waived its claim for violation of R.P. § 9-201; (3) appellee had not entered into a new contract with Alply and X-Clad, thus releasing appellant from liability; (4) appellee, by requesting a judgment against United Aluminum, had not elected remedies, barring its claim against appellant, and (5) appellee had proved "knowledge" sufficient to sustain a finding of liability under R.P. §§ 9-201 to -202.

Held: Affirmed. In deciding whether appellee had sustained damages as a result of a violation of the Maryland Construction Trust Statute, the Court of Special Appeals interpreted R.P. §§ 9-201 to -202. The Court explained § 9-202 provides a person liable under the statute is liable to "any person damaged by the action." The "action," in context, means retaining or using money held in trust for any purpose other than to pay the subcontractors for whom the money is held in trust. The trial court found appellant did retain or use money held in trust for Alply and X-Clad that was not fully paid to the subcontractors.

As to the trial court's finding of damages, the Court explained the evidence clearly permitted a finding that United Aluminum received monies from appellee for payment to Alply and X-Clad that were not paid, and that the amount ranged from approximately $124,000.00 to approximately $174,000.00. The Court

held there was sufficient evidence to permit a finding that appellant's breach of trust contributed to appellee's total damages. Although the trial court did not expressly indicate how it arrived at the amount of $146,533.00 in damages, the Court held that amount was within the range that was supportable by the evidence.

The Court held appellee had not waived its claim under the Maryland Construction Trust Statute. In interpreting the contract between appellee and United Aluminum, the Court applied the objective test, and concluded that the language of the contract was clear and unambiguous, a question of law. Simply put, the contract stated: "Nothing contained herein . . . *shall create* any fiduciary liability or tort liability" (emphasis added), but it did not purport to waive fiduciary liability or, specifically, liability for breach of trust existing outside of the contract, such as the Maryland Construction Trust Statute. The Court held the trial court was correct in concluding that appellee had not knowingly relinquished a claim under that statute.

Appellant argued appellee's agreements with Alply and X-Clad, following the termination of its contract with United Aluminum, constituted novations, thereby excusing United Aluminum from performance and barring appellee's claim for damages. The Court disagreed and held the evidence was insufficient to establish novation as a matter of law.

Appellant argued because the judgment against United Aluminum included the amount of the judgment entered against appellant (i.e. total amount in payments made by appellee to Alply and X-Clad), that appellee's action against appellant was barred by the election of remedies. The Court disagreed. The Court explained the doctrine of election of remedies applied when a claimant had coexistent and inconsistent remedies, pursued one of them to final judgment, and then pursued the other remedy. *See* Surratts Assocs. v. Prince George's County, 286 Md. 555, 568 (1979); Haynie v. Nat'l Gypsum Corp., 62 Md. App. 528, 533 (1985). The Court explained the remedies in the case were cumulative, not inconsistent. The Court explained the causes of action were different, but because appellee's alleged damages were one set of damages resulting from the failure of United Aluminum to complete its contract, appellee was only entitled to one satisfaction of those damages. The damages awarded against United Aluminum included the damages awarded against appellant. Thus, each judgment debtor was entitled to credit for amounts paid by the other.

Finally, the Court held there was legally sufficient evidence to sustain the court's finding that appellant "knowingly" retained

or used monies held in trust under R.P. § 9-201. The Court explained appellant testified at trial regarding his control of the money disbursements for United Aluminum on the library project, including the specific amounts of money appellant paid to Alply and X-Clad out of the monies paid to United Aluminum by appellee; an employee of appellee testified appellant received payments from appellee on behalf of United Aluminum for monies to be paid to X-Clad and Alply; copies of checks between appellee and United Aluminum, and between United Aluminum and Alply and X-Clad, were submitted into evidence; and copies of invoices and demands for payment that Alply and X-Clad had sent to United Aluminum regarding the library project were submitted into evidence.

Keith A. Walter v. Atlantic Builders Group, Inc., No. 218, September Term, 2007, filed June 30, 2008. Opinion by Eyler, James R., J.

***

CORPORATIONS & ASSOCIATIONS - FORFEITURE OF CORPORATE CHARTER DURING PENDENCY OF LITIGATION

Facts: Hill Construction Company, Inc., a Maryland corporation, appellant, filed a complaint in the Circuit Court for Worcester County against Sunrise Beach, LLC ("the LLC"), Gerald T. Day ("Day"), and J. Wesley Hughes ("Hughes"), appellees. The circuit court entered judgment in favor of appellees on the ground that appellant's corporate charter had been forfeited, and thus, it had no standing to maintain the suit. Appellant appealed to the Court of Special Appeals. Appellees filed a motion to dismiss the appeal on the ground that, because appellant's charter was forfeited when it noted an appeal, the notice of appeal was a nullity.

The Court of Special Appeals explained the facts surrounding appellant's complaint against appellees. On November 1, 2001, appellant entered into an agreement with Day, Hughes, and the LLC, pursuant to which appellant became a member of the LLC. Prior to

that time, Day, Hughes, and Donald C. Hoen were the members of the LLC, with Day owning a 52% interest, Hughes owning an 8% interest, and Hoen owning a 40% interest. Also prior to November 1, 2001, Hoen had transferred his interest in the LLC to Day. Pursuant to the November agreement, Day transferred a 40% interest in the LLC to appellant, in exchange for appellant's agreement to construct a project in Ocean City, known as Sunset Beach, on a cost basis. The project, consisting of four condominium units, was to be completed by June 1, 2002. Pursuant to a preexisting operating agreement, Day was the general manager of the LLC. At all relevant times, Mark Hill was appellant's president, sole shareholder, and sole director.

Appellant did not complete the project by June 1, 2002, but by March, 2003, appellant had substantially completed the project. In May, 2003, a certificate of occupancy was issued.

A dispute arose between the members of the LLC with respect to the timeliness of the work by appellant, a need for further work by others, after March, 2003, to complete the project, the propriety of the sale of the unit to Day, and the distribution of profits.

On November 18, 2003, appellant filed its complaint, containing various counts, in which it alleged breach of contract, breach of fiduciary duty, fraud, conversion, fraudulent conveyance, and civil conspiracy. Appellant sought a constructive trust, an accounting, and compensatory, restitutionary, and punitive damages. During the course of the litigation, the court entered partial summary judgment in favor of appellees with respect to some of the counts and some of the damage claims.

On October 8, 2004, appellant's charter was forfeited by the Comptroller of the Treasury, for nonpayment of personal property taxes. On September 18, 2006, appellees filed a motion to dismiss based on the status of appellant's charter. On February 14, 2007, the court granted appellees' motion to dismiss based on the forfeiture of the charter and the consequent lack of standing by appellant to maintain the suit.

On July 24, 2007, appellant noted an appeal to the Court of Special Appeals. Appellant asserted the court erred in granting appellees' motion to dismiss and erred in its prior partial summary judgment rulings. Appellees, in addition to responding to the merits of appellants' contentions, moved to dismiss the appeal based on the forfeiture of the charter. On April 29, 2008, appellant filed articles of revival and reinstated its charter.

Held: Appeal dismissed. Appellant argued there is no

authority that a corporation cannot maintain an action, initiated when its charter was in good standing but forfeited during the pendency of the litigation, relying primarily on Maryland Code (2007 Repl. Vol.), § 3-515 of the Corporations & Associations Article ("C.A."). Based on that section, appellant contended that Mark Hill, as a director winding up the affairs of the corporation, could maintain the suit, including the appeal.

The Court of Special Appeals interpreted various sections of the C.A. Article. C.A. § 3-515(a) provides: "When the charter of a Maryland corporation has been forfeited, until a court appoints a receiver, the directors of the corporation become the trustees of its assets for purposes of liquidation." Subsection (c) provides: "The director-trustees may: . . . Sue or be sued in their own names as trustees or in the name of the corporation." C.A. § 3-515(c)(3).

Appellant argued that C.A. § 3-515 is a successor to former Maryland Code (1957) Article 23, § 82(a) and former Maryland Rule 222. Article 23, § 82(a) in the 1957 Code, as it existed prior to 1975, and which was substantively the same as Article 23, § 78 in the 1951 Code, provided: "The dissolution of a corporation shall not . . . abate any pending suit or procedure by or against the corporation and all such suits may be continued with such substitution of parties, if any, as the court directs."

The Court of Special Appeals explained that in the 1957 Code, Article 23, § 82(a) was part of the subtitle which addressed dissolution. It was not part of the separate subtitle which addressed forfeiture and revival. In this same time period, Article 23, § 84 addressed forfeiture of corporate charters for misuse or abuse of powers, but Article 81, § 204 addressed forfeiture of corporate charters for nonpayment of taxes. Article 81 contained no provision similar to Article 23, § 82(a). Article 23, § 82(a) was repealed in 1975 when the C.A. Article was enacted. *See* Laws of Maryland 1975, chapter 311. The substance of present C.A. § 3-515 was not part of the law at that time. Later in 1975, §§ 3-516 through 3-519 were added to the C.A. Article. *See* Laws of Maryland 1975, chapter 506. Section 3-516, as then enacted, is substantively the same as present § 3-515.

The Court explained Rule 222 tracked the language in Article 23, § 82(a) and its predecessor and provided that dissolution of a corporation would not abate a pending suit but would continue with such substitution of parties as may be directed by the court. Rule 222 was repealed in 1985 as part of major changes to the Maryland Rules. Its successor, although substantively different, appears in Maryland Rule 2-241(a). Unlike former Rule 222, present Rule 2-

241(a) provides, in pertinent part: "The proper person may be substituted for a party who . . . , (4) if a corporation, dissolves, forfeits its charter, merges, or consolidates . . ." The Court explained the current Rule requires a substitution and, if not made, authorizes a court to dismiss the action.

The Court explained that with respect to appellant's argument under C.A. § 3-515, accepting the premise that it permits maintenance of a suit by the directors of a corporation after forfeiture of its charter, it is "for purposes of liquidation." C.A. § 3-515(a). The Court explained the directors do not become trustees for the purpose of continuing to operate the business.

The Court found the result in the case was controlled by the Court of Appeals' decision in Dual, Inc. v. Lockheed Martin, 383 Md. 151 (2004). The Court held that, as was true in Dual, on the record, the case before the Court did not come within C.A. § 3-515. The Court explained in order for C.A. § 3-515 to apply, the facts must fit within it, and that was true whether the question was initiation of a law suit or the maintenance of a law suit. In either situation, when the corporation's charter is forfeited, it loses all powers and its actions are null and void. The Court explained the directors become trustees of its assets only for the purpose of liquidating and winding up its affairs. The Court held the notice of appeal filed by appellant therefore had no legal force and effect.

The Court explained that had the charter been revived prior to filing the notice of appeal but after dismissal of the case, the notice of appeal would have been valid but the ultimate result would be the same. In that situation, the Court would affirm the circuit court's judgment on the same ground as was stated above—the failure to bring the case within C.A. § 3-515 and Rule 2-241(a).

The Court then addressed the fact that appellant revived its charter during the pendency of the appeal. The Court explained the decision in Redwood Hotel v. Korbien, 197 Md. 514, 521 (1951), decided under Maryland Code (1939, Supp.1947), Article 81, § 153, suggested that the appeal was viable. In the Court's view, that decision was no longer good law.

The Court explained C.A. § 3-512 contains the same language of successor statutes to Article 81, § 153. The Court explained C.A. § 3-512 does not validate corporate action taken during forfeiture of its charter, which action was a nullity, if the corporation's right to take action was divested while the charter was forfeited. The Court explained that was not part of the law in 1951, when Redwood Hotel was decided. Given the numerous decisions since 1951

holding that an act by a corporation while its charter is forfeited is null and void, and given the decisions holding that a subsequent act after the charter has been revived do not relate back to cure the loss of a right divested during the time that the charter was forfeited, *see* Dual, Inc., 383 Md. at 163; Stein v. Smith, 358 Md. 670, 676-79 (2000); Kroop & Kurland, P.A. v. Lambros, 118 Md. App. 651, 667 (1998), the Court concluded that revival of the charter pending appeal would not save the appeal. In that scenario, the filing of the notice of appeal was a nullity, and while the charter was forfeited, the time for noting a valid appeal expired, and the right was lost.

Hill Construction v. Sunrise Beach, LLC, No. 1230, September Term, 2007, filed July 2, 2008. Opinion by Eyler, James R., J.

***

COURTS AND JUDICIAL PROCEEDINGS - FINAL JUDGMENT - Md. Code (1974, 2006 Repl. Vol.), Courts and Judicial Proceedings Article § 12-301; Under § 12-301, "a party may appeal from a *final judgment* entered in a civil or criminal case by a circuit court." *See also* § 12-101(f) (defining "final judgment" as "a judgment . . . or other action by a court . . . from which an appeal, application for leave to appeal, or petition for certiorari may be taken"). Because the trial court adjudicated "the rights and liabilities of fewer than all of the parties to the action," *See* Rule 2-602, in dismissing one of the six named defendants, the court's order does not constitute a final judgment and, to be appealable, an order or judgment ordinarily must be final.

EXCEPTION TO FINAL JUDGMENT RULE - *Salvagno v. Frew*, 388 Md. 605, 615 (2005); There are only three exceptions to the final judgment requirement: "appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals from interlocutory rulings allowed under the common law collateral order doctrine."

Md. Code (1974, 2006 Repl. Vol.) Courts and Judicial Proceedings Article § 12-303; Pursuant to § 12-303(1), a party may appeal from an interlocutory order "entered with regard to the *possession of*

property with which the action is concerned or with reference to the receipt or charging of the income, interest, or dividends therefrom, or the refusal to modify, dissolve, or discharge such an order."

The appeal does not fall within the ambit of § 12-303(1) or any other statutory exception and, thus, in the absence of a final judgment, dismissal is mandated.

Facts: Creditor brought suit against bank and debtors, alleging claims of fraudulent conveyance under the Maryland Uniform Fraudulent Conveyance Act. Bank moved to dismiss count one of the complaint. The Circuit Court for Prince George's County granted the motion. Creditor appeals.

Held: Dismissed. The ruling from which appealed had no direct bearing on the possession of the property at issue. Moreover, whether appellant has a right to possess the property is speculative.

By dismissing count one of the complaint, the trial court adjudicated the rights and liabilities of fewer than all of the parties to the action and, thus, the order does not constitute a final judgment from which creditor may appeal.

Although a party may appeal from an interlocutory order entered with regard to the possession of property with which the action is concerned, the ruling from which appellant seeks to appeal has no direct bearing on the possession of the property at issue.

Tammy Abner v. Branch Banking & Trust Company et al., No. 1446, September Term, 2007, decided July 3, 2008. Opinion by Davis, J.

***

CRIMINAL LAW – CLOSING ARGUMENT – FINGERPRINTS – EXPERT TESTIMONY.

Facts: Brandon Washington was charged with two handgun offenses arising out of an incident in which, while fleeing two police officers, he made "a gesture with his right arm as though he was throwing a metal object up into the air onto a roof" of a building. One of the officers retrieved the suspicious object from the roof: a fully loaded handgun. The officer was not wearing gloves when he handled the weapon.

The police submitted the handgun for fingerprint testing. At trial, the State introduced a form titled "Request for Firearms Examination." It listed appellant's name and the date of processing for latent fingerprints. Moreover, it indicated that the "Results" of the latent fingerprint examination were "Negative." One of the officers testified that the form showed that the handgun "came back for negative prints," meaning that "[n]o prints could be lifted off the weapon." The State offered no expert testimony as to fingerprint evidence.

In his closing argument, the prosecutor noted that no fingerprints were found on the handgun. He claimed that "the surface of the handgun is such that there can't be prints that are obtained from it[.]" In his summation, defense counsel responded that the fingerprints examination "came back negative for the officers. Why? Because they weren't looking for the officers' prints. They were looking for Mr. Washington's prints." The prosecutor objected and moved to strike this comment. The trial court sustained the objection, reasoning that defense counsel's argument was "not a fair interpretation" of the laboratory report. The jury convicted Washington of both handgun offenses. On appeal, Washington claimed that the court had impermissibly limited his closing argument.

Held: Reversed. The Court of Special Appeals concluded that the trial court erred in construing the State's laboratory report to mean that it was negative for all fingerprints – appellant's as well as the officer who handled the weapon . In the Court's view, the report was ambiguous, and gave rise to competing interpretations. By stating that the test for latent prints was "negative," the report could have meant that no prints at all were recovered, or it could have meant that the weapon was analyzed for appellant's prints, with negative results as to him. Notably, the State never called the examiner to establish the exact meaning of the words used in the report. Nor did the State offer expert testimony to establish that the gun surface was of a kind from which prints could not be lifted. Therefore, the circuit court erred in restricting defense counsel's closing argument.

Brandon Washington v. State of Maryland, No. 1709, September Term,

2006. Opinion by Hollander, J. on filed July 1, 2008.

***

CRIMINAL LAW - IN PARI MATERIA — ARTICLE 26 - REASONABLE, ARTICULABLE SUSPICION — DRUG DETECTION DOGS — MOTOR VEHICLES — EXCLUSIONARY RULE — STARE DECISIS

Facts: Appellant was pulled over for speeding while on southbound I-95. On the basis of several "criminal indicators," the officer who initiated the stop requested a drug dog sniff of the exterior of the car. The K-9 officer arrived promptly, and the drug detection dog alerted to the presence of illegal drugs before the traffic stop concluded. A search of the vehicle revealed a hidden compartment containing over 1,500 grams of heroin. Accordingly, appellant was arrested and charged in the Circuit Court for Cecil County with possession of heroin with intent to distribute. *See* § 5-602(2) of the Criminal Law Article of the Maryland Code.

At a pre-trial suppression hearing, which proceeded on an agreed statement of facts, appellant conceded that the Fourth Amendment did not require suppression of the narcotics. But, he argued that the evidence should be suppressed under Article 26 of the Maryland Declaration of Rights. The circuit court rejected the argument and, after a trial on stipulated facts, convicted appellant of possession with intent to distribute.

Held: Affirmed. In *Illinois v. Caballes*, 543 U.S. 405 (2005), the United States Supreme Court determined that, under the Fourth Amendment, a scan by a drug detection dog during a lawful traffic stop "does not implicate legitimate privacy interests," *id.* at 409, and is thus permissible, without any additional justification, so long as the stop is not prolonged for the purpose of conducting the scan. *Caballes* confirmed Maryland's longstanding interpretation of the Fourth Amendment. Thus, as appellant correctly conceded, he had no claim under the Fourth Amendment for suppression of the contraband.

The Court reiterated that Article 26 is construed *in pari materia* with the Fourth Amendment to the United States Constitution, although they are independent provisions. Nevertheless, the Court of Appeals has never held that Article 26 provides greater protection than its federal counterpart.

In *Fitzgerald v. State*, 384 Md. 484 (2004), the Court of Appeals was presented with the opportunity to interpret Article 26 more expansively than the Fourth Amendment in the context of a police dog scan of a residence, but the Court did not do so. The Court of Appeals concluded that, even *if* Article 26 "deems a dog sniff a search . . . it would require only reasonable suspicion, which was present in this case." *Id.* at 512. The Court of Special Appeals pointed out that *Fitzgerald* did not determine whether Article 26 requires reasonable suspicion for the conduct of any dog sniff, and did not depart from the view that Article 26 is read *in pari materia* with the Fourth Amendment.

The Court of Special Appeals also recognized that, even if Article 26 requires police to possess reasonable suspicion before performing a dog scan, no exclusionary rule exists for a violation of Article 26. In the period before the federal Fourth Amendment exclusionary rule applied to the states, Maryland courts repeatedly rejected an exclusionary rule based on Article 26. *See, e.g.*, *Meisinger v. State*, 155 Md. 195 (1928). The Court of Special Appeals is bound by *Meisinger*.

Louis Charles Padilla v. State of Maryland, No. 212, September Term, 2007, filed May 30, 2008. Opinion by Hollander, J.

***

ESTATES AND TRUSTS - PAYMENT - EFFECT OF PAYMENTS ON A PROMISSORY NOTE BY THE OBLIGOR TO AN INDIVIDUAL PURPORTING TO BE AN AGENT OF PAYEE – AGENCY – UNJUST ENRICHMENT; ESTATES AND TRUSTS.

Facts: The late Edward Saunders, M.D., sold a parcel of real

property in October 1998 to two entities: 2107 Brandywine, LLC and 2109 Brandywine, LLC (collectively, "Brandywine"), appellees. Brandywine executed a promissory note (the "Note"), secured by a deed of trust on the property, in which it promised to pay $200,000 to Saunders by monthly payments.

Dr. Saunders died in November 2002, before Brandywine had made all of the payments due under the Note. Dr. Saunders's girlfriend, Francina Mitchell, told Brandywine's principal, Frederic Harwood, that she was the personal representative of Saunders' Estate, and that he should deliver to her the remaining payments due under the Note. In fact, Mitchell was not the Estate's personal representative; the Estate had no representation until December 2003, when Walter S. B. Childs was appointed Special Administrator of the Estate. Calvin J. Jackson, appellant, later became personal representative of the Estate.

Between Saunders's funeral and Childs's appointment, Brandywine tendered twenty monthly payments on the Note to Mitchell, by checks payable to Saunders. Mitchell deposited the checks in a bank account she had jointly owned with Saunders. The proceeds of the checks were commingled with Mitchell's personal funds. Mitchell used $80,600 of the money to pay funeral expenses and other obligations of the Estate.

Soon after Childs was appointed, he learned of the Note and concluded that the Estate had never received the payments Brandywine had made to Mitchell. He demanded that Brandywine tender these amounts to the Estate. Brandywine wanted to sell the property it had bought from Saunders. It reached an agreement with Childs in September 2004, by which Childs agreed to release the deed of trust on the property if Brandywine deposited into an escrow account the sum Childs had demanded in connection with the Note.

Thereafter, Brandywine brought a declaratory judgment action against Jackson, as Personal Representative of the Estate, in December 2005, alleging that it was entitled to the money in the escrow account; Brandywine also pled one count of unjust enrichment against the Estate. Following a bench trial, the circuit court awarded Brandywine all the money in the escrow account. Jackson appealed, arguing that the Estate was entitled to these funds.

Held: Reversed, in part; affirmed, in part. The Court of Special Appeals held that Brandywine had the burden of proving that it made payments on the Note to the proper payee (the Estate) or its authorized agent. Brandywine failed to satisfy this burden, because there was no evidence of conduct by the Estate or its

personal representative authorizing Mitchell to act as the Estate's agent. Brandywine therefore remained liable to the Estate for the twenty payments it had tendered to Mitchell. It bore the risk of loss for making these payments because it should have endeavored to ascertain the proper payee before paying Mitchell, and had the right to request that Mitchell prove that she was the proper payee.

But, the Court also noted that Mitchell used $80,600 of the proceeds from Brandywine's payments on the Note for the benefit of the Estate. Therefore, the Court upheld the award to Brandywine of that sum, based on unjust enrichment. The balance of the escrow account was awarded to the Estate.

Calvin J. Jackson, Personal Representative of the Estate of Edward H. Saunders, et. al. v. 2019 Brandywine, LLC, et al., No. 317, September Term, 2007. Opinion filed on July 2, 2008 by Hollander, J.

***

FAMILY LAW - CHILD CUSTODY - VENUE - COMPLAINT TO MODIFY CUSTODY.

Facts: Anne Arundel County Circuit Court granted custody of child to a third party (paternal aunt of deceased Father). When suit was filed in that case, venue was proper in Anne Arundel County. Approximately a year later, Mother filed complaint to modify custody in Circuit Court for Calvert County. When that complaint was filed, venue no longer was proper in Anne Arundel County, as Mother no longer lived there, the child did not live there, Father was dead, and no other basis for jurisdiction existed under sections 6-201 or 6-202 of the Courts and Judicial Proceedings Article.

Third-party custodians moved to dismiss complaint to modify for improper venue or on *forum non conveniens* grounds. Court granted motion and transferred complaint for modification to Anne Arundel County Circuit Court. Mother appealed transfer order.

Held: Order vacated. Court committed legal error by granting motion to dismiss and transferring case. When complaint to modify was filed, Mother was living in Calvert County, and venue therefore was proper there. Even though the Circuit Court for Anne Arundel County had continuing jurisdiction over its custody order, venue was not proper in that county when the custody modification complaint was filed. It is legal error for a court to transfer a case from a jurisdiction where venue is proper, when suit is filed, to one that is not proper, either on venue or *forum non conveniens* grounds.

Sigurdsson v. Nodeen, No. 2066, 2007 Term, filed June 26, 2008. Opinion by Eyler, Deborah S., J.

***

LABOR AND EMPLOYMENT -- BREACH OF COVENANT NOT TO COMPETE -- TEMPORARY INJUNCTION -- MARYLAND LITTLE NORRIS-LAGUARDIA ACT.

Facts: Former employer podiatry practice sought and obtained temporary restraining order ("TRO") against former employee podiatrist for breach of covenant not to compete. TRO was issued, but a week later, after a hearing, it was lifted. Later, summary judgment was granted in favor of the former employee. Former employee moved against the bond the former employer had posted upon issuance of the TRO, seeking to recover damages incurred during period of TRO. Court denied that motion. On appeal, former employee argued that the court erred because, under a provision of the Maryland Little Norris-LaGuardia Act, also known as the Maryland Anti-Injunction Act, he was entitled as of right to recover against the bond for the TRO's having been issued improvidently or erroneously. Former employer responded that the case was not governed by the Maryland Anti-Injunction Act but by Maryland common law and rules on injunctions, which gave the court discretion to deny the motion to recover against the bond.

Held: Affirmed. Former employee must have sought injunctive relief with reference to the Maryland Anti-Injunction Act in order

to later assert that the act applied and the injunction was issued improvidently or erroneously. Former employee failed to do so. Even so, the injunction proceeding was not controlled by the Maryland Little Norris-LaGuardia Act, and, to the extent that a provision in that act allows recovery against an injunction bond as of right, that provision did not apply. Court had discretion to deny the motion to recover against the bond and did not abuse its discretion in denying that motion.

Vu v. Allied Foot & Ankle, P.C., No. 1427, 2007 Term, filed July 2, 2008. Opinion by Eyler, Deborah S., J.

***

TORTS - MEDICAL MALPRACTICE - HEALTH CARE MALPRACTICE CLAIMS STATUTE - CERTIFICATE OF QUALIFIED EXPERT - COURTS & JUDICIAL PROCEEDINGS ARTICLE § 3-2A-02(d) - C.J. § 3-2A-04; "et al." - MARYLAND RULE 1-301(a) - MARYLAND RULE 8-131; JURISDICTION; CONDITIONS PRECEDENT TO SUIT

Facts: Carolyn Barber underwent a repeat coronary bypass on November 24, 2000, and died on the same date. An autopsy revealed that Ms. Barber's pulmonary artery had been punctured. On November 19, 2003, Jason Allen Barber, as Personal Representative of the Estate of Carolyn Barber, and Jason and Andrew Barber, as surviving sons of Carolyn Barber, appellants, filed a Statement of Claim with the Health Claims Arbitration Office ("HCAO") against six physicians and six entities, identified by name and address, and collectively referred to as "Health Care Providers," all appellees. In addition, all twelve were again mentioned in the text of the Statement of Claim, where they were referred to collectively as "Health Care Providers." In the Certificate of Qualified Expert, filed a few months later, appellants named only one entity in the caption, followed by "et al." and "Health Care Providers." The expert's report stated, in part: "Furthermore, it is my opinion that such Health Care Providers' actions or omissions did proximately cause injury to Carolyn Barber, and was a substantial factor in causing her death."

The parties waived arbitration and suit was filed in the Circuit Court for Baltimore County. Following this Court's decision in *D'Angelo v. St. Agnes Healthcare, Inc.*, 157 Md. App. 631, *cert. denied*, 384 Md. 158 (2004), appellees moved to dismiss the suit, arguing that the Certificate did not comply with the requirements of C.J. § 3-2A-04, because appellants failed to name each appellee in the caption and the text of the Certificate of Qualified Expert. The circuit court agreed and dismissed the case.

In its initial decision, 174 Md. App. 314 (2007) ("Barber I"), the Court of Special Appeals reversed. The Court reasoned that the use of the phrase "Health Care Providers" in the Certificate, coupled with "et al.," satisfied any requirement of specificity, because it referred to a corresponding and discrete group specifically identified in the Statement of Claim and Claim Form, which were the initial filings submitted by appellant to the HCAO. The Certificate, filed a few months later with the HCAO, in the very same case, used the defined term of Health Care Providers and the common legal shorthand of "et al." to refer to all the defendants previously identified. The Court found this practice consistent with Md. Rule 1-301(a), which applies to HCAO claims through the operation of C.J. § 3-2A-04.

Without reaching the merits, the Court of Appeals vacated *Barber I* and remanded to the Court of Special Appeals for reconsideration in light of *Carroll v. Konits*, 400 Md. 167 (2007).

Held: Reversed. The Court reaffirmed its initial holding in *Barber I*. The Court distinguished *Carroll*, in which the expert's certificate failed to satisfy the minimum statutory requirement of stating, with specificity, the identify of the health care provider (or providers) who breached the standard of care. In contrast, the Certificate filed by appellants stated that the Health Care Providers, a defined term, breached the standard of care.

On remand, the appellees also argued that the content of the Certificate was legally insufficient. The Court noted that this argument was made for the first time on remand, i.e., after the first appeal in *Barber I*, and after *Carroll* was decided. Consequently, it was not "raised in or decided by the trial court." Rule 8-131. The Court declined to consider the issue, because it was not "jurisdictional"; although the filing of a proper certificate is a condition precedent to filing a claim in circuit court, it does not affect the power of the court to render judgment.

Jason Allen Barber, et al. v. Catholic Health Initiatives, Inc., et

al., No. 2819, September Term, 2004 Opinion by Hollander, J. filed on July 1, 2008.

***

TRANSPORTATION - STATE HIGHWAY ADMINISTRATION - Md. Code (1977, 2001 Repl. Vol., 2007 Supp.), Transportation Article, § 8-309; Under § 8-309(f), authorizing the SHA to dispose of unneeded land from a completed project without first offering the property to the former owner, and providing that "(1) Except as required by this section for property from an abandoned project, this section does not prevent the *[SHA] from conveying any of its surplus land to an adjacent property owner*: . . . (i) *As all or part of the consideration for a right-of-way transaction*; . . . (3) *If the Board of Public Works approves the sale and the deed, the [SHA] may execute a deed conveying the land to the adjacent property owner*. (Emphasis added). § Section 8-309(g), prescribes the procedures for disposing of "surplus land to any State or local agency": "Except as required by this section for property from an abandoned project, this section does not prevent the [SHA], *with the approval of the Board of Public Works, from conveying any of its surplus land to any State or local agency that*: (1) *Needs the property for a public purpose*. . . ."

Third Party Beneficiary; Incidental Beneficiary; *Mackubin v. Curtiss-Wright Corp.*, 190 Md. 52, 57-58 (1948); Intent being the principal touchstone for determining whether a third party beneficiary contract exists, it must clearly appear from the language of the contract itself, *Volcjak v. Washington County Hosp. Ass'n*, 124 Md. App. 481 (1999), and the surrounding circumstances, *Shillman v. Hobstetter*, 249 Md. 678, 688-89 (1968), that the parties intend to recognize an incidental beneficiary as the primary party in interest and as privy to the promise.

Reverter Clause provided that, "[n]otwithstanding anything to the contrary contained herein, in the event said property shall cease to be used for a public purpose, or is required at a future date for a transportation purpose, all right, title, and interest in

same shall immediately revert to the State of Maryland to the use of the [SHA.]"; under such terms, a conveyance under § 8-309(g) restricts the government agency's use of the property to a public purpose; however, the agency is not subject to a right of first refusal on the part of the former owner; § 8-309(g), by its terms, does not bestow a benefit upon appellant.

Facts: Property owner filed a complaint for declaratory and injunctive relief against appellees, the State Highway Administration and Howard County, alleging that it is a third party beneficiary of a deed executed by appellees. Appellees subsequently moved for summary judgment. The Circuit Court for Howard County, Leasure, J., granted the motion. Owner appealed and appellees cross-appealed.

Held: Affirmed. The circuit court properly granted summary judgment in favor of appellee, finding that appellant was merely an incidental beneficiary with no rights to recover on or enforce the SHA/County Deed.

Appellees intended their prior agreements to the deed to survive and, thus, the doctrine of merger by deed does not preclude our consideration of parol evidence in determining whether the deed conveying the land at issue was executed pursuant to subsection (f) or (g) of § 8-209 of the Transportation Article.

When reviewing the deed and the prior agreements thereto, it is clear that the conveyance occurred pursuant to Transp. § 8-209(g).

The agreements and correspondence leading up to the execution of the deed fail to demonstrate that appellees intended to recognize the property owner as a primary party in interest or that they intended to benefit the owner to the exclusion of all others. Property owner cannot legitimately claim that a reverter clause was included in the deed for the purpose of bestowing a direct benefit that only it and its successors can enjoy.

Lovell Land, Inc. v. State Highway Administration et al., No. 1594, September Term, 2007, decided July 3, 2008. Opinion by Davis, J.

***

WORKERS' COMPENSATION - INJURY "ARISING OUT OF" EMPLOYMENT - IDIOPATHIC CONDITION OF EMPLOYEE.

Facts: Employee with insulin-dependent diabetes fell down stairs at work when he suffered a hypoglycemic episode. He sustained injuries in the fall that all parties agree were sustained "in the course of" employment. Workers' Compensation Commission determined that injuries also "arose out of" employment. In "essentially *de novo*" judicial review action in circuit court, with court as the trier of fact, the court found that the employee's injuries were caused by his idiopathic condition (diabetes) and were not brought about or aggravated by some hazard or factor particular to his employment as a computer assisted design drafter. The court reversed the Commission, on the ground that the injuries did not "arise out of" the employment.

Held: Judgment affirmed. On the first-level factual findings made by the court, which were not clearly erroneous, the court did not err in ruling that the employee's injuries from falling downstairs at work when he experienced a hypoglycemic episode were not injuries that "arose out of" his employment. There was no evidence adduced of any hazard or particular factor of the employment itself, *i.e.*, the employee's work as a computer-assisted design drafter, that brought about or aggravated the employee's injuries. The case is distinguishable from prior cases in which employees with idiopathic conditions were injured while engaged in a peculiarity or hazardous condition of employment. Here, the employee simply was walking in the office, from upstairs to downstairs.

Youngblud v. Fallston Supply Co., No. 1625, 2007 Term, filed June 30, 2008. Opinion by Eyler, Deborah S., J.

***

JUDICIAL APPOINTMENTS

On May 14, 2008, the Governor announced the appointment of SUSAN HOWER HAZLETT to the District Court of Harford County. Judge Hazlett was sworn in on June 2, 2008 and fills the vacancy created by the elevation of the Hon. Angela M. Eaves.

*

ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals of Maryland dated June 13, 2008, the following attorney has been suspended for six (6) months, effective July 12, 2008 from the further practice of law in this State:

PATRICK JOSEPH SMITH

*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective July 16, 2008:

CHARLENE SUKARI HARDNETT

*

By an Opinion and Order of the Court of Appeals of Maryland dated June 17, 2008, the following attorney has been indefinitely suspended from the further practice of law in this State, effective July 17, 2008:

ERNEST S. NICHOLS

*