Amicus Curiarum

VOLUME 28
ISSUE 10 OCTOBER 2011

A Publication of the Office of the State Reporter

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http://mdcourts.gov/opinions/coa/2011/22a10ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts: Petitioner, the Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against attorney Roland N. Patterson, Respondent. Petitioner alleged violations based on Respondent's actions in three regards: the management of his interest on lawyer trust account ("IOLTA" or "trust account"); and the handling of two separate client matters.

The Court of Appeals assigned the matter to the Honorable Susan Souder of the Circuit Court for Baltimore County, pursuant to Md. Rule 16-752. Judge Souder held a hearing and found by clear and convincing evidence that Respondent violated Maryland Lawyers' Rules of Professional Conduct ("MRPC") 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5(a) and (b) (fees), 1.15(a) and (d) (safekeeping of client property), 1.16(d) (declining or terminating representation), 3.2 (expediting litigation), 8.1(b) (cooperation with bar counsel), and Md. Rules 16-606.1 and 16-609(c) governing attorney trust accounts.

Judge Souder found that Respondent had written two checks against his IOLTA account. The first was for the purpose of closing the account and was in the amount of the account's entire holdings, while the second was for an additional $500. Respondent knew that he had written checks in excess of the account holdings. Respondent also failed to keep a chronological record of all deposits and disbursements. Judge Souder concluded that this conduct violated Maryland Rules 16-609(c) and 16-606.1 as well as MRPC 1.15(a).

Judge Souder further found that Respondent failed to enter his appearance in a matter after his client had paid the full retainer fee. Respondent learned of the hearing date through his client. Respondent failed to request a continuance, because he was not prepared, or issue subpoenas, to prepare. He did not present evidence at the hearing, which resulted in a judgment of $0 for his client. Respondent performed no meaningful services for his client

and failed to communicate with him about the judgment. Judge Sounder concluded that Respondent's conduct violated MRPC 1.1, 1.3, 1.4(b), 1.5(a), 1.15(a), 1.16(d).

Judge Souder also found that Respondent filed a complaint for another client without researching or collecting documents to support the complaint. The complaint was dismissed for Respondent's failure to take any action, including responding to a notice of contemplated dismissal. Again, Respondent failed to provide competent services in exchange for the fee collected. And, he failed to provide his client with a full accounting when she demanded a refund. Judge Souder concluded that Respondent's conduct in this matter violated MRPC 1.1, 1.3, 1.15(a) and (d),and 1.16(d).

Judge Souder also found that Respondent failed to respond timely to Bar Counsel's demands for information, a violation of MRPC 8.1(b).

Held: Respondent violated Maryland Lawyers' Rules of Professional Conduct 1.1, 1.3, 1.4(b), 1.5(a) and (b), 1.15(a) and (d), 1.16(d), 3.2, and 8.1(b), as well as Md. Rules 16-606.1 and 16-609(c), for which the appropriate sanction is an indefinite suspension with the right to apply for readmission no sooner than six months after the imposition of the sentence.

The Court of Appeals conducted an independent review of the record giving deference to the hearing judge's findings of fact unless clearly erroneous. The Court concluded that there was clear and convincing evidence in the record that Respondent violated the above-cited rules, with one exception. The Court sustained Respondent's exception as to Judge Souder's conclusion that Respondent violated MRPC 1.15(a) by taking disbursements from the IOLTA account without having earned the fees. The Court found that Bar Counsel had not carried its burden of proving that element of the petition by clear and convincing evidence because Bar Counsel failed to present evidence contradicting Respondent's testimony that he had done work on the matter prior to withdrawing the funds.

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Charles G. Bernstein v. State of Maryland, et al., Misc. No. 1, September Term, 2010, filed September 22, 2011. Opinion by Bell, C. J.

http://mdcourts.gov/opinions/coa/2011/1a10m.pdf

CONSTITUTIONAL LAW - THE JUDICIARY - JUDGES' TENURE

GOVERNMENTS - COURTS - JUDGES - MANDATORY RETIREMENT

Facts: Charles G. Bernstein, retired judge of the Circuit Court for Baltimore city, filed a complaint in the United States District Court for the District of Maryland, naming the State of Maryland, Governor Martin O'Malley, and the Maryland General Assembly as defendants, and alleging that the Article IV, § 3 requirement of mandatory retirement for circuit court judges at the age of seventy, as applied to him, violated his Equal Protection rights under the Fourteenth Amendment. The suit sought a judgment declaring that Article IV, § 3 is unconstitutional, and an inunction preventing the application of its requirements to Judge Bernstein. Concurrently, Judge Bernstein filed a Motion for a Preliminary Injunction to temporarily preclude enforcement of the provision's requirements, allowing him to continue to hold his office until the suit was decided on the merits. Following a hearing, the District Court denied the request for a preliminary injunction, found for the State with regard to the constitutional challenge against § 3, and, noting that there is no Maryland case providing a definitive interpretation of § 3, certified the following questions to the Court of Appeals for resolution: (1) Does the Maryland Constitution (i) require a sitting judge to retire upon reaching seventy, (ii) prohibit the Governor from appointing a person seventy or older to the bench, and (iii) prohibit a person seventy or older from running for a judicial office? (2) Conversely, does the Maryland Constitution permit individuals seventy or older to run for judicial office and, if elected, to serve out their entire terms?

Held: (1) The Maryland Constitution (i) requires a sitting judge to retire upon reaching age seventy, (ii) prohibits the Governor from appointing a person seventy years of age, or older, to the bench, and (iii) prohibits a person seventy years of age, or older, from running for a judicial office; (2) Conversely, the Maryland Constitution does not permit a person seventy years of age, or older, to run for a judicial office and, if elected, to serve out the entire term. The Court applied rules of statutory construction, concluding that § 3, read in context of the remainder of Article IV, unambiguously prohibits all persons over the age of seventy from holding judicial office. The Court, moreover, held

that the intent of the framers in drafting Article IV, § 3 was clearly to exclude persons over the age of seventy from judicial office, either by appointment or the elective process. Additionally, the Court found it particularly persuasive that Maryland has maintained a long-standing practice and policy, since 1867, of retiring circuit court judges after they have attained that age. The Court of Appeals, thus, concluded that under Article IV, § 3, no one over the age of seventy, no matter his or her prior judicial history or lack thereof, can be an active member of the Maryland Judiciary.

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Silva v. State, No. 126, September Term, 2010, filed September 21, 2011. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/126a10.pdf

CRIMINAL LAW – ACCOMPLICE – JURY INSTRUCTION

Facts: Petitioner, convicted of two counts of first-degree premeditated murder, requested at trial a jury instruction that three of the State's key witnesses were accomplices as a matter of law, and therefore, their testimony required corroboration to be credited. The trial court granted the instruction as to one of these witnesses, who admittedly was involved in the murders, but declined to do so as to the other two witnesses. The trial court agreed with the State that the evidence presented may have been strong enough for a jury to find that the witnesses were accomplices, but was not sufficient to deem either witness an accomplice as a matter of law given various inconsistencies in the witnesses' testimony. The trial court then instructed the jury that, should the jury find the witnesses to be accomplices, their testimony required corroboration to be credited. After his convictions, Petitioner filed a timely appeal to the Court of Special Appeals, where he urged the court to find error in the trial court's refusal to instruct the jury that the other two witnesses were accomplices as a matter of law. The Court of Special Appeals affirmed the convictions in an unreported opinion. The Court of Appeals granted certiorari to review the trial court's ruling as to the jury instruction.

Held: Affirmed. Where the evidence as to a witness's status as an accomplice could reasonably support either conclusion as to the witness's status, it is rightfully left to the fact-finder, in this case the jury, to decide whether the witness is an accomplice, and if so, whether the testimony has been corroborated. The trial court, therefore, properly denied the Petitioner's request for a jury instruction identifying the two witnesses as accomplices as a matter of law.

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Ronald Cox v. State of Maryland, No. 125, September Term, 2010, filed September 20, 2011, Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/125a10.pdf

CRIMINAL LAW– CONFRONTATION CLAUSE

Facts: On January 29, 2009, a jury in the Circuit Court for Baltimore City convicted Ronald Cox ("Petitioner"), of multiple offenses relating to a murder in 2007. The Court of Special Appeals affirmed his convictions.

On December 28, 2007, Baltimore City Police Officer William Keitz found Todd Dargan lying face up dying from a gunshot wound. Later that same day, Baltimore City Police Detectives Milton Smith, III, Derek Phyall, and Eugene Bush were patrolling in an unmarked car approximately ten blocks away from where Dargan was shot when they saw Ronald Cox driving a black 2006 Mercedes Benz. Rodney Johnson, a black male wearing a black hooded sweatshirt, was sitting in the passenger's seat. When the car failed to come to a complete stop at a stop sign, the detectives stopped the car. They observed that Mr. Johnson's hands were visibly shaking. During the stop a series of calls came over the police radio reporting the nearby shooting. Mr. Johnson became increasingly nervous upon hearing the information. Detective Smith asked Mr. Johnson if he possessed anything illegal, and after Mr. Johnson replied that he did not, the detective asked if he "could check." Mr. Johnson stepped out of the car and Detective Smith patted him down, finding no drugs or weapons.

Between fifteen and twenty-three minutes after the initial stop, a description of the suspect in the shooting was relayed over the radio describing a "black male wearing a black hoodie." When Detective Phyall realized that Mr. Johnson matched that description, he asked Petitioner if there was anything in the car. In response, Petitioner stepped out of the car with his hands in the air. Detective Phyall testified that he felt this action constituted consent to a search, and he searched the vehicle and found a handgun in the trunk. Both Petitioner and Mr. Johnson were arrested.

Petitioner and Mr. Johnson filed a pretrial motion to suppress the evidence obtained during the stop, namely the recovered gun. The Circuit Court held an evidentiary hearing and found that the initial stop was lawful but concluded that the length of that detention, which was between fifteen and twenty-three minutes, was unreasonable. The State did not challenge the detention, and therefore the search and subsequent arrest, were deemed unlawful.

The Circuit Court held a second pretrial suppression hearing regarding Petitioner's motion to suppress the testimony of a fellow inmate named Michael West. At the hearing, Mr. West testified that he had been arrested, on an unrelated weapons charge, on the same date as Petitioner and Johnson. According to Mr. West, he saw Petitioner and Mr. Johnson the next day in central booking. Mr. West explained that he had known Mr. Johnson for approximately fifteen years. According to Mr. West, Mr. Johnson told Mr. West about the murder and the subsequent arrest in detail, without provocation, while Petitioner stood close by, listening and occasionally filling in details. Mr. West continued that, according to Mr.Johnson, Petitioner and Mr. Johnson were driving by the shopping center when Petitioner identified the victim as someone who had been involved in the murder of an acquaintance. Mr. Johnson told Mr. West that Petitioner offered him $15,000 to kill the victim. When Mr. Johnson agreed, Petitioner gave him a nine-millimeter pistol and dropped him off on Caroline Street, adjacent to Church Square Shopping Center. Mr. Johnson ran up behind the victim and shot him in the head, then met Petitioner on Bond Street around the corner, put the gun in the trunk of the car, and got into the vehicle. According to Mr. West, Mr. Johnson then explained that they had been pulled over, and Petitioner added that the police had noticed Mr. Johnson's nervousness.

Petitioner's counsel objected to the admission of Mr. West's testimony as hearsay, a violation of Petitioner's right to confrontation, and as the "poisonous fruit" of the illegal detention, search, and arrest. Petitioner's motion to suppress the statements was denied. The statements by Mr. Johnson to Mr. West, were admissible as they were adopted admissions by Petitioner during his conversation with Mr. West in central booking and the statements to Mr. West were "'outside the ambit of the fruit of the poisonous tree doctrine.'" *Cox*, 194 Md.App. at 638, 5 A.3d at 735. It is unlikely that Mr. Johnson would have made the statements to Mr. West if he believed the statements would be used in a later trial. Rather, the statements were "much more akin to casual remarks to an acquaintance than formal declarations to an official." *Smalls*, 650 F.3d at 780 (referencing *Crawford*, 541 U.S. at 51). Mr. Johnson did not intend to bear testimony against Petitioner, nor did he seek to establish "facts for use in a criminal investigation or prosecution." *Id.*

Held: Petitioner's tacit admission during Mr. West's statements in the presence of Mr. Johnson, was not testimonial in nature because the primary purpose of the statements were made under circumstances that would not have led an objective declarant reasonably to believe that the statements would be available for use at a later trial. Therefore introducing Mr. West's statements

and Petitioner's response, including his silence, did not violate the confrontation clause. Moreover, the fact that Mr. Johnson's statements, and Petitioner's acceptance thereof, were purely voluntary, unprompted by police interrogation or action, or any interrogation at all, is an intervening circumstance which weighs heavily in allowing admission of Mr. West's testimony. Neither the police conduct surrounding the illegal detention, search, and arrest, nor the circumstances which led to Petitioner and Mr. Johnson's admissions in the presence of Mr. West were flagrant or purposeful. The voluntariness of Mr. Johnson's statements constitute an intervening factor, and there is no indication that Mr. West was serving as an inserted informant. Therefore, we hold that the trial court did not err in denying Petitioner's motion to suppress.

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Langley v. State, No. 51, September Term, 2008, filed 19 September 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/51a08.pdf

CRIMINAL LAW – CONSTITUTIONAL RIGHTS – CONFRONTATION CLAUSE – TESTIMONIAL HEARSAY – SITUATION THAT COMPRISES AN ON-GOING EMERGENCY

Facts: Langley returned to a convenience store after arguing earlier with the victim – owner of the store. Langley shot the victim and drove away. Several eyewitnesses observed Langley in the store and leaving the scene of the shooting. In addition, a witness outside the store, who was not called to testify at trial by the State, observed portions of the incident, called 9-1-1, and reported that a shooting "was just happening." The 9-1-1 caller also described a person meeting a description of Langley, the getaway vehicle, and the vehicle's license-plate number. At trial, the prosecution offered in evidence a recording of the 9-1-1 call. The judge admitted it, over Langley's objection that he could not cross-examine the recording. On appeal, the Court of Special Appeals affirmed the trial court. The Court of Appeals granted certiorari.

Held: Affirmed. The recorded 9-1-1 call was admitted properly because the 9-1-1 caller's statements were nontestimonial and otherwise admissible hearsay. In light of the recent Supreme Court decision in *Michigan v. Bryant*, which held that a primary factor in confrontation clause analysis (i.e., testimonial versus nontestimonial)is whether the declarant made his statement during an on-going emergency, the Court determined that an on-going emergency existed at the time of the 9-1-1 call in this case. An ongoing emergency focuses the declarant's mind on the crisis at hand and minimizes distortion caused by recalling past events. Therefore, the declarant's statements are reliable and need not be tested in the "crucible of cross-examination." In this case, the shooting just occurred, the 9-1-1 caller's tone was harried and informal, and the victim suffered severe, ultimately mortal injuries stemming from a violent crime. For those reasons, the 9-1-1 caller reported an ongoing emergency, and her statements were nontestimonial admissible hearsay.

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Thomas v. State, No. 88, September Term 2010, filed September 22, 2011. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/88a10.pdf

CRIMINAL LAW - EVIDENCE – WITNESS TESTIMONY – IMPEACHMENT – PRIOR CONVICTIONS

EVIDENCE – WITNESS TESTIMONY – IMPEACHMENT – PRIOR MISCONDUCT NOT RESULTING IN A CONVICTION

Facts: Petitioner, Robert Lee Thomas, was convicted by a jury in the Circuit Court for Prince George's County, of the offense of carrying a handgun. Before trial, the State moved to prohibit Petitioner from impeaching the testimony of the State's key witness based on her prior conviction for theft of a motor vehicle pursuant to Maryland Rules 5-609(a) (impeachment by prior conviction) and 5-608(b) (impeachment by prior conduct). The State argued that the witness's theft conviction was the product of an unconstitutionally-obtained guilty plea. Specifically, the witness, at the time she entered the plea of guilty, was not represented by counsel nor had she waived her Sixth Amendment right to counsel. The motion was granted over Petitioner's objection, and Petitioner was convicted. Petitioner appealed to the Court of Special Appeals, which affirmed the conviction in an unreported opinion.

Held: Petitioner is entitled to a new trial. The Court of Appeals concluded that the trial court did not err or abuse its discretion in refusing to allow Petitioner to impeach the witness's testimony, pursuant to Md. Rule 5-609(a), with evidence of her prior conviction. Supreme Court and Maryland precedent clearly indicate that constitutionally infirm guilty pleas cannot be used to impeach a witness with a prior conviction. However, the trial court did err in denying Petitioner's request to impeach the testimony using the conduct underlying the prior conviction under Md. Rule 5-608(b) because Petitioner had a "reasonable factual basis" to impeach the witness's testimony based on this conduct. The factual basis took the form of Petitioner's admission, in open court at the time of the plea, to having committed the crime of motor vehicle theft.

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Douglas Scott Arey v. State of Maryland, No. 104, September Term, 2010, filed September 22, 2011, Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/104a10.pdf

CRIMINAL PROCEDURE – POSTCONVICTION DNA TESTING

Facts: In 1974, Appellant, Douglas Scott Arey, was convicted of first-degree murder and use of a handgun in the commission of a felony. Arey was convicted, in part, on the basis of results of the scientific analysis of the blood on his shirt which was admitted into evidence. Arey was sentenced to life imprisonment plus ten years concurrent. The Maryland Court of Special Appeals affirmed the conviction on June 2, 1975.

In 2001, the Maryland Legislature passed the DNA Evidence – Postconviction Review Act, becoming one of more than thirty states which now have similar statutes providing for postconviction scientific testing of evidence in cases where the petitioner was convicted of one or more statutorily enumerated crimes. Section 8-201(b) of Criminal Procedure Article of the Maryland Code grants a right to a person convicted of one or more specified crimes to file a petition for DNA testing of evidence in the possession of the State that relates to a conviction. On May 7, 2002, Arey filed a petition in the Circuit Court for Baltimore City for postconviction DNA testing of evidence related to his conviction. On April 21, 2010, the Circuit Court dismissed the petition, concluding that the evidence related to Arey's conviction no longer existed. On July 26, 2010, Arey filed a timely appeal from that ruling directly to prsso § 8-201(j)(6).

On May 7, 2002, Arey filed a *pro se* petition in the Circuit Court for Baltimore City under § 8-201 of the Criminal Procedure Article, seeking postconviction DNA testing of evidence related to his convictions. The State produced an affidavit of a police sergeant averring that the evidence no longer existed after the sergeant searched the database and records of the Baltimore City Police Department's Evidence Control Unit (ECU) and found no reference to the evidence. On the basis of the affidavit, the Circuit Court for Baltimore City dismissed the petition on July 17, 2006.

In 2007, we reversed and remanded, holding that the Circuit Court erred in dismissing the petition because the State's affidavit was not sufficient to constitute a reasonable search for the evidence requested. *See Arey v. State*, 400 Md. 491, 503-04, 929 A.2d 501, 508 (2007) (*Arey I*). We pointed out that

"[t]he State should have attempted to determine the proper protocol for handling and destroying evidence in Baltimore City in 1974. From this, the State might have discovered other locations to search for the requested evidence or determined more conclusively its fate." *Arey I*, 400 Md. at 504, 929 A.2d at 508.

On remand, the Circuit Court held four separate hearings between November of 2007 and April of 2010. On April 21, 2010, two days later, the Circuit Court dismissed the petition for DNA testing on the ground that the State conducted a reasonable search for the evidence.

Arey first contends that the hearing judge erred in holding that the State performed a reasonable search for evidence relating to his conviction. According to Arey, the State's search for evidence was not reasonable because it consisted only of a search by property number when the property number associated with Arey's case was either undisclosed or unknown. More specifically, Arey argues that the State has failed to look through a large mass of "old clothing" for the shirt and has neglected to search for the blood slides used by the crime laboratory for blood type analysis. These issues, in our view, are best left for the hearing judge to resolve in the first instance, on remand, and we decline to address them. Secondly, Arey argues that the hearing judge erred in prematurely ruling on his petition for DNA testing by dismissing it the day after the State filed the pivotal affidavit of Mr. Davis.

According to the State, by submitting Davis's affidavit, it has met its burden of conducting a reasonable search. Additionally, the State contends that it has searched all of the places where the evidence could possibly have been found including the ECU, original trial judge's chambers, original trial courtroom, State's Attorney's office, court clerk's office, and the court reporter's office. While the property control number associated with the evidence in Arey's case was never located, the State contends that other attempts were made to find the evidence using the criminal complaint number and the physical description of the shirt. Finally, the State maintains that it has sufficiently identified the evidence-handling protocol in 1974 by presenting testimony that officers would authorize the destruction of evidence after any direct appeals concluded.

Held: Although we decline to hold that the hearing judge's ultimate conclusion was clearly erroneous, we do decide that, on the record before us, the ruling was premature. Accordingly, we remand the case to the Circuit Court for Baltimore City for

further proceedings. The hearing judge erred in ruling on Arey's petition for testing only two days after the State submitted an affidavit from a key witness. Arey was not given adequate opportunity to respond to the affidavit before the hearing judge dismissed his petition. Arey's due process rights entitled him to notice and a reasonable opportunity to respond to the averments in Davis's affidavit before a ruling was made. While the possibility exists that no further information would come from an interview with Davis, Arey still must be given the opportunity to probe, challenge, or otherwise respond to the statements in the affidavit before a decision can be rendered.

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Jeffery Breslin, et al. v. Ronald Powell, et al., No. 134, September Term 2010, filed 16 August 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/134a10.pdf

STATUTORY INTERPRETATION – PLAIN MEANING RULE – HEALTH CARE MALPRACTICE CLAIMS ACT – CERTIFICATE OF QUALIFIED EXPERT

REGARDING THE REQUIREMENTS FOR A CERTIFICATE OF A QUALIFIED EXPERT IN A MEDICAL MALPRACTICE CLAIM SET FORTH IN MARYLAND CODE (1974, 2006 REPL. VOL.), COURTS & JUDICIAL PROCEEDINGS ARTICLE, §§ 3-2A-02 AND 3-2A-04, THE PLAIN LANGUAGE OF THE TWO SECTIONS, WHEN READ TOGETHER PROPERLY, REQUIRES THAT WHEN A CERTIFICATE, FAILING TO MEET ONE OR MORE OF THE REQUIREMENTS OF THE CERTIFICATE LISTED IN THE STATUTE, IS FILED, A COURT OR ARBITRATION PANEL DISMISS THE UNDERLYING CLAIM OR ACTION *WITHOUT* PREJUDICE, REGARDLESS OF WHETHER THE REQUIREMENT(S) WITH WHICH THE CERTIFICATE DOES NOT COMPORT IS LOCATED IN §§ 3-2A-02 OR 3-2A-04.

Facts: Jackie D. Powell was admitted to Good Samaritan Hospital on 31 October 2002 for a hepatorenal arterial bypass procedure. Dr. Monford Wolf, a board-certified anesthesiologist, administered epidural anesthesia to Mr. Powell. Dr. Jeffery Breslin, a board-certified vascular surgeon, performed the surgery. Mr. Powell died as a result of a spinal cord injury caused by an epidural hematoma.

On 30 July 2004, the decedent's son, Ronald Powell, on behalf of Mr. Powell's estate, filed a claim of negligence on the part of Dr. Wolf, his professional association, and Good Samaritan Hospital. The claim originated as a Health Claims Arbitration Proceeding pursuant to CJ § 3-2A-03, and as such, Powell filed with the Health Care Alternative Dispute Resolution Office a "Certificate of Merit" and a notice of intent to waive arbitration and transfer the suit to the Circuit Court for Baltimore City.

On 5 August 2005, Powell added as defendants in the Circuit Court Dr. Breslin and his professional association. A new Certificate, signed by Dr. Ronald Burt, a board-certified anesthesiologist, accompanied this filing. In this Certificate of Merit, Dr. Burt attested to departures from the standard of care by Dr. Breslin, and stated that Dr. Burt met the requirements of CJ § 3-2A-02.

At deposition, however, Dr. Burt stated that he was not an

expert in the fields of vascular surgery or general surgery. Dr. Breslin filed in the Circuit Court a Motion to Dismiss, or in the Alternative, for Summary Judgment, on the grounds that Powell failed to comply with the requirements of CJ § 3-2A-02, mandating generally that any expert who attests in a Certificate to a departure from the standards of care on the part of a health care provider must be board-certified and have clinical, consulting, or teaching experience in the defendant health care provider's specialty.

The Circuit Court granted summary judgment in favor of Dr. Breslin, explaining that the legislative directive required strict compliance with CJ §3-2A-02. Powell filed a Motion to Reconsider on the grounds that CJ §3-2A-04 mandates dismissal without prejudice for failure to file a proper Certificate of Merit. The Circuit Court deined this motion (and a subsequent Motion to Alter or Amend Judgment Nunc Pro Tunc).

Powell noted an appeal timely with the Court of Special Appeals, arguing again that summary judgment was not a proper vehicle to dispose of the suit on the defect alleged in the Certificate. In a reported opinion, *Powell v. Breslin*, 195 Md. App. 340, 6 A.3d 360 (2010), the intermediate appellate court reversed the Circuit Court, explaining that all of the requirements relating to the qualifications of experts attesting to a Certificate of Merit must be read together, and, therefore, failing to file a compliant certificate results in dismissal without prejudice, and not summary judgment.

Dr. Breslin filed a Petition for Writ of Certiorari, which we granted, *Breslin v. Powell*, 418 Md. 190, 13 A.3d 798 (2011), to consider two questions, which the Court rephrased as one:

> Whether, in a medical malpractice case where a party files a certificate signed by an expert who does not meet the qualifications set forth in CJ § 3-2A-02(c)(2)(ii), CJ § 3-2A-04(b)(1)(i)(1) mandates dismissal without prejudice, regardless of whether the case is pending in the HCADRO or the Circuit Court at the time of the revelation?

Held: Affirmed. The Court first discussed the background of the Health Care Malpractice Claims Act, created by the General Assembly created in 1976 in response to increasing malpractice insurance costs and threats from insurers to leave the malpractice insurance market in Maryland. The Act created an arbitration process as a means of resolving malpractice claims at

a lower cost to both parties. In 1986, the General Assembly, responding to another malpractice insurance "crisis," added a requirement that a Certificate of Merit accompany every claim filed with the arbitration panel. The portion of this section relevant to the present case provides:

> [A] claim or action filed after July 1, 1986, shall be dismissed, without prejudice, if the claimant or plaintiff fails to file a certificate of a qualified expert with the Director attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury, within 90 days from the date of the complaint.

The General Assembly added additional qualifications in 2004 for experts attesting to a Certificate of Merit in CJ § 3-2A-02:

> 1. In addition to any other qualifications, a health care provider who attests in a certificate of a qualified expert or testifies in relation to a proceeding before a panel or court concerning a defendant's compliance with or departure from standards of care:
>
> A. Shall have had clinical experience, provided consultation relating to clinical practice, or taught medicine in the defendant's specialty or a related field of health care, or in the field of heath care in which the defendant provided care or treatment to the plaintiff, within 5 years of the date of the alleged act or omission giving rise to the cause of action . . . .

The Court then undertook an exercise in statutory construction, beginning with the plain meaning of the Act. The Court noted that CJ § 3-2A-04(b)(1)(i), added in 1986, requires that a claimant or plaintiff with a medical malpractice cause of action file a certificate from a qualified expert; the sanction for failing to file a certificate of a qualified expert is dismissal without prejudice of the "claim or action." In 2004, the Legislature added additional qualifications for the attesting expert in CJ § 3-2A-02, presumably with the knowledge that the section added in 1986 already required dismissal without prejudice for failure to file a proper Certificate. Further, the Court noted that the use of the words "in addition to any other

qualifications" in CJ § 3-2A-02(c)(2)(ii) shows clearly and unambiguously that the Legislature intended the qualifications in CJ § 3-2A-02 and CJ § 3-2A-04 to be read together. Therefore, because the two provisions act in tandem, filing a Certificate of an unqualified expert, in contravention of CJ § 3-2A-02, mandates dismissal without prejudice of the claim or action, as provided in CJ § 3-2A-04.

In dismissing Dr. Breslin's arguments, the Court emphasized that its plain meaning analysis does not undermine the Legislature's intent – to weed out non-meritorious claims. Because the Certificate is vital, an action in circuit court (or federal court) will be dismissed without prejudice if *any* of the Certificate's material requirements are not met. Such an outcome supports the legislative purpose by not allowing a claim or action to go forward with an unqualified expert, and, therefore, an insufficient Certificate. Further, dismissing the case without prejudice allows for protection of a plaintiff's rights in a medical malpractice case by providing the opportunity to re-file (assuming the limitations period has not expired) if a qualified expert can attest in a Certificate to departures from the standard of care and causation between such departure and the injury.

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COURT OF SPECIAL APPEALS

Barry J. Nace v. Tamara Hamilton Miller, No. 0692, September Term 2010, filed September 7, 2011. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2011/692s10.pdf

CIVIL PROCEDURE - VENUE - TRANSFER - CONVENIENCE TRANSFERS

CIVIL PROCEDURE - JUDGMENTS - PRECLUSION & EFFECT - LAW OF THE CASE
CIVIL PROCEDURE - VENUE

Facts: On January 27, 1997, appellant settled a medical malpractice suit on behalf of appellee. Not long after, appellant began acting as the guardian of appellee's proceeds. At some point during the guardianship, appellee's mother informed appellant that she had failed to pay property taxes for 2002. Appellant petitioned the Circuit Court for Montgomery County for $14,284.37 to satisfy the outstanding taxes and secure property insurance. The Circuit Court for Montgomery County released the funds, but neither appellant nor appellee's mother purchased property insurance. On two other occasions, appellant petitioned the Circuit Court for Montgomery County for funds to secure property insurance. However, property insurance was never purchased.

On March 14, 2004, a fire ravaged appellee's residence, and she and her mother lost everything. Appellant subsequently filed an "Emergency Motion for Release of Funds." The Circuit Court for Montgomery County granted the request and released $5,000 for shelter and clothing. Approximately two years after the fire, appellant petitioned the court to secure funds to repair appellee's residence. The court granted the request and released approximately $80,000 to repair the residence and replace clothing and goods that were destroyed in the fire.

On April 1, 2008, appellee filed a complaint in the Circuit Court for Prince George's County, alleging legal malpractice for the failure to purchase an insurance policy and submit annual fiduciary reports while acting as a guardian. Appellant filed a motion to transfer venue, which was granted, and the case was transferred to the Circuit Court for Montgomery County. After the transfer, a motion to re-transfer was filed. The Circuit Court for Montgomery County granted the motion and transferred the case back to the Circuit Court for Prince George's County.

Appellant noted an appeal.

Held: Judgment affirmed. Appellant argued that the lower court was not permitted to review the motion to re-transfer, and that the court abused its discretion in granting the motion.

Md. Rule 2-327(c), which controls a motion to transfer based on *forum non conveniens*, provides that a court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice. Md. Rule 2-327(c) was derived from 28 U.S.C. § 1404(a), and as such, federal case law is persuasive.

In the federal system, a court is not permitted to review a motion to re-transfer, absent compelling circumstances, because of the law of the case doctrine. *See Allfirst Bank v. Progress Rail Serv.'s Corp.*, 178 F. Supp. 2d 513, 515 (D. Md. 2001). The Court, however, declined to hold that the law of the case doctrine prohibits courts from reviewing a motion to re-transfer because the doctrine is applied differently in Maryland. *See Kearney v. Berger*, 416 Md. 628, 641 (2010).

After concluding that the lower court was permitted to rule on the motion to re-transfer, the Court held that venue was appropriate in Prince George's County because the injury (i.e. the fire) occurred there. *See* Md. Code, § 6-202(8) of the Courts & Judicial Proceedings Article. The Court then concluded that the lower court did not abuse its discretion in granting the motion to transfer based on *forum non conveniens*.

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Brett Russell Molter v. State of Maryland, No. 1079, September Term, 2010, filed September 7, 2011. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2011/1079s10.pdf

CRIMINAL LAW - BURGLARY AND THEFT - LEGAL SUFFICIENCY OF PROOF OF BURGLARY - HOW RECENT IS "RECENTLY" - PROBATION BEFORE JUDGMENT AND IMPEACHMENT OF CREDIBILITY - DENIAL OF A MISTRIAL - PLAIN ERROR - HARMLESS ERROR

Facts: Molter was convicted of first first-degree burglary and theft of goods of the value of $500 or more. The victims of the burglary, Eric Eisenrauch and his girlfriend, lived together in a two-story house in Joppa, Maryland. The couple traveled to New York on Saturday, April 18, 2009, and returned on Monday, April 20, 2009. Their home was burglarized while they were gone.

The following evidence was adduced during trial. Eisenrauch testified that before leaving for New York, he had told Molter about the impending trip. Until this incident, Molter and Eisenrauch were friends of twenty years. Another witness observed Molter at the side-door of Eisenrauch's home during the evening of April 18, 2009. Eisenrauch and his girlfriend also furnished police with a detailed list of items that were stolen from their home. Several items matching the items described by the victims were recovered from the trunk of Molter's car during a search by police on April 27, 2009.

At trial, the court did not permit Molter to impeach Eisenrauch by showing, pursuant to Rule 5-609, that he had been convicted of the possession of a controlled dangerous substance. Eisenrauch was convicted on April 22, 2009, but at the time of trial, his original conviction was stricken and substituted for a finding of probation before judgment ("PBJ"). The trial court ruled that a PBJ was not a conviction within the contemplation of Rule 5-609. The court also forbade Molter from introducing the PBJ pursuant to Rule 5-608(b) ("Impeachment by examination regarding witness's prior conduct not resulting in convictions"), finding that the prejudicial effect of the evidence of Eisenrauch's PBJ far outweighed its probative value.

During the State's direct examination of Eisenrauch, he began to state that Molter had previously broken into Eisenrauch's business. Before Eisenrauch finished his sentence, defense counsel objected. The objection was sustained, and the jury was subsequently instructed, without objection, to ignore the statement.

Defense counsel proposed staging a demonstration for the jury during closing argument to counter a statement made by Eisenrauch during his testimony regarding how his stolen camera fit perfectly into his tripod. The trial judge denied defense counsel's proposal.

On appeal, Molter raised five questions:

1. Was the evidence legally sufficient to support his conviction for first-degree burglary?;

2. Did the circuit court erroneously rule a State's witness could not be impeached with evidence of that witness's PBJ?;

3. Did the circuit court erroneously deny his motion for a mistrial?;

4. Did the prosecutor's comments during opening statement and closing argument prejudice his right to a fair trial?; and

5. Did the circuit court erroneously deny him his right to put on before the jury a simple demonstration during closing argument?

Held: Affirmed. The Court first addressed Molter's conviction of first degree burglary. Molter did not challenge his conviction for the theft of the items in question. Molter argued that the burglary charge should be bifurcated from the theft charge. The Court stated that "if the evidence…establishes that the theft was inextricably part and parcel of a burglary…the indivisibility of the total criminal package establishes the criminal agency of the possessor for whatever role he played in the criminal episode." Here, Eisenrauch told Molter that he and his girlfriend were out of town the weekend the theft occurred. Further, a long-term acquaintance of both Eisenrauch and Molter observed Molter at the scene during the weekend in question. Finally, because Molter was in possession of the recently stolen goods, because he did not offer an explanation as to why he was in possession of these stolen goods, and because the stolen goods were found in Molter's trunk within nine days of the theft, which, as noted by the Court, is "recent" within the contemplation of the rule, an inference that he was therefore the thief of these stolen goods was permissible. Thus, Molter's conviction for first degree burglary was affirmed by the Court.

The Court next addressed the circuit court's ruling that it could not impeach a State's witness with evidence of that

witness's PBJ. Eisenrauch testified for the State. Molter sought to impeach Eisenrauch's testimony pursuant to Maryland Rule of Procedure § 5-609(a) using evidence of Eisenrauch's previous PBJ. The Court stated that impeaching a witness through evidence of prior convictions under § 5-609(a) requires a final judgment of conviction. Under Maryland Code § 6-220(g)(3), a PBJ is "not a conviction for purposes of disqualification…imposed by law because of conviction of a crime." Thus, a PBJ is not a conviction within the purview of § 5-609(a), and the Court affirmed the circuit court judge's ruling that Eisenrauch's PBJ could not be used to impeach his credibility as a witness under § 5-609(a). The Court also disagreed with Molter's second argument for admitting the PBJ to impeach Eisenrauch. Rule § 5-608(b) permits the court to allow witnesses to be examined and impeached regarding the witness's own prior conduct that did not result in a conviction but which the court determines is probative of a character trait of untruthfulness. The Court noted that § 5-608(b) requires the judge to act in his discretion and balance the actual probative value of the prior bad act against the prejudice against the witness's character. Here, the Court determined that the circuit court judge's decision to exclude Eisenrauch's PBJ under § 5-608(b) was not an abuse of his judicial discretion, and again affirmed the circuit court judge's ruling denying the introduction of the PBJ to impeach Eisenrauch.

The Court then held that Molter's motion for a mistrial was properly denied by the circuit court. Molter argued that he should be awarded a mistrial based on an unfinished statement by Eisenrauch on direct examination. Molter believed the statement, if finished, would have accused Molter of a prior burglary of Eisenrauch's business. The circuit court judge, following a bench conference and without objection issued a curative instruction to the jury. The Court noted that the judge gave an adequate curative instruction, and because no immediate objection was made, Molter waived his ability to later raise this issue. The Court also asserted that a mistrial is an extraordinary remedy of last resort, and it is reviewed on an abuse of discretion standard. The Court affirmed the circuit court's denial of Molter's motion for a mistrial and ruled that the circuit court did not abuse its discretion in so denying.

The Court next discussed Molter's argument that the prosecutor's comments during the opening statement and closing argument prejudiced his right to a fair trial. The Court noted that Molter failed to object at the time these statements were made and therefore also failed to preserve his right to raise these statements as an issue on appeal. The Court further dismissed Molter's argument that he was entitled to the plain

error exception to the preservation requirement, stating that even if an argument regarding an error a trial adequate enough to prevail is made, it does not trump the preservation requirement. The Court stated that the preservation rule "contemplates error" and that its purpose is to bring the error to the judge's attention at trial, giving him a chance to correct it immediately. While an appellate court can, in its discretion, overlook the lack of preservation, the Court noted that there was no reason to do so here and held that because Molter failed to object to the prosecutor's comments during his opening statement and during his closing argument contemporaneously, Molter waived his ability to raise these issues on appeal.

Finally, the Court addressed Molter's contention that he was erroneously denied the opportunity to have his counsel put on a demonstration before the jury during closing argument to purportedly diminish the impact of Eisenrauch's statement, and was thus denied a fair trial. The Court stated that Eisenrauch's statement regarding his stolen camera fitting perfectly inside his tripod, while possibly gratuitous and superfluous, was inconsequential to the overall case of showing that Molter was both the thief and the burglar. Thus, when Molter's counsel proposed demonstrating to the jury that tripods are universal and that every camera fits into every tripod, the circuit court denied the proposal. The Court held that this denial was also inconsequential to the overall case and it therefore did not deny Molter a fair trial. The Court stated that even if it were to hold that the circuit court erroneously denied the demonstration proposal, it would be the quintessential example of harmless error, and Molter would still have received a fair trial.

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Jerome Pinkney v. State of Maryland, Case No. 2661, September Term, 2009, filed September 2, 2011, Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2011/2661s09.pdf

CRIMINAL LAW AND PROCEDURE - COUNSEL - SUBSTITUTION & WITHDRAWAL - RIGHT TO COUNSEL - RIGHT TO SELF REPRESENTATION - JURY INSTRUCTIONS - MISSING WITNESS

Facts: This case involves a defendant's motion to discharge his counsel and the trial court's refusal to give a missing witness jury instruction. The defendant was charged with second-degree assault, resisting arrest, and disorderly conduct. Prior to trial, appellant filed a motion to discharge counsel. The circuit court denied the motion without prejudice and held that appellant could renew the motion at trial. On the first day of trial, prior to jury selection, appellant renewed the motion to discharge his attorney. The trial judge denied the motion, finding that appellant had not presented a meritorious reason for the request to discharge counsel.

At trial, the State did not present the victim of the assault as a witness. As such, appellant requested that the trial court give the Maryland Pattern Jury Instruction Criminal 3:29 (2007) regarding missing witnesses. The circuit court refused to give the missing witness jury instruction. The jury convicted appellant of second-degree assault. On appeal, appellant contends that the trial judge violated Maryland Rule 4-215(e) in failing to inform appellant that he could proceed *pro se* at trial if he chose and erred in failing to give the missing witness jury instruction.

Held: The Court of Special Appeals affirmed. A defendant in a criminal prosecution has a constitutional right to the effective assistance of counsel and the corresponding right to reject that assistance and represent himself. Gonzales v. State, 408 Md. 515, 529-30 (2009). "The Sixth Amendment to the United States Constitution grants the accused not only the right to be represented by counsel, but also the right to make his own defense **without** the assistance of counsel." Gregg v. State, 377 Md. 515, 548 (2003) (footnote and citations omitted) (emphasis in original). Maryland Rule 4-215(e) provides:

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the

> court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a) (1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Under Md. Rule 4-215(e), where a trial court finds no meritorious reason for the requested discharge of counsel and does not permit the discharge, Md. Rule 4-215(e) does not impose an obligation on the trial court to inform the defendant of the option to proceed *pro se*.

The language of Williams v. State, 321 Md. 266, 273, 582 A.2d 803, 806 (1990): "When a defendant makes an unmeritorious request to discharge counsel, the trial judge may . . . deny the request and, if the defendant rejects the right to represent himself and instead elects to keep the attorney he has, continue the proceedings[,]" was *dicta* and does not impose a duty on the trial judge to advise a defendant of his right to proceed *pro se* after finding the defendant's reasons for discharging his counsel are unmeritorious.

Thus, where the trial court finds no meritorious reason for the defendant's request and **does not permit** discharge of counsel, under a plain reading of Md. Rule 4-215(e), there is no requirement that the trial court advise the defendant of the right to proceed *pro se*. It is the defendant's burden to assert the right to proceed *pro se*. "[W]hen an accused desires to represent himself **he must assert that right**, and its grant is conditioned upon a valid waiver of the right to assistance of counsel." Parren v. State, 309 Md. 260, 266 (1987). As the defendant did not assert his right to proceed pro se, we found no error in the trial court's denial of the defendant's motion to discharge his counsel.

"The missing witness rule applies where (1) there is a witness, (2) who is peculiarly available to one side and not the other, (3) whose testimony is important and non-cumulative and will elucidate the transaction, and (4) who is not called to

testify." Woodland v. State, 62 Md. App. 503, 510, cert. denied, 304 Md. 96 (1985). Here, the witness was identified in the charging document, and as such, there is no indication that the witness was peculiarly available to the State and not to the defense.

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Rodney Patrick Morton v. State of Maryland, No. 2490, September Term 2009, filed September 2, 2011. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/2490s09.pdf

CRIMINAL LAW—MARYLAND RULE 4-263(d)—DISCLOSURE OF EXPERT WITNESSES—DISCOVERY SANCTIONS—MARYLAND RULE 4-323(a)— TIMELINESS OF OBJECTION—MARYLAND RULE 5-702— QUALIFICATIONS TO RENDER EXPERT TESTIMONY

Facts: The State identified a SAFE (sexual assault forensic examination) nurse as a lay witness in a sexual abuse case, but did not inform the defense that it intended to call her as an expert witness until one week before trial. Appellant objected to her testimony in a motion *in limine*, arguing untimely identification of an expert witness under Maryland Rule 4-263(d) and requesting exclusion of her testimony as a discovery sanction under Rule 4-263(n). The trial court denied the motion and permitted the witness to take the stand. After *voir dire* of the SAFE nurse prior to her qualification as an expert, appellant again objected to her testimony, arguing that she was not qualified to render an expert opinion under Rule 5-702. The trial court admitted the SAFE nurse's testimony over appellant's objection. A jury in the Circuit Court for Worcester County found appellant guilty of a third degree sex offense and second degree assault.

Held: The Court of Special Appeals affirmed. When a motion *in limine* to exclude evidence is denied, the issue of the admissibility is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial. Thus, appellant waived his objection to the SAFE nurse's testimony—initially made in a motion *in limine*— by failing to make a contemporaneous objection at the time her testimony was introduced at trial, as required by Rule 4-323(a).

Trial court judges have discretion in applying sanctions for discovery failures, and exclusion of evidence is not a favored sanction. Further, defense council made no effort to mitigate the prejudice caused by the late disclosure of the expert witness by attempting to find another expert to review the SAFE nurse's report or to provide a contradicting opinion. Thus, even if appellant had preserved his objection, the trial court did not abuse its discretion in admitting expert testimony and declining to impose sanctions.

The trial court did not abuse its discretion in determining

that the SAFE nurse's testimony was likely to aid the jury in evaluating the claim of digital penetration by appellant, which was the central contested issue in the case. The court thoroughly questioned the SAFE nurse about her training and experience, and she testified that she had been a registered nurse for twenty-two years, that she was a certified forensic nurse examiner in Maryland and Virginia, that she was subject to peer review to maintain her certification, and that she had conducted over one hundred pelvic exams. The trial court correctly found that the SAFE nurse qualified as an expert to testify about pediatric forensic examinations under Rule 5-702 based on her specialized knowledge, skill, experience, training, and education. Accordingly, the trial court did not err in admitting her expert testimony.

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Roland Charleau v. State of Maryland, No. 2644, September Term, 2009, filed September 2, 2011. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/2644s09.pdf

CRIMINAL LAW – MARYLAND RULE 4-326 – JUROR MISCONDUCT

Facts: A jury in the Circuit Court for Montgomery County found appellant guilty of robbery with a dangerous weapon, robbery, and conspiracy to commit robbery. Appellant's counsel spoke with two jury members in the courtroom lobby after the jury reached its verdict. Appellant alleged that they told his council that one of the jurors held himself out as a professional photography analyst, that he provided the other jurors with magnifying equipment during deliberations, and that such expertise and equipment was decisive in the jury's deliberations. Based on this conversation, appellant filed a motion for a new trial, which argued that he was deprived of a fair trial. The trial court denied appellant's motion, finding no prejudice, and that the jury's verdict was fair and impartial.

Held: The Court of Special Appeals affirmed. The trial court did not abuse its discretion in denying appellant's motion for a new trial because appellant was not prejudiced by a more critical examination of actual evidence than had occurred at trial. Although a magnifying glass is not on the list of permissible items in a jury room under Md. Rule 4-326, the jurors' use of the magnifying glass did not allow them to have access to information that would not otherwise be available to them, such as conversations with a third party or use of the internet to access information. The use of the magnifying glass was akin to jurors using reading glasses – which are also not on the list of permissible items under Md. Rule 4-326–to examine items in evidence, a practice which is commonly accepted. The juror's self-professed expertise in photo analysis did not cause appellant undue prejudice, because deliberating jurors are not required to leave their experience and knowledge at the door. Rather, jurors are permitted to consider the evidence in light of their own experiences and to draw any reasonable inferences or conclusions from the evidence that they believe to be justified by common sense and their own experiences.

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Michael T. McCloud v. Department of State Police, Handgun Permit Review Board. Case No. 0483, September Term 2010. Opinion filed September 6, 2011 by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/483s10.pdf

CRIMINAL LAW & PROCEDURE - CRIMINAL OFFENSES - WEAPONS - LICENSES - HOLDERS - APPLICATION FOR CARRYING & CONCEALED PERMITS

Facts: Appellant Michael T. McCloud applied for a renewal of a permit issued to him by appellee Maryland State Police ("MSP") to carry a concealed weapon. MSP denied the application, stating that McCloud was disqualified under Maryland law from possessing a regulated firearm because he was convicted in 2006 in the District of Columbia of attempting to carry a pistol without a license. McCloud appealed the denial of his application to the Handgun Review Board ("the Board"), which reversed MSP and issued a decision in his favor. MSP sought judicial review in the Circuit Court for Baltimore County. The circuit court issued an opinion reversing the decision of the Board, thereby denying the permit renewal. McCloud now appeals the decision of the circuit court.

Held: The Court of Special Appeals affirmed. The Court said that the Board erred by failing to find that McCloud's conviction in the District of Columbia disqualified him from lawfully possessing a handgun in Maryland under Md. Code (2003), Public Safety Article ("PS") Sec. 5-133 (b)(1) & Sec. 5-101 (g) (unlawful to possess handgun after conviction for "disqualifying crime," including violation that has a potential statutory penalty of greater than 2 years), and therefore he was not eligible for a handgun permit under PS § 5-306 (a) (criteria for handgun permit eligibility). McCloud's D.C. conviction disqualified him from being able to lawfully posses a handgun because the out-of-state offense is comparable to a Maryland misdemeanor that has a penalty of greater than two years imprisonment. To determine whether an out-of-state crime constitutes a "disqualifying crime," a court looks to the penalty for the equivalent Maryland offense in effect at the time the person convicted seeks to possess a regulated firearm. The circuit court correctly determined that the current Maryland equivalent of McCloud's D.C. conviction is considered a misdemeanor and carries a maximum penalty of up to three years imprisonment. Accordingly, the Board erred by concluding that McCloud's D.C. conviction was not a "disqualifying crime."

In *Ralph Coleman Brown, Jr. v. Handgun Permit Review Board*, 188 Md. App. 455 (2009), the Court stated in dicta that it would

"produce an absurd result" if a person could lawfully obtain a handgun carry permit under PS § 5-306 (a) (permit must be granted unless applicant has been sentenced to more than 1 year imprisonment), but still be arrested and charged with unlawfully possessing a handgun in violation of PS § 5-133 (b)(1) & 5-101 (g) (see above). The Court here embraced the dicta in *Brown* and held that the Handgun Review Board should deny a permit if an applicant is ineligible to possess a handgun under PS § 5-133 (b)(1) & PS § 5-101 (g).

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Assateague Coastkeeper et al. v. Maryland Department of the Environment, No. 471, September Term, 2010 Opinion filed on September 6, 2011 by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2011/471s10.pdf

ENVIRONMENT - GENERAL PERMIT FOR ANIMAL FEEDING OPERATIONS - SUBSTANTIAL BASIS - AGENCY EXPERTISE - CLEAN WATER ACT

Facts: This appeal involves the propriety of regulation by the Maryland Department of the Environment ("MDE"), appellee, of Animal Feeding Operations ("AFOs"), facilities that house animals. AFOs produce large quantities of animal manure each year, which is applied to crops in place of chemical fertilizer. The manure contains nutrients that, if improperly managed, contribute to water quality problems for lakes, rivers, and groundwater. The challenge here is to the decision by MDE to issue a General Discharge Permit for AFOs (the "GP"). The GP authorizes certain discharges, but it imposes requirements regarding the management of manure and its application as fertilizer.

Appellants filed with MDE a petition for a contested hearing, asserting that the GP violated both Maryland and federal law. Specifically, appellants asserted that the GP: (1) "allows open storage of poultry litter under conditions that are certain to result in discharges of pollutants to the waters and groundwaters of" Maryland; and (2) "fails to ensure compliance with water quality standards and TMDL waste load allocations prior to permit coverage approval."

The case was transmitted to the Office of Administrative Hearings ("OAH") for a hearing before an Administrative Law Judge ("ALJ"). On May 5, 2009, the ALJ issued a proposed decision, denying appellants' motion for summary decision and granting MDE's motion. The ALJ initially rejected appellants' contention that the GP's open storage provision was inconsistent with federal law, reasoning that, because Maryland Animal Feeding Operations ("MAFOs") are unregulated at the federal level, MDE's regulation of them was in excess of its responsibilities under the Clean Water Act ("CWA"). It stated that "MDE is not narrowing the definition of [Confined Animal Feeding Operations ("CAFOs")] as the Petitioners suggest, but instead they are expanding the group of AFOs that must submit to some sort of permitting requirement in order to operate and store manure." The ALJ likewise rejected appellants' assertion that MDE's decision to regulate MAFOs differently from CAFOs was arbitrary and capricious, noting that MDE's decision was based on available

scientific information. Finally, the ALJ found that the GP complied with federal regulations governing water quality, noting: (1) all of Maryland's water quality standards had been approved at that point by the EPA; and (2) the GP was consistent with the existing approved standards.

On or about May 27, 2009, appellants filed exceptions to the ALJ's proposed decision granting MDE's motion for summary decision in its favor. On August 19, 2009, the Final Decision Maker ("FDM") heard argument on the exceptions to the ALJ's proposed decision, and it granted MDE's motion for summary decision. It found that there was no genuine dispute of material fact, and the decision of MDE to issue the GP was not arbitrary and capricious. The Circuit Court for Baltimore City affirmed, and appellants appealed.

Held: Affirmed. There was substantial evidence to support the provisions of the GP allowing MAFOs to store poultry manure on the ground for up to 90 days, in contrast to the 14-day storage limit for AFOs subject to federal regulations. MDE had a reasonable basis for establishing the three-year, 90-day phase-in period for the storage of uncovered manure by MAFOs. The evidence submitted by MDE made clear that it considered the lack of evidence of any significant differences in water quality impacts between litter storage of 14 and 90 days, and it weighed that against the potential adverse effects of a stringent field storage time limit, as well as the need to give chicken farmers time to makes changes to their business practices to comply with the new requirements. MDE's decision in this regard was consistent with the policy goals of the Maryland Environmental Article, particularly the goal to prevent, abate, and control pollution of the waters of this State.

There was no error in the FDM's conclusion that there existed no dispute of material fact precluding summary decision in favor of MDE. As the FDM stated, appellants did not submit any evidence, by affidavit or otherwise, stating that there were quantifiable differences in nutrient loss for 90-day storage of poultry litter as opposed to 14-day storage. Given the lack of evidence quantifying the nutrient losses for uncovered piles of poultry manure over time, there was no material dispute of fact that the 90-day provision in the GP, based on the recommendation of the Chesapeake Research Consortium, did not adequately protect water quality.

The GP did not violate federal regulations that prohibit the issuance of a federal discharge permit "[t]o a new source or a new discharger, if the discharge from its . . . operation will

cause or contribute to a violation of water quality standards." The resolution of the interpretation of the phrase "cause or contribute" is an issue that involves MDE's agency expertise, and we give deference to its interpretation of the phrase to mean that a discharge does not cause or contribute to a violation of water quality standards if it results in a net reduction in pollution.

There was a substantial basis for the FDM's finding that the GP does not "cause or contribute" to a violation of water quality standards because it will result in a reduction in pollutants to State waters. Because the GP imposes restrictions on CAFOs and MAFOs, including farms that previously were not subject to regulation, a reasoning mind could conclude, as the FDM did, that these conservation practices would reduce, overall, the pollutants introduced to waterbodies. Thus, even with some new discharges, there would be a net reduction in pollutants to State waters.

The GP complies with other applicable federal laws governing water quality standards. It was within the province of MDE to determine that the preparation of site-specific Nutrient Management Plans ("NMPs") and Comprehensive Nutrient Management Plans ("CNMPs"), which are subject to MDE's approval, provides ample opportunity to consider whether the plans are adequate to assure compliance with water quality standards prior to issuing permit coverage.

The GP is not less stringent than federal law. Both MAFOs and CAFOs are required to develop a NMP. Although a CAFO must develop a CNMP, whereas a MAFO may develop a CNMP and a Conservation Plan, the GP requires all AFOs in Maryland to develop NMPs. And the GP's requirements in this regard are substantially the same as the federal requirements. The GP actually is broader than federal law. After *National Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011), CAFOs are subject to regulation under the Clean Water Act only if they discharge to surface water. Maryland, however, still regulates CAFOs that "propose to discharge." The GP also regulates MAFOs that do not discharge or propose to discharge to surface water. Because the GP regulates facilities not subject to regulation under federal law, it is broader, not less stringent, than federal law.

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Baltimore County, Maryland v. AECOM Services, Inc. f/k/a DMJM H&N, Inc., Case No. 1301, September Term 2009, filed September 1, 2011, Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2011/1301s09.pdf

GOVERNMENTS - LOCAL GOVERNMENTS - CLAIMS BY & AGAINST - ORDINANCES & REGULATIONS - CONTRACT LAW - CONTRACT INTERPRETATION - DEFENSES - EQUITABLE ESTOPPEL - JUDGMENT INTEREST - PREJUDGMENT INTEREST

Facts: This appeal concerns a dispute between Baltimore County (the "County") and DMJM H&N, Inc., now known as AECOM Services, Inc. ("DMJM"), regarding payment for services performed in connection with the expansion of the Baltimore County Detention Center. The County and DMJM entered into a contract in which DMJM was appointed as the "[a]rchitect to provide professional architectural/engineering services in connection with a project to construct an addition and [an] associated parking structure at the Baltimore County Detention Center" (the "Project"). The County filed suit against DMJM in the Circuit Court for Baltimore County alleging breach of contract and negligence, and DMJM filed a Counterclaim and an Amended Counterclaim seeking payment for services under the "base contract" and for "additional services." At trial, the County made a motion for judgment asking that the circuit court find, as a matter of law, that DMJM could not receive payment for "additional services" performed outside of the terms of the contract. The circuit court denied the motion. At trial, DMJM requested that the circuit court instruct the jury that they could award DMJM prejudgment interest on any amount awarded. The circuit court denied the request. A jury awarded damages in favor of DMJM, including payment for the additional services. Both the County and DMJM appealed. On appeal, the County argues that the circuit court erred in denying the motion for judgment. On appeal, DMJM argues that the circuit court erred in failing to instruct the jury on prejudgment interest.

Held: The Court of Special Appeals reversed the circuit court's denial of the County's Motion for Judgment and vacated the judgment in favor of DMJM in the amount of $966,022.00 for additional services. The Court of Special Appeals affirmed the circuit court's denial of prejudgment interest.

Appellate courts take an objective approach to contract interpretation, according to which, unless a contract's language is ambiguous, we give effect to that language as written without

concern for the subjective intent of the parties at the time of formation. When interpreting a contract, we are confined to the four corners of the agreement, and we ascribe to the contract's language its customary, ordinary, and accepted meaning. We do not consider the subjective intent of the parties, rather we consider the perspective of a reasonable person standing in the parties' shoes at the time of the contract's formation. As such, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. The language of a contract is only ambiguous if, when viewed from this reasonable person perspective, that language is susceptible to more than one meaning.

The language of the contract is clear and unambiguous - the contract and contract amendments were to be in writing and approved by the Baltimore County Council. Based on a plain reading of the document, in simplest terms, AECOM Services, Inc. f/k/a DMJM H&N, Inc. did not comply with the procedures outlined under the contract for seeking compensation for additional services.

The plain meaning of Baltimore County Charter § 715 and Baltimore County Code § 10-2-304, § 10-2-306 and § 10-2-107 support the conclusion that an enforceable contract amendment required approval by the County Council.

The legislative history of Baltimore County Charter § 715, Baltimore County Code § 10-2-304 and § 10-2-306 clearly demonstrate the County Council's intent was to create a process by which County Council approval is required prior to the execution of a contract for services involving a term in excess of two years or the expenditure of more than $25,000 per year or such amount as may be set by legislative act of the County Council. There is no indication that the County Council intended to exempt, from the County Council approval requirement, contract amendments where services exceed a cost of $25,000 or the two year duration.

Based on the plain meaning of Baltimore County Code § 10-2-504, and an examination of its legislative history, Baltimore County Code § 10-2-504 does not allow changes to existing contracts, which increase the contract price without notice to and the acquiescence of the County Council.

Maryland appellate courts have consistently held that a county or municipality may never have an obligation imposed upon it except in the formal manner expressly provided by law. The

rule is strict; if the municipality's charter provisions are not precisely followed during the contracting process, the contract is *ultra vires*, or outside the power of the municipal corporation to make, and void *ab initio*. The rule is firmly established that one who makes a contract with a municipal corporation or administrative agency is bound to take notice of the limitations of its powers to contract.

Municipal corporations are not exempt from application of equitable estoppel principles; however, in practice we have applied the doctrine more narrowly. Equitable estoppel is not applicable when the limited authority of a public officer has been exceeded, or was unauthorized or wrongful.

There are three rules regarding prejudgment interest: (1) as a matter of right - prejudgment interest is allowed as a matter of right when the obligation to pay and the amount due [have] become certain, definite, and liquidated by a specific date prior to judgment so that the effect of the debtor's withholding payment was to deprive the creditor of the use of a fixed amount as of a known date; (2) absolute non-allowance - where the recovery is for bodily harm, emotional distress, or similar intangible elements of damage not easily susceptible of precise measurement, the award itself is presumed to be comprehensive, and prejudgment interest is not allowed; and (3) if the case falls in between the as of right and absolute non-allowance, prejudgment interest is within the discretion of the trier of fact.

Where breach of contract damages are unliquidated or not reasonably ascertainable until the verdict, a party is not entitled to a discretionary determination on the issue of prejudgment interest by the jury, prior to the verdict in the case.

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Erie Ins. Exch. v. Estate of Jeanne R. Reeside, et al., No. 2941, September Term 2009, filed September 1, 2011. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2011/2941s09.pdf

INSURANCE - PROCEDURE – ALTERNATIVE DISPUTE RESOLUTION – MEDIATION

Facts: Appellee, the Estate of Jeanne R. Reeside ("Estate"), filed a claim for damages in the Circuit Court for Montgomery County against appellant, Erie Insurance Exchange ("Erie"), and the Washington Suburban Sanitary Commission ("WSSC"). The Estate alleged that "WSSC failed and/or refused to pay for any clean up and/or remediation after WSSC's sewage pipes backed up Reeside's basement, and that the Estate was "forced to pursue reimbursement . . . against their home owners' insurance company – Erie."

On September 26, 2007, WSSC and the Estate attended a mediation session, at which time "WSSC made a monetary offer to settle." On October 2, 2007, counsel for the Estate sent an e-mail to counsel for Erie and WSSC, stating that the assignment clerk had been informed of "the settlement." Thereafter, the court stayed the case "for a period of 30 days." On October 26, 2007, upon receiving a draft of the agreement, counsel for the Estate stated that "[t]he settlement agreement and release are not acceptable as written." The Estate asked WSSC to make six changes. Upon learning that WSSC could not make any of the suggested changes, counsel for the Estate requested that "this matter be put back on the trial track."

On January 11, 2010, Erie filed a motion to enforce settlement. On February 2, 2010, the court held a hearing, at which time it learned that there was nothing placed in writing during the mediation session that "articulated [] the terms of the settlement." The court denied Erie's motion, and this appeal followed.

Held: Affirmed. The circuit court correctly declined to enforce settlement where the parties failed to agree on essential terms of the contract and therefore did not mutually assent to it as a whole. A third party who was not present during the mediation cannot assert that an agreement was reached where the third party failed to request proof of it in writing, and the mediator did not draft a memorandum of understanding or a summary of the terms of the agreement at the end of the mediation session.

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Insurance Commissioner for the State of Maryland v. State Farm Fire & Casualty, No. 0041, September Term 2010. Opinion filed on September 6, 2011 by Hotten, J.

http://mdcourts.gov/opinions/cosa/2011/41s10.pdf

INSURANCE LAW - CLAIMS & CONTRACTS

INSURANCE LAW - CLAIMS & CONTRACT

Facts: On August 6, 2007, Reverend D.C. Washington met with a State Farm Mutual Automobile Insurance Company ("State Farm") agent to obtain automobile and renter's insurance. The agent quoted Washington a premium rate of $1,401.46 for a six month policy. Washington accepted the quote and tendered an initial payment of $233.57. The agent subsequently issued an insurance binder. Both parties understood that an insurance policy would be issued at a later date.

Not long after, the agent submitted Washington's application to the company's underwriting department. After the submission, the agent realized he had quoted an incorrect premium rate. A new policy with a premium of $2,512.62 was subsequently issued. State Farm then received information that suggested Washington's insurance premium should be further reduced. After accounting for the discount associated with renter's insurance, the six month premium was retroactively reduced to $1,603.20.

On October 24, 2007, Washington filed a complaint with the Maryland Insurance Administration ("MIA"), alleging State Farm raised his premiums without notice or explanation. MIA concluded that State Farm violated Md. Code (2006 Repl. Vol., 2010 Supplement), § 27-614 of the Insurance Article ("Insur.") because it failed to provide written notice of the increased premium at least 45 days before its effective date. State Farm challenged the determination.

The Office of Administrative Hearings ("OAH") concluded that Washington met State Farm's underwriting standards; therefore, upon discovering the error, appellee was obligated to adjust the premium to comply with its established rating plan. OAH also noted that there was no increase in premium because Insur. § 27-614 does not treat the terms "binder" and "policy" as synonymous.

MIA petitioned for judicial review and the Circuit Court for Baltimore City concluded that the terms "binder" and "policy" were not interchangeable. The court then concluded that there was no violation of Insur. § 27-614 because it applied to policies and not binders. Appellant noted an appeal.

Held: Judgment Affirmed. The Court affirmed OAH's decision. The Court reasoned that the notice requirement in Insur § 27-614 is applicable to insurance policies and not binders. Moreover, the Court held that an insurer may cancel a binder or policy during the underwriting period if the risk does not meet the underwriting standards of the insurer. Finally, the Court held that a binder or policy does not have to be cancelled merely because it does not meet the underwriting standards of an insurer.

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In re Antonette H., No. 0944, September Term, 2010, filed August 31, 2011. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2011/0944s10.pdf

JUVENILE DELIQUENCY ADJUDICATION - CRIMINAL POSSESSOR - CONSOLIDATED THEFT STATUTE AND LEGAL SUFFICIENCY OF GUILT - TERRITORIAL JURISDICTION OVER DEFENDANT - INCONSISTENT VERDICTS IN NON-JURY TRIALS

Facts: Antonette H. was convicted of the theft of a stolen vehicle. At 6:30 A.M. on August 11, 2009, Robert Tucker parked his 1995 Jeep Cherokee in the parking lot of his apartment building in Temple Hills, Prince George's County. Later that day, he discovered that his car had been stolen. On August 12, 2009, Washington D.C. police officer Michael Milocheck observed the Jeep Cherokee being driven on Alabama Avenue in Washington, D.C. Southeast. The Jeep struck a parked vehicle, and three individuals exited the car and fled on foot. One of these individuals, Antonette H., was driving the Jeep at the time it struck the parked car. Antonette was apprehended shortly thereafter.

The ignition of the Jeep was "punched out," a recognized technique for starting a car without a key. It is characteristic for stolen cars to have "punched out" ignitions. One of the Jeep's windows was broken: Mr. Tucker stated that neither the "punched out" ignition nor the broken window was present when he last saw his car.

Antonette was first seen behind the wheel of the Jeep less than 34 hours after the original theft. This qualified her for being in possession of recently stolen goods.

At trial, Antonette testified that she first saw the Jeep around her neighborhood and that it was being driven by her male friend, Marcus. Antonette stated that Marcus let her drive the car and that she knew it was a stolen car when she asked to drive it.

The trial court judge found Antonette guilty of theft by inferring the theft as arising from the unexplained possession of recently stolen goods. Unexplained in this context means both a total lack of explanation and a failure to present a plausible explanation.

On appeal, Antonette alleged the following:

1. If she was treated as a recipient of stolen goods, then

Maryland was the incorrect state in which to prosecute her;

2. If she was treated as the actual thief of the property, then her conviction as such was inconsistent with her acquittal for "punching out" the Jeep's ignition, an element of the theft itself and would thus be void following Maryland precedent prohibiting inconsistent verdicts in non-jury trials.

Held: Reversed. The Court first noted that while this appeal arose out of a juvenile delinquency adjudication, the proceeding must still provide the "essentials" of due process and fair treatment, which includes the requirement that a Maryland court have territorial jurisdiction over the crime or the delinquent act with of the juvenile is accused and the requirement that verdicts be consistent.

The Court then discussed the Maryland Consolidated Theft Act and the respective histories of two of the thefts encompassed within it: larceny and receiving stolen goods. The Court noted that before 1979 and the passage of Consolidated Theft Act, larceny and receiving stolen goods were separate crimes that were mutually exclusive. It was a defense to larceny to be a receiver; and it was a defense to receiving stolen goods to be the original thief. Under the Consolidated Theft Act, Maryland Code, Criminal Law Article, §§ 7-101 through 7-110, both larceny and receiving stolen goods are seen as the same theft crime. However, the Court noted that there are two separate inferences permitted from the possession of recently stolen goods: that the defendant was the thief within the purview of common law larceny and that the defendant was a receiver of stolen goods within the purview of the common law of receiving. Thus, the same evidence of possession will support each of the inconsistent views of the defendant's act. The Court next discussed the differences in the modalities of the two distinct common law crimes. For larceny, the focus is more on the actus reus, whereas the focus is more on the mens rea element of the receiving of stolen goods. That is, for larceny, courts focus on the elements of caption and asportation whereas for receiving stolen goods, courts focus more on the receiver's knowledge.

Next, the Court addressed the requirement that in order to prosecute a defendant, the court must have territorial jurisdiction over the defendant at the situs of the crime. The pertinent situs for the crime of receiving stolen goods is where the criminal possession is demonstrated to have occurred: not the site of the original theft. Here, Antonette's criminal possession of the Jeep was on Alabama Avenue in Washington, D.C., outside Maryland's territorial limits. Thus, the Court

concluded, a Maryland court does not have territorial criminal jurisdiction over the prosecution of Antonette for receiving stolen goods.

The Court then discussed the fatal problem of having inconsistent verdicts in non-jury trials regarding the multiple charges levied against Antonette. Maryland forbids inconsistent verdicts in non-jury trials. The Court averred that in this instance, the "punching out" of the ignition was a necessary part of what the thief did: while not a formal element of "obtaining and exerting unauthorized control" of property, it was a necessary factual component in this particular instance. The trial court determined in three separate counts (one count of tampering and two counts of malicious destruction of property) that Antonette did not "punch out the ignition" of the Jeep. Thus, the Court reasoned, because Antonette was found not guilty of "punching out" the ignition, she cannot be found guilty of the actual theft of the Jeep because it would be an inconsistent verdict in a non-jury trial.

The Court also noted the irony that the permitted inference of the totality of the theft because of Antonette's unexplained possession of the stolen Jeep was legally sufficient evidence that Antonette was involved in "punching out" the ignition. However, the trial court did not appreciate that the inference of the theft's totality embraced all elements of the theft, "punching out" being such an element. The Court summarized its holding by stating: "if a defendant is found not to have done what the thief must have done, defendant cannot be the thief."

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Donzel M. Page v. National Railroad Passenger Corporation, No. 01959, September Term 2010, filed September 2, 2011. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2011/1959s09.pdf

LABOR AND EMPLOYMENT - FEDERAL LIABILITY EMPLOYERS' ACT - NEGLIGENCE - CAUSATION - NO REQUIREMENT TO DEMONSTRATE PROXIMATE CAUSATION

A FELA plaintiff is not required to prove legal or proximate causation, as that term is defined in common law negligence. The appropriate standard of causation in a FELA case is whether the employer's acts, or those of its employees, "played any part, even the slightest, in producing the [employee's] injury." *CSX Transp. v. McBride*, ____U.S. ____, 131 S. Ct. 2630, 2643 (2011).

FEDERAL LIABILITY EMPLOYERS' ACT-NEGLIGENCE-FORESEEABILITY
An employer need not have foreseen the employee's specific injury, but merely must have foreseen that an injury could have resulted from the employer's negligence.

FEDERAL LIABILITY EMPLOYERS' ACT-NEGLIGENCE-CONTRIBUTORY NEGLIGENCE
Contributory negligence does not bar a FELA claim, but merely permits the jury to diminish the plaintiff's reward in proportion to his degree of fault.

FEDERAL LIABILITY EMPLOYERS' ACT-NEGLIGENCE-RES IPSA LOQUITUR
The common law restrictions on the use *res ipsa loquitur* to prove a defendant's negligence do not apply in FELA cases. The pertinent question in a FELA case is not whether the facts "fit[] squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding . . . [of] negligence." *Jesionowski v. Boston & Maine R.R.*, 329 U.S. 452, 456-457 (1947).

Facts: Donzel M. Page filed suit against his former employer, the National Railroad Passenger Corporation ("Amtrak"), seeking recompense for a work-related injury which took place at Pennsylvania Station in Baltimore, Maryland. The injury occurred when Page, an on-duty police officer for Amtrak, was informed that a baggage cart had fallen onto live train tracks, blocking an incoming train. Fulfilling his duty to remove obstructions from the tracks, Page sat down on the side of the platform nearest to the cart, dropped down to the tracks next to the cart and pushed the cart off the tracks. Upon dropping down to the tracks, Page landed slightly off balance, injuring his left hip. Two alternate means of ingress to the tracks, a ramp and set of

stairs located 100 yards from the fallen cart, were available to Page. Amtrak filed a motion for summary judgment, which the Circuit Court for Baltimore City granted, finding that, as a matter of law, Amtrak could not be held negligent because Page had failed to prove that Amtrak had breached any duty or that any alleged breach of duty caused Page's injuries.

Held: Vacated and remanded. Page presented evidence, albeit circumstantial, from which a fact-finder could reasonably infer that Amtrak was negligent and that physical injury was a foreseeable result of that negligence. While the relationship between Amtrak's negligence and Page's injuries may not satisfy the common law requirements for proximate causation, a plaintiff in a FELA action need only prove that "'employer negligence played any part, even the slightest, in producing the injury. . . . '" *CSX Transp. v. McBride*, ____U.S. ____, 131 S. Ct. 2630, 2638 n. 2 (2011) (quoting *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957)). Page has met this unexacting threshold. Therefore, we will vacate the judgment entered on Amtrak's behalf and remand this case to the circuit court for trial.

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Joy Friolo v. Douglas Frankel, M.D., et al., No. 825, September Term 2010, filed September 7, 2011. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/825s10.pdf

LABOR AND EMPLOYMENT - MARYLAND WAGE PAYMENT AND COLLECTION LAW - MARYLAND WAGE AND HOUR LAW - STATUTORY ATTORNEY'S FEES - LODESTAR ANALYSIS - REASONABLE FEE - MARYLAND RULE OF PROFESSIONAL CONDUCT 1.5 - CONTINGENCY - DEGREE OF SUCCESS - BONA FIDE DISPUTE - AFFIRMATIVE DEFENSE - MARYLAND RULE 2-323

Facts: Appellant, Joy Friolo, filed a complaint against appellees in the Circuit Court for Montgomery County, alleging breach of express and implied contract, unjust enrichment, fraudulent inducement, and violations of the Maryland Wage Payment and Collection Law and the Maryland Wage and Hour Law. In addition to $128,164.00 in economic and statutory damages, appellant and her co-plaintiff sought punitive and non-economic damages. Prior to trial, appellant abandoned her claim to an interest in appellees' business, and at trial she consented to dismissal of her counts alleging breach of implied contract, unjust enrichment, and fraudulent inducement. At the conclusion of trial, the jury awarded appellant $11,778.85. The court awarded her attorney's fees of $4,711.00 and $1,552.00 in costs. Before this Court commenced appellate proceedings, the Court of Appeals granted *certiorari* and held that the circuit court erred by failing to apply the lodestar method to determine attorney's fees. The case was remanded and, on March 18, 2005, the circuit court entered a second judgment, this time awarding Friolo attorney's fees of $65,348.00. Both parties filed appeals from that judgment, and this Court held that the circuit court failed to fulfill the Court of Appeals' mandate to use the lodestar method. This Court also held that attorney's fees are not recoverable for appellate proceedings where the plaintiff's judgment has been satisfied and the sole issue on appeal is the circuit court's fee award. The Court of Appeals again granted *certiorari*, agreeing that the trial court failed to apply the lodestar analysis but holding that fees for appellate proceedings are generally recoverable. The Court of Appeals again remanded the case to circuit court, and after further proceedings the circuit court entered judgment awarding Friolo attorney's fees of $5,000.00 and $2,277.00 in costs. In a separate judgment, the court ordered Friolo to pay $7,575.00 for one-half of a special master's fee.

Held: The Court of Special Appeals vacated the judgments of the circuit court and entered judgments pursuant to Maryland Rule 8-604(e). An award of "reasonable" attorney's fees must represent a balance between the claimant's degree of success and

her contribution to unnecessary litigation. Consideration of what a hypothetical plaintiff would willingly pay to recover the judgment awarded is antithetical to the legislative intent of fee shifting statutes. Limits on a client's liability, whether fixed or contingent, do not make fee award demands exceeding that limit "unreasonable." In light of the legislative intent to encourage only meritorious claims and case law emphasizing the importance of a plaintiff's "degree of success," the lodestar amount should be reduced by taking into account both the plaintiff's overstatement of damages in the complaint and appellees' understatement of damages in any settlement offer, both as measured by the verdict. Costs should be apportioned similarly. Unless a complaint under Maryland's Payment law alleges, and the answer denies, that an employer withheld wages not as a result of a *bona fide* dispute, the issue remains an affirmative defense that is waived if not separately pled according to Rule 2-323.

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Miller v. City of Annapolis Historic Preservation Comm'n, No. 219 September Term, 2010, Opinion filed on September 6, 2011 by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2011/219s10.pdf

REAL PROPERTY - HISTORIC PRESERVATION COMMISSION - SUBSTANTIAL EVIDENCE - STRICT REVIEW FOR RECONSTRUCTION PROJECTS - STATUTORY INTERPRETATION

Facts: The Millers own a home located within the City of Annapolis Historic District. They requested permission from the Historic Preservation Commission (the "Commission") to construct a single-story porch to replace the porch that had been attached to their home when it was originally constructed between 1903 and 1908, but which subsequently had been torn down. The Millers indicated that they would use exclusively traditional material, including wood for the porch columns. The Commission approved their request.

When construction commenced, the builder hired to construct the porch recommended that the Millers use fiberglass instead of wood to build the porch columns. Without seeking a new Certificate of Approval from the Commission, the Millers allowed the builder to install fiberglass columns. The Millers then submitted to the Commission an "Application for after-the-fact installation of porch columns."

The Commission rejected the Millers' application. It found that the project was not "new construction" within the meaning of the City Code, and therefore, it was subject to strict scrutiny. Because the relevant guidelines provide that contemporary materials are "not acceptable" and "should be avoided," the Commission found that the fiberglass columns would not be permitted in the Historic District.

Mr. Miller appealed. He argued that the porch project was reconstruction, which was subject to lenient review, and that fiberglass columns generally are compatible with the surrounding structures in the Historic District. He also argued that the Commission exceeded its authority in imposing a ban on the use of fiberglass.

Held: Affirmed. The decision of the Commission, denying the Millers' application for an after-the-fact Certificate of Approval to permit them to keep the fiberglass columns installed on their reconstructed porch, was supported by substantial evidence and was not premised upon an erroneous conclusion of law. The record supports the Commission's decision that the

porch project was not new construction, and therefore, it was subject to strict review. The definition of "new construction" in the Annapolis City Code requires "the introduction of new elements . . . or structures or additions to existing buildings." Here, the Millers were not introducing a new element; they were seeking to replace an original porch that had been removed.

The Commission did not impose a ban on the use of fiberglass in the Annapolis Historic District. Several guidelines in the *Annapolis Historic District Design Manual* address the use of substitute building materials, and they all direct that contemporary materials such as fiberglass "should" be avoided; they do not provide that the materials "shall" be avoided. The term "should" encourages a course of action but is permissive, whereas the term "shall" requires a course of action and is mandatory. The Commission's guidelines, which use the word "should," strongly discourage the use of contemporary substitute materials, but it is still permitted. Mr. Miller's contention that the Commission exceeded its authority in imposing a ban on fiberglass is without merit.

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ATTORNEY GRIEVANCE

By an Order of the Court of Appeals of Maryland dated September 9, 2011, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

SPENCER DEAN AULT
*

By an Order of the Court of Appeals of Maryland dated September 9, 2011, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

LUCILLE SAUNDRA WHITE
*

By an Order of the Court of Appeals of Maryland dated September 12, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

STANLEY HOWARD NEEDLEMAN
*

By an Order of the Court of Appeals of Maryland dated September 19, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

RICHARD DONALD LIEBERMAN
*

By an Opinion and Order of the Court of Appeals of Maryland dated September 19, 2011, the following attorney has been suspended for thirty (30) days, effective September 19, 2011, from the further practice of law:

JOSEPH TAUBER
*

By an Opinion and Order of the Court of Appeals of Maryland dated September 21, 2011, the following attorney has been indefinitely suspended from the further practice of law in this State:

ROLAND NATHANIEL PATTERSON, JR.
*

RULES ORDERS AND REPORTS

A supplement to the One Hundred and Sixty Eighth Report of the Standing Committee of the Rules of Practice and Procedure was filed on September 8, 2011:

http://mdcourts.gov/rules/reports/168supplement.pdf

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A Rules Order pertaining to the One Hundred and Seventy First Report of the Standing Committee of the Rules of Practice and Procedure was filed on September 8, 2011:

http://mdcourts.gov/rules/rodocs/ro171.pdf

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A supplement to the One Hundred and Seventy First Report of the Standing Committee of the Rules of Practice and Procedure was filed on September 15, 2011:

http://mdcourts.gov/rules/rodocs/ro171supplemental.pdf

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