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Facts: Appellant Melanie Senter Lubin, Securities Commissioner for the State of Maryland, served two subpoenas *duces tecum* on appellee Agora, Inc. seeking the identities of the recipients of two Agora investment publications. The Commissioner sought this information in conjunction with an investigation of whether Agora had violated Md. Code (1975, 1999 Repl. Vol., 2004 Cum. Supp.), § 11-301 of the Corporations and Associations Article, prohibiting fraud in connection with the offer, sale, or purchase of securities, § 11-302, prohibiting fraud in advising others for consideration concerning the value of securities, or § 11-401, requiring persons acting as investment advisers in Maryland to register with the Securities Commission.

The Commissioner sought the identities of persons who received an email from Agora offering an investment report, and the identities of the recipients of the report itself. Agora sent the email to subscribers of some of its investment newsletters. The email promised that purchasers of the report would learn the name of a company whose stock would increase in value after the announcement of a nuclear arms reduction treaty between the United States and Russia. The report advised purchasing stock in the United States Enrichment Corporation, Inc. At least one purchaser of the report filed a complaint with the Securities Commission after he followed the report's advice and lost money on the transaction.

After Agora refused to produce the recipient lists pursuant to the subpoenas, the Commissioner filed a complaint against Agora in the Circuit Court for Baltimore City, seeking enforcement of the subpoenas. Agora raised the First Amendment of the United States Constitution and Article 40 of the Maryland Declaration of Rights as affirmative defenses to the enforcement of the subpoenas. The Circuit Court held that the First Amendment prohibited enforcement of the subpoenas. The Commissioner noted a timely appeal to the Court of Special Appeals. Before consideration by that court, the Court of Appeals issued a writ of certiorari on its own initiative.

Held: Affirmed. The Court held that the identities of the

recipients of the Agora publications were protected from disclosure to the Commissioner by the First Amendment. The Court first concluded that the First Amendment protects an individual's choice of reading materials from disclosure to the government. The Court then rejected the Commissioner's contention that her request for disclosure of the recipient lists should be subject to a lesser standard of scrutiny than is ordinarily applied to state action that infringes on First Amendment rights on grounds that the Agora publications were commercial speech. The Court held that the publications were not mere commercial speech, as they did more than simply propose commercial transactions. Thus, the Court held that the Commissioner must show a substantial relation between the information sought in the subpoenas and a compelling state interest in order to enforce the subpoenas.

Applying this standard, the Court held that Agora had failed to make the requisite showing. The Court concluded that the Commissioner had not shown a substantial relation between the information sought and the interest of enforcing the antifraud provisions of the Securities Act because the Commission could determine whether Agora had committed fraud simply by examining the contents of the email and the report, which it already had in its possession. The Commissioner also failed to show a substantial relation to the interest of enforcing the investment advisor registration requirements of the Securities Act, as the Commissioner failed to show that the contents of the email or the report were tailored to the portfolios of individual recipients.

Melanie Senter Lubin, Securities Commissioner of Maryland v. Agora, Inc., No. 128, September Term, 2003, filed September 12, 2005. Opinion by Raker, J.

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ARBITRATION - AGREEMENTS TO ARBITRATE - PERSONS AFFECTED -ONLY PARTIES TO AN AGREEMENT TO ARBITRATE CAN OBTAIN A STAY OF LITIGATION OF ISSUES SUBJECT TO THE AGREEMENT

Facts: Questar Homes of Avalon Courtyard, LLC ("Questar") is in the business of residential and commercial construction. Questar was one of several general contractors in the construction of a residential single-family home community. After completion of the project, the Council of Unit Owners of the Avalon Courtyard Homes Condominium, Inc. ("Council of Unit Owners") filed suit in the Circuit Court for Baltimore County against Questar and the other contractors, alleging that the named defendants defectively designed and constructed Avalon Courtyard Homes.

Questar filed a third-party complaint seeking indemnity and/or contribution from the forty subcontractors, suppliers, and manufacturers involved in the project. Thirty-nine of the subcontractor's agreements with Questar for the construction project contained an arbitration clause that either mandated arbitration for any claims against the subcontractors or gave Questar the option to arbitrate. One third-party defendant's contract did not contain an arbitration clause.

Two third-party defendants, with a right to arbitration, demanded arbitration, while the remaining thirty-eight either agreed to litigation or waived their right to arbitration. The two third-party defendants demanding arbitration filed a motion with the Circuit Court to stay litigation. The Circuit Court entered an order in effect staying *all* litigation between Questar and *all* third-party defendants until the conclusion of the arbitration proceedings. Questar appealed to the Court of Special Appeals and, before any adjudication by the intermediate court, the Court of Appeals issued a Writ of Certiorari on its own initiative.

Held: Reversed in part, affirmed in part. Only parties subject to an arbitration agreement can be compelled to arbitration. Parties without an arbitration agreement and parties that waive their right to arbitration cannot be compelled to arbitration, nor should their suits be affected by those who demand arbitration.

Questar Homes of Avalon Courtyard, LLC v. Pillar Construction, Inc., No 145, September Term, 2004, filed September 8, 2005. Opinion by Cathell, J.

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CIVIL PROCEDURE — MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV")- THE MARYLAND RULES ARE "PRECISE RUBRICS" WHICH ARE TO BE FOLLOWED. MARYLAND RULE 2-532 (A) PROVIDES THAT "A PARTY MAY MOVE FOR JUDGMENT NOTWITHSTANDING THE VERDICT *ONLY IF* THAT PARTY MADE A MOTION FOR JUDGMENT AT THE CLOSE OF ALL THE EVIDENCE AND ONLY ON THE GROUNDS ADVANCED IN SUPPORT OF THE EARLIER MOTION." THE LANGUAGE IS MANDATORY AND UNAMBIGUOUS. FAILURE TO RENEW THE MOTION FOR JUDGMENT AT THE CLOSE OF ALL OF THE EVIDENCE NULLIFIES A PARTY'S RIGHT TO FILE A MOTION FOR JNOV FOLLOWING AN ADVERSE JURY VERDICT.

Facts: On February 14, 2000, Randall C. Seay (Seay), a General Motors employee was terminated for allegedly falsifying a workers' compensation claim. Seay denied falsifying the workers compensation claim and argued that he was discharged solely for filing a claim. On March 3, 2000, the Workers' Compensation Commission ("Commission") awarded Seay workers' compensation benefits.

General Motors sought judicial review of the Commission's ruling in the Circuit Court for Baltimore County. On January 19, 2001, the jury found that Seay did not sustain an injury arising out of and in the course of his employment. Based on the jury's finding, the court reversed the Commission's award and disallowed Seay's workers' compensation claim.

Subsequently, on March 14, 2001, Seay filed a complaint in the Circuit Court for Baltimore City against GM and four GM employees (Grant, Tucker, Wooten, and Jones), ultimately alleging wrongful termination, defamation, and intentional infliction of emotional distress. At the end of Seay's case-in-chief, both parties made a motion for judgment. Subsequently, the court granted the motion for judgment in favor of Tucker and Wooten on the wrongful termination count, and granted the motion for all the defendants for defamation and intentional infliction of emotional distress claims.

Following the court's ruling on the motion for judgment, GM presented argument regarding the proper parties in the wrongful termination action and questioned whether Seay met his burden of demonstrating that he was fired "solely" for filing a workers' compensation claim. Over GM's objection, Seay's counsel then presented rebuttal testimony. General Motors neglected to renew the motion for judgment following the additional testimony. On March 24, 2003, a jury found that Seay was wrongfully terminated by GM and Grant. On April 3, 2003, GM filed a motion for JNOV, or in the alternative a motion for a new trial. Seay filed a motion in opposition to GM's motion for JNOV challenging the

merits of the motion but not on the basis that it was procedurally defective. On May 27, 2003, the trial court granted the motion for JNOV in favor of GM, Jones, and Grant and set aside the jury's verdict.

On June 25, 2003, Seay filed a notice of appeal. Notwithstanding Seay's failure to preserve the issue, the Court of Special Appeals reviewed the trial court's ruling on the motion for JNOV and reversed. On May 21, 2004, in an unreported opinion, the intermediate appellate court held that although the testimonial evidence by Jones was immaterial and extraneous, GM's failure to renew their motion for judgment at the end of the presentation of Seay's evidence nullified their right to file a motion for JNOV under Maryland Rule 2-519 and 2-532.

Held: Reversed and remanded for further proceedings. The Court of Appeals was not inclined to depart from our state court jurisprudence of strict compliance with the procedural requirements of Rules 2-519 and 2-532 in favor of the more flexible interpretation of Federal Rule 50 as recognized by a number of federal circuits. Although Seay's rebuttal testimony may qualify as "brief and inconsequential," there was no indication from the trial judge that GM need not renew its motion at the close of all the evidence as mandated by the federal exceptions.

General Motors neglected to renew its motion for judgment at the close of all the evidence as Rule 2-519(a) specifies. Pursuant to the Maryland Rules of Procedure, GM's failure to renew the motion resulted in the loss of its right to file a motion for JNOV. As a matter of procedure, the trial judge erred in granting the motion for JNOV. The Court of Appeals upheld the intermediate appellate court's decision. Additionally, the Court referred this matter to the Rules Committee for study and to make any recommendations it deems appropriate with regard to whether Rules 2-519 and 2-532 should be modified to allow trial judges to exercise discretion to excuse, in the interest of justice, minor procedural defaults.

The Court of Special Appeals did not abuse its discretion when it decided the issue of whether the motion for JNOV was properly before the trial court. The question is purely a matter of rule interpretation and does not depend on the presentation of additional evidence. Moreover, had the procedural error been raised at the trial level, the proper result would have been to deny the motion irrespective of any efforts to correct the error. GM was not, therefore, prejudiced by the exercise of discretion to address the unpreserved ground for objecting to GM's motion.

Upon remand there will be matters open for resolution by the trial court, such as Seay's outstanding claim for punitive damages.
General Motors Corp., et al.. v. Randall C. Seay, No. 66, September Term 2004, filed August 10, 2005, Opinion by Greene, J.

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ESTATES - ELECTIVE SHARE

Facts: Decedent's widow, petitioner Shirley Downes, timely filed four petitions to extend the time to elect her statutory share of the decedent's estate, which the Orphans' Court granted. Petitioner filed a fifth petition for an extension twenty-two days after the expiration of the previous extension period, which the Court denied, citing § 3-206 of the Estates & Trusts Article (ET) of the Maryland Code, which provides that the court "may extend the time for election, before its expiration, for a period not to exceed three months at a time, upon notice given to the personal representative and for good cause shown." The court also denied petitioner's motion to reconsider. After administration of the Estate was completed, petitioner appealed the denial of her fifth petition for an extension and her motion to reconsider to the Circuit Court. Gregory Downes, as sole surviving beneficiary of the residuary trust, moved to intervene and to dismiss the appeal as untimely, and the court granted both motions.

The Court of Special Appeals reversed in an unreported Opinion, concluding that the order approving the Fifth and Final Administration Account was the final, appealable judgment, and not the orphans' court's denial of petitioner's motion to reconsider. On remand, the Circuit Court ruled that, pursuant to E&T § 3-206, it could not grant a subsequent extension once the allowable period or current extension expired, and the Court of Special Appeals affirmed in a reported Opinion. *See Downes v. Downes*, 158 Md. App. 598, 857 A.2d 1155 (2004). The Court of Appeals granted *certiorari* to consider whether an orphans' court, or a circuit court in a *de novo* appeal, has discretion to accept a surviving spouse's petition

for extension of time to make an election under ET §§ 3-203(a) and 3-206(a) and Maryland Rule 6-411(c) when the petition seeking the extension is filed after the previous election has already expired.

Held: Judgment affirmed. Although CJP § 12-502(a)(1) provides that an appeal to a circuit court is to be heard *de novo*, "as if there had never been a prior hearing or judgment by the orphans' court" and "according to the equity of the matter," the Circuit Court is bound by the same limitations set forth in ET § 3-206(a) and Rule 6-411(c) as the orphans' court and has no greater ability to ignore the statutory restrictions imposed on seeking extensions of the time to make an election than does the orphans' court. The orphans' court does not have any authority to ignore the statutory limitation and excuse a late request. Although the time limitation imposed by ET § 3-206 is not jurisdictional in nature, the orphans' court does not have discretion to extend it or excuse its violation, and neither Maryland Rule 6-104(a) or 6-107(b), or the combination of them, permit the court to ignore the limitation. As presaged in *Barrett v. Clark*, 189 Md. 116, 54 A.2d 128 (1947), an untimely request for extension must be denied. Although a different law was under consideration in *Barrett*, the same underlying principles apply. There has been no retreat from the principle that the ability to renounce a Will in favor of a statutory share is to be strictly construed and the law continues to favor the expeditious administration and early settlement of Estates.

Shirley L. Downes v. Gregory Downes, No. 112, Sept. Term 2004, filed August 15, 2005. Opinion by Wilner, J.

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EVIDENCE – APPLICATION OF THE MARYLAND RULES OF EVIDENCE IN PERMANENCY PLANNING HEARINGS – MAINTAINING CONFIDENTIALITY IN CHILD ABUSE CASES.

Facts: The children, who are the subject of the permanency

planning at issue, are Gregory B.-G., Matthew B., Laione D., and Ashley E. Petitioner is the children's biological mother, Ms. B. Ms. B. and the children first became involved with the Child Welfare Services Unit of the Montgomery County Department of Health and Human Services (the Department" in August of 2001, when Ms. B. sought assistance in caring for her children because she anticipated being incarcerated due to an outstanding warrant. The Department arranged for temporary shelter, medical treatment for Gregory, and foster care for the children when Ms. B. was hospitalized for complications of a pregnancy, which ended in miscarriage.

On January 31, 2002, Laione revealed sexual abuse to her first grade teacher who reported the suspected child sexual abuse to the Department. A social worker employed by the Department interviewed the children and instructed Ms. B. to take the children to the Sexual Abuse and Assault Center at Shady Grove Hospital to be examined. The physical examination revealed signs of sexual abuse on Laione's body. Ms. B. denied the allegations and refused to comply with the Department's request to interview the children again. The Department provided a parent aide to Ms. B.

On April 22, 2002, Laione disclosed more sexual abuse to her teacher, who again reported the abuse to the Department. The children were placed in emergency shelter care and interviewed. All of the children revealed sexual abuse. On April 23, 2002, the Circuit Court for Montgomery County, sitting as the juvenile court, held an emergency shelter care hearing and committed the children to the Department for foster care placement. The Department then filed Child In Need of Assistance (CINA) petitions for all four children. The Circuit Court held adjudicatory and disposition hearings on May 23 and 24, 2002. The court sustained the majority of the factual allegations contained in the petitions. The children were declared CINA and committed to the Department to continue in foster care. The permanency plan for the child was reunification with Ms. B.

On March 25, 2002, the Circuit Court conducted a permanency planning hearing pursuant to statute. The Department recommended changing the permanency plan to termination of parental rights (TPR)/adoption. Ms. B. opposed the change. The court did not change the permanency plan at that time and ordered Ms. B. to undergo a psychological evaluation, which was completed.

A second permanency planning hearing was held on October 1, 2003. The Department again requested that the permanency plan be changed to TPR/adoption, which Ms. B. opposed. During this hearing, the Department presented testimonial evidence as well as

a ninety-nine page report including a calendar containing entries indicating when Ms. B. failed to attend visits, a discharge summary from Shepard Pratt for Gregory, and writings by the children. Ms. B. objected to the admission of the report as inadmissable hearsay and objected to opinion testimony from the children's social worker. She also requested that others who had been identified as witnesses be excluded from the courtroom and that the courtroom be cleared of all members of the general public. The court denied her requests and overruled her objections stating that a permanency planning hearing is a "species of" disposition hearing under the Maryland Rules and thus, the application of the Maryland Rules of Evidence is discretionary outside the context of competency of witnesses. At the close of the hearing, the court granted the Department's petition to change the permanency plan and found that the Department made reasonable efforts to reunite Ms. B. and her children. The same day, the court issued written orders changing the children's permanency plans to TPR/adoption.

On October 31, 2003, Ms. B. noted her appeal to the Court of Special Appeals. The court upheld the decision to change the permanency plan from reunification to TPR/adoption and agreed with the Circuit Court's determination that a permanency planning hearing is a kind of disposition hearing because at such a hearing the court is determining the appropriate actions that the court should take and reviewing the permanency plan established at the original disposition hearing. Therefore, the court concluded that the Rules do not mandate the application of the Rules of Evidence during the hearing. Moreover, the court held that the Circuit Court's decision to permit certain employees of the Department to remain in the courtroom during the hearing did not constitute good cause for overturning the Circuit Court's decision because Ms. B. did not show both error and prejudice.

Held: Affirmed. Permanency planning hearings are dispositional in nature and may properly be characterized as hearings governed by Rule 11-115d., in which the Rules of Evidence are not mandatory, the Circuit Court was not required to apply the Rules of Evidence during permanency planning hearings. Moreover, the Circuit Court did not err in failing to exclude the Department's employees who were no longer directly involved in the case because their presence did not destroy the confidential nature of the proceedings due to their prior knowledge of the facts of the case.

In re: Ashley E., Laione D., Matthew B., and Gregory B.-G., No. 90, September Term 2004. Battaglia, J.

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FAMILY LAW - APPEALS - PERMANENCY PLANNING HEARING.

Facts: Mary S., Jessica W., Billy W., and George B. are the children of Tammy B. The father of Mary S., Jessica W., and Billy W. is deceased and the father of George B. is Michael B., Tammy B.'s husband, from whom she is now separated. All four children resided with both Tammy B. and Michael B. prior to the parents' separation. The family first came to the attention of the Baltimore County Department of Social Services (DSS) when Mary S., then eight years old, alleged that she had been sexually abused by Michael B., who was later charged and convicted. All of the children remained in Tammy B.'s care and during the next two years DSS investigated four additional allegations of abuse and neglect, including allegations that Mary S. had sexually abused Billy W.

On February 7, 2002, DSS removed all four children from Tammy B.'s care, placed them under emergency shelter care, and subsequently filed a petition in the Circuit Court for Baltimore County requesting judicial approval of shelter care for the children. The court ordered DSS custody of the children, and shelter care for them, pending an adjudicatory hearing. Thereafter, during the adjudicatory hearing, all four children were declared to be children in need of assistance (CINA) and committed to the care and custody of DSS for placement in foster care. The court also established permanency plans of reunification with Tammy B.

Initially, DSS placed Billy W. and George B. together in a foster home; however, both boys were removed due to allegations that Billy W. had sexually abused a younger child in the home. After a brief stay in another home, Billy W. was committed to a residential treatment center, from June 2002 until November 2003, when DSS transferred him to a therapeutic foster home. During that same time George B. was moved to another foster home where he has remained.

Mary S. and Jessica W. were placed together in a foster home; after six weeks both were moved to a therapeutic foster home. In August 2002, Mary S. was admitted to Sheppard Pratt Hospital for suicidal behavior, where she was diagnosed with "aggressive disorder recurrent with psychosis" and "possible dissociative disorder." Mary S. stayed at Sheppard Pratt for six weeks, was discharged and moved to transitional housing, and then to the Villa Maria Residential Treatment Center for six months, before returning to the original therapeutic foster home in May 2003. Jessica W. has remained in the original therapeutic foster home the entire time.

On June 23, 2003, DSS recommended, and the court ordered, a change in the permanency plan for George B. from reunification to a concurrent plan of reunification with Tammy B. and adoption. The court also increased Billy W., Jessica W., and Mary S.'s visitation with Tammy B. to include one additional hour of unsupervised visitation and maintained the same plans of reunification with Tammy B. for the three children. Tammy B. did not object to the maintenance of the permanency plans for Billy W., Jessica W. or Mary S., but contested the change in the permanency plan for George B. and noted an appeal to the Court of Special Appeals, which affirmed the judgment of the Circuit Court. While that appeal was pending in the Court of Special Appeals, the Circuit Court held another six month review hearing on November 10, 2003.

During the review hearing, DSS filed a report addressing the status of each child and Tammy B.'s efforts to comply with various service agreements, to which Tammy B. objected on hearsay grounds, which was overruled by the court. In addition, DSS produced its only witness, the foster care worker, Ms. Kristy Caceres, who testified about the current status of each child and the interactions among Tammy B. and the children. At the conclusion of the hearing, the trial court continued the commitment of all four children to the care and custody of DSS, and the permanency plans for Billy W., Jessica W., and Mary S., as reunification with Tammy B. The court also ordered that Tammy B.'s visitation with Billy W. and Jessica W. would remain two hours supervised per week and one hour unsupervised per week. As to Mary S., the parties agreed and the court acquiesced in the decision that Tammy B. would be permitted one hour supervised visitation per week with Mary S. and that the unsupervised visitation would be suspended. Tammy B.'s visitation with George B. continued to be three hours of visitation with George B., but the supervised visitation was reduced to one and a half hours per week. In addition, the court ordered that the permanency plan for George B. should remain a concurrent plan of reunification with Tammy B. and adoption.

Both Tammy B. and Michael B. noted separate appeals to the Court of Special Appeals concerning all of the children with respect to the admissibility of hearsay testimony during the hearing, and from the court's order regarding George B. In an unreported opinion, the intermediate appellate court addressed the substantive issues raised by the parties and affirmed the judgments of the Circuit Court.

Held: To be an appealable interlocutory order, an order maintaining extant permanency plans either must operate to deprive the parent of the care and custody of the child or change the terms of the parent's care and custody of the child to the parent's

detriment. Because the trial court did not change the permanency plans for the children to deprive Tammy B. of her right to care and custody of her children or alter the terms of her access to the children, Tammy B.'s fundamental rights were not implicated. Therefore, the trial court's orders related to the permanency plans for all of the children were not appealable final judgments or interlocutory orders, which precludes review of the trial court's decision to admit hearsay testimony during the permanency planning review hearing. Thus, the judgment of the Court of Special Appeals was vacated.

In re Billy W., Jessica W., Mary S., and George W., No. 92, Sept. Term 2004, filed May 11, 2005. Opinion by Battaglia, J.

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JUDGMENTS - POST JUDGMENT INTEREST - MONEY JUDGMENTS - GARNISHMENT - JUDGMENT CREDITOR IS NOT ENTITLED TO POST-JUDGMENT INTEREST ON ACCRUED POST-JUDGMENT INTEREST ON JUDGMENT

Facts: Appellee Davis filed wrongful-death and survivor actions against a physician who treated their son and against the physician's insurer. The Circuit Court, Prince George's County, entered judgment on a jury verdict for appellee parents, then reduced judgment by remittitur. The physician's insurer appealed. On grant of certiorari, the Court of Appeals held that interest on the money judgment began to run on the day of first entry of judgment on the jury verdict, not from the date of the acceptance of the remittitur. Appellant paid post-judgment interest in the amount ordered pursuant to a writ of garnishment. Appellant filed a Motion to Enter Judgment As Fully Paid and Satisfied. Appellees opposed, claiming that additional post-judgment interest had accrued during the appeals litigation, and remained unpaid. The Circuit Court held a hearing on appellant's motion and agreed with appellee, ordering appellant to pay interest on the previously-paid post-judgment interest that had accrued during the appellate litigation leading up to the garnishment hearing. Medical Mutual

appealed questioning the propriety of the order entered by the Circuit Court assessing interest on the garnishment judgment.

Held: Judgment reversed. The purpose of a garnishment proceeding is to satisfy money judgments with property of the judgment debtor in a third party hands. It determines whether garnishee has any funds or property that belongs to the judgment debtor. Although a garnishment proceeding proceeds like an original action with the judgment creditor as plaintiff and the garnishee as defendant, such actions are *not* original actions, independent of the actions out of which the judgments sought to be enforced emanate. Garnishment proceedings are ancillary to such actions. The original judgment itself establishes the judgment debtor's obligation to the judgment creditor. The amount of the judgments obtained in the underlying action to which the garnishment proceeding relates is necessary information, and deciding which date from which post-judgment interest was payable is a necessary and *preliminary* step. Once it is determined that the garnishee has the property of the judgment debtor, the garnishment judgment only mandates payment and the original judgment is satisfied.

Medical Mutual v. Davis, No. 84, September Term, 2002, filed September 15, 2005. Opinion by Bell, C.J.

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STATUTORY INTERPRETATION - STATE PERSONNEL MANAGEMENT SYSTEM - PUBLIC SERVICE COMMISSION - APPOINTING AUTHORITY - THE FIVE COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION (OR THE VOTE OF A MAJORITY THEREOF) CONSTITUTE THAT AGENCY'S "APPOINTING AUTHORITY"

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Facts: An at-will employee of the Maryland Public Service Commission ("Commission"), Chrys Wilson, was terminated initially by the Chairman of the Commission, acting without the approval, acquiescence, or delegation of the full Commission, which is made up of five Commissioners (including the Chairman). According to Md. Code (1993, 2004 Repl. Vol.), §11-113 of the State Personnel and Pensions Article, Wilson requested an administrative review of the termination by the"head of the principal unit," which, in this case, was the Chairman. She based her request for review on certain contentions that the termination was illegal or unconstitutional. The Chairman denied Wilson's request, addressing in writing the merits of each of her contentions.

Wilson filed suit in the Circuit Court for Baltimore City against the Commission and the Chairman seeking reinstatement, back pay, and benefits. Among her arguments were: (1) the Chairman had no authority, acting alone, to terminate her; rather, an action by the full Commission, by at least majority vote, was necessary to terminate her or at least to delegate that authority to the Chair; (2) she had been fired *sub silentio* for cause and thereby deprived of important pre-termination procedural due process protections; and, (3) her firing was unconstitutional because she was terminated for partisan political reasons. Cross-motions for summary judgment were filed. Prior to argument on those motions, Wilson took the deposition of the Chairman. In the deposition, although he disclaimed that he fired Wilson for such reasons, the Chair indicated that he had not been pleased, in a number of regards, with the quality of Wilson's performance in her position at the Commission and also recounted an incident occurring in the year prior to the discharge where he confronted her about his suspicion of a possibly fraudulent time sheet. As to the time sheet incident, after Wilson denied any wrongdoing, the Chairman stated that he concluded there was insufficient evidence of misconduct and elected not to pursue the matter further.

The Circuit Court granted Wilson's motion and denied that of the Commission and Chairman. It entered summary judgment directing the reinstatement of Wilson and awarding back pay and benefits. The sole basis relied on by the court was a determination that the Chairman lacked the authority to fire Wilson.

Shortly after entry of judgment (and within 30 days thereof), several things happened concurrently or in rapid succession. The Commission filed a post-judgment motion asking the Circuit Court to reconsider the back pay and benefits award aspect of its order. Of greater significance, the Commission notified Wilson that, while technically honoring the court's order to reinstate her briefly, it, by a 3 vote majority of the Commission, was terminating her anew. No reasons were given for the new firing by the Commission. Rather than submit a request for administrative review of the Commission's action, as she had done when the Chairman attempted to fire her, Wilson filed in the pending litigation in the Circuit Court a motion to hold the Commission in contempt of the court's order.

The Circuit Court held a hearing to consider the motions. The court refused to hold the Commission in contempt or reconsider the award of back pay and benefits. Nonetheless, the court entered a new order, essentially amending its prior grant of summary judgment, whereby, in maintaining the unlawfulness of the Chairman's attempted firing of Wilson and her reinstatement, the court determined further that the Commission's purported firing of her was unlawful as a termination based on misconduct without the prerequisite pre-termination procedural protections applying in such cases, and that the Chairman could not serve as an unbiased, objective adjudicator of any administrative appeal by Wilson of her firing. Ultimately, the Circuit Court also ordered that Wilson could not be fired in the future unless given all of the pre-termination protections afforded an employee who was proposed to be fired for misconduct.

The Commission appealed to the Court of Special Appeals. The Court of Appeals, on its initiative, issued a writ of certiorari before the intermediate appellate court could decide the appeal.

Held: Reversed and remanded with instructions to enter judgment for the Commission. Under Md. Code (1993, 2004 Repl. Vol.), § 11-305 of the State Personnel and Pensions Article, an at-will employee may be terminated only by the "appointing authority." Although the "appointing authority" is not identified expressly with regard to the Commission, the statutory scheme in the Public Utility Article demonstrates that the Commission, as a whole, is the body that possesses the authority to appoint and terminate at-will employees. Because the initial termination was not effectuated by the Commission as a whole, that termination was unlawful.

The Circuit Court, however, also found that Wilson's termination was unlawful because it was the result of "employee misconduct" and Wilson was not afforded the statutory pre-

termination procedures mandated by Md. Code (1993, 2004 Repl. Vol.), § 11-106 of the State Personnel and Pensions Article. When an at-will employee under the State Personnel Management System claims that his or her termination or other discipline was unlawful because the "appointing authority" did not follow the specific procedures in § 11-106, that employee bears the burden of demonstrating that either the "appointing authority" did not follow properly the procedures in § 11-106 or that the disciplinary action was the result of some meaningful level of consideration by the "appointing authority" of alleged "employee misconduct." In this case, Wilson did not present any evidence that she was fired, *sub silentio*, as the result of "employee misconduct."

Md. Code (1993, 2004 Repl. Vol.), § 11-113 of the State Personnel and Pensions Article provides a post-action administrative appeal process for employees against whom disciplinary action is taken. This post-action process permits the employee to raise challenges to the action regarding illegality and/or constitutionality. In this case, Wilson failed to submit an appeal of her re-termination by a majority of the full Commission, instead opting to file a motion to hold the Commission in contempt of an earlier order entered in the Circuit Court action regarding the Chairman's initial, but illegal, termination of her employment. When a statute provides an administrative remedy, an affected party ordinarily must await a final administrative decision before resorting to a judicial forum. Although Maryland courts recognize an exception to the exhaustion doctrine where an individual attacks the constitutionality of a statute or regulation, this "constitutional exception" applies only when there is an attack on the statute or regulation on its face. In this case, Wilson did not make a facial attack on § 11-113; instead she argued that it was unconstitutional as applied to the circumstances of her case. Accordingly, because she failed to note the provided for administrative appeal following her re-termination, the Commission was entitled to judgment as a matter of law.

Public Service Commission v. Wilson, No. 133, September Term, 2004, filed September 13, 2005. Opinion by Harrell, J.

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WORKERS' COMPENSATION – UNDOCUMENTED WORKERS AS "COVERED EMPLOYEES".

Facts: Appellant Design Kitchen and Baths (Design) employed appellee Diego E. Lagos (Lagos), an illegal alien. Lagos injured his hand during his employment, requiring several surgeries. Both parties agreed that Lagos' injury met all requirements of a compensable injury under the Maryland Workers Compensation Act, but Design argued that because Lagos was an undocumented worker, he was not eligible for workers compensation. The Workers Compensation Commission found in favor of Lagos. The case was reviewed by the Circuit Court for Montgomery County, which denied Design's motion for summary judgment, granted Lagos' motion for summary judgment, and remanded to the Commission. Design appealed. The Court of Appeals granted certiorari on its own initiative.

Held: Affirmed. Pursuant to Md. Code Labor & Employment §9-202(a), to be a "covered employee" an individual must be in the service of the employer, in connection with "an express or implied contract of apprenticeship or hire." Subsection (b) states that whether a minor is lawfully or unlawfully employed is unrelated to whether the minor is a covered employee. This case is thus one of statutory interpretation.

The clear, unambiguous language of §9-202 indicates that Lagos is a covered employee. Legislative history supports this statement. §9-202 is the successor statute to Md. Code Article 101, 21(b)(1) which, until its replacement in 1991, explicitly included lawful and unlawful employees as "covered employees." The revisions to 21(b)(1) were intended to be without substantive change. Therefore, Lagos' status as a lawful or unlawful employee is immaterial.

This result is consistent with the Workers Compensation Act and, in fact, furthers its purpose– "to protect employees, employers, and the public alike." Public policy also favors the inclusion of undocumented workers as covered employees, and other courts have held such.

Design argued that there can be no contract for work between itself and Lagos, an undocumented worker, and therefore no basis for workers compensation benefits. This argument is rejected.

The Court concluded that "an undocumented worker injured in the course of his employment is a "covered employee" under §9-202 and, therefore, is eligible to receive workers compensation benefits."

Design Kitchen and Baths, et al. v. Lagos, No. 82, September Term 2003, filed September 12, 2005. Opinion by Bell, C.J.

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WORKERS' COMPENSATION - UNINSURED EMPLOYERS' FUND - OBLIGATION TO PAY- PENALTIES - ATTORNEY FEES - LABOR AND EMPLOYMENT

Facts: This case involves §9-1002 of the Labor and Employment Article of the Maryland Code and when it requires the Uninsured Employers' Fund to pay an injured worker compensation benefits awarded by the Workers' Compensation Commission. The case also concerns whether the Workers' Compensation Commission may assess penalties and attorney fees under §9-728 and §9-734, respectively, against the Fund if the Fund refuses to pay the compensation benefits awarded by the Commission.

On 16 February 2001, Gerald E. Danner suffered a deep laceration in his right arm while working as a carpenter at 300 Cathedral Street in Baltimore, Maryland. As a result of the injury, Danner has lost substantial use of his left arm and has been unable to work. On 18 April 2001, Danner filed for workers' compensation benefits with the Workers' Compensation Commission. The Commission heard the claim on 6 June 2002. Stivers, Danner's employer at the time of injury, did not attend the June 6 hearing. The Fund did attend the hearing. On 14 June 2002, the Commission decided the following:

> 1. Danner sustained an accidental personal injury arising out of and in the course of employment on 16 February 2001;
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> 2. Danner's disability resulted from that accidental personal injury;
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> 3. Danner be paid temporary total disability at the rate of $400.00, payable weekly beginning 16 February 2001 and

continuing as long as the claimant remains temporarily totally disabled;

4. The correct name of the employer is Timothy Stivers;

5. Timothy Stivers was uninsured at the time of the accidental injury.

The Commission, at the request of the Fund, reserved decision on a sixth issue of whether NWJ Management Company, Inc., (NWJ) the owner of 300 Cathedral Street, is a statutory employer. Neither the Fund nor Stivers appealed any of the Commission's findings.

Danner on the date of the order, requested payment from Stivers. Stivers, who did not carry workers' compensation insurance, refused to pay the June 14 order. On 17 July 2002, more than 30 days after the date of the initial award and notice against Stivers, Danner notified the Fund of Stivers's non-payment and requested payment of that award. The Fund refused payment of the award. Danner made subsequent requests on 23 August 2002 and 25 September 2002. The fund refused both requests.

On 13 September 2002, the Commission decided that NWJ was not a statutory employer. The Fund thereafter filed a timely appeal with the Circuit Court for Baltimore Country from the Commission's decision that NWJ was not the of statutory employer. The Fund did not appeal the award of benefits.

Concurrent to the Fund's appeal and possessing an unfulfilled order for workers' compensation benefits, Danner filed a complaint with the Commission. On 26 November 2002, the Commission held a hearing over whether it should sanction the Fund for its failure to pay compensation. On 11 December 2002, the Commission answered the issue presented in the affirmative:

> The Commission finds on the issue presented that the answer is "YES"; and finds that the Fund shall pay unto Frederick W. Miller, Esquire, counsel for the claimant, a counsel fee in the amount of $500.00; and shall pay unto the claimant a 40% penalty on all moneys due the claimant beginning February 16, 2001 and ending November 12, 2001.
>
> It is, therefore this 11th day of December, 2002 by the Worker's Compensation Commission ORDERED that the Uninsured Employer's Fund is hereby assessed penalties as here in above set

> forth; and further ORDERED that the above-entitled claim be reset upon request.

The Fund appealed the penalties and attorney's fees order to the Circuit Court for Baltimore County. The Circuit Court granted Danner's motion for summary judgment and denied the Fund's cross motion for summary judgment. In its ruling, the Circuit Court directed the Fund to pay Danner the June 6 benefits order and December 11 penalties order. The Fund appealed the Circuit Court finding to the Court of Special Appeals. In its appeal, the Fund raised two issues: (1) did the unresolved issue of NWJ's statutory employer status stay the Fund's obligation to pay and (2) did the court err in imposing penalties and attorney's fees against the Fund. To the former issue, the Court of Special Appeals decided the outstanding issue of statutory employer did not stay the Fund's obligation to pay compensation awards. To the latter issue, the court found that penalties and attorney's fees should not have been imposed against the Fund. The Fund appealed the court's finding that an outstanding issue does not stay the Fund's obligation to pay. Danner cross appealed the Court of Special Appeal's reversal on the award of penalties and attorney fees. The Court of Appeals issued a writ of certiorari on both the Fund's appeal and Danner's cross appeal.

Held: Judgment affirmed. In this case, the court interprets sections of the Labor and Employment Article of the Maryland Code. The applicable sections of the Labor and Employment Article are (1) §9-1002 - pertaining to the Fund's obligation to pay the compensation award, (2) §9-728 - pertaining to the Commission's right to assess penalties against the Fund, and (3) §9-734 - pertaining to the Commission's assessment of attorney fees against the Fund.

Section 9-1002 does not require the Fund to pay a Workers' Compensation Award where there is a timely appeal or the raising of issues following a Commission award. However, this exemption from payment should not extend to the appeals of collateral issues because that would defeat the purpose of providing timely compensation to the injured worker who would then have to withstand more litigation in order to recover workers' compensation. Moreover, reading §9-1002 in conjunction with the anti-stay provision of §9-741 indicates that the exemption from payment the Fund enjoys should be read narrowly.

Section §9-728 permits the Commission to assess sanctions against employers and insurers. The Fund is neither an employer nor an insurer. Because the Fund is not an employer or an insurer, the Commission's right does not apply to the Fund. Although it

could be argued that the Fund is an insurer because it stands in the place of the uninsured employer, the Fund is not an insurer in all practical effects. It is a government entity and does not profit from the benefits it provide. Moreover, its liability accrues only when the uninsured employer refuses payment. For these reasons, the Fund cannot be included within the reach of §9-728.

Section 9-734 permits the Commission to assess attorney's fees against those who unreasonably institutes proceedings. In this case, attorney fees should not be assessed against the Fund. Although the Fund was wrong in not paying the compensation award, it did not act unreasonably. It denied payment on a reasonable though wrong interpretation of §9-1002. For this reason §9-734 should not apply.

Uninsured Employers' Fund v. Danner, No. 110, September Term, 2004, filed 7 September 2005. Opinion by Harrell, J.

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COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - 30-DAY PERIOD FOR IMPOSING DISCIPLINE UNDER SECTION 11-106(b) OF THE STATE PERSONNEL AND PENSIONS ARTICLE - "BRIGHT-LINE" RULE OF WESTERN CORR. INST. v. GEIGER, 371 MD. 125 (2002).

Facts: The appellant, Stanley McClellan, was a Correctional Officer II with the Division of Pretrial Detention and Services. In November 2001, McClellan informed a security guard at Mondawmin Mall that an unidentified individual had fired shots at him while he was alone in a nearby parking lot. Solothal Thomas, a former BCDC inmate supervised by McClellan, had been shot and wounded at the same time and location. Thomas informed the police that McClellan was present
with him when a man shot at them. McClellan was interrogated by BCPD detectives. On December 3, 2001, the BCPD contacted the Division about the incident and McClellan submitted a Matter of Record, explaining that he did not see Thomas at the time of the shooting. The following day, McClellan submitted a second MOR, stating that he had reported to the detectives that he noticed a red car on the day of the shooting. Detective Robar, in a memorandum received by the Division on December 20th, recounted the events of the interrogation and informed he would investigate further to determine McClellan's involvement in the shooting. Major Richardson, Commander of the Division's Bureau of Special Operations, submitted a memorandum to Division Commissioner Flanagan, informing him of the pending investigation.

In 2002, a BCPD report issued to the Division revealed that gunshot residue had been found on McClellan's left hand. McClellan, in an MOR on April 11, 2002, explained that a mistake was made in the report, as he had not been near a firearm. Division Major Richardson advised the Commissioner that McClellan had violated several Department Standards and provisions of COMAR. Deputy Commissioner Brown signed McClellan's Notice of Termination. The termination notice was approved, and McClellan's appeal to the Secretary was denied. The appeal was forwarded to the Office of Administrative Hearings, where McClellan filed a motion to dismiss the termination as untimely. The ALJ found that the Division had complied with the 30-day period and affirmed the termination by the Division. In an action for judicial review, the circuit court affirmed the ALJ's decision.

Held: Vacated and remanded to the circuit court with instructions to remand to the Department for further administrative proceedings not inconsistent with this opinion. There was not

substantial evidence in the record to support the ALJ's finding that McClellan's appointing authority did not, under SPP section 11-106(b), acquire knowledge of the misconduct for which discipline was imposed more than 30 days before the date that disciplinary action was taken. Action was taken on April 30, 2002. Commissioner Flanagan was, by statute, the appointing authority for McClellan. Deputy Commissioner Brown was acting as McClellan's appointing authority upon delegation by Commissioner Flanagan. Major Richardson and the Bureau employees working directly for him were acting as agents of Commissioner Flanagan; therefore, the knowledge acquired by them was imputed to Commissioner Flanagan. The evidence showed that McClellan was terminated for misconduct occurring in November and December 2001 and April 2002. The appointing authority had knowledge in December 2001 of misconduct sufficient to order an investigation, even absent the gunshot residue results, with one exception - the appointing authority did not have knowledge until April 11, 2002, of McClellan's false statements in the MOR submitted on that date. The disciplinary action based on misconduct in November and December 2001 was not taken timely; action based on misconduct in April 2002 was taken timely.

McClellan v. Department of Public Safety and Correctional Services, No. 1391, September Term, 2004, filed September 19, 2005. Opinion by Eyler, Deborah S., J.

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CHILD CUSTODY - UNIFORM CHILD CUSTODY JURISDICTION ACT ("UCCJA") - UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT ("UCCJEA") - F.L. TITLE 9.5; F.L. §§ 9-201 TO 9-224 - STATE - DIVORCE ACTION - CHILD CUSTODY - APPOINTMENT OF COUNSEL FOR CHILD.

Facts: Deepa Garg filed a complaint against her husband, Ajay Garg, seeking a limited divorce, custody, and child support. Ms. Garg, Mr. Garg, and their child, Chaitanya, are natives of India, where they were living when the parties separated in March 2002. Ms. Garg is a U.S. citizen, Mr. Garg had been a lawful U.S.

resident, and the child allegedly qualified for U.S. citizenship.

In April 2002, Mr. Garg initiated custody proceedings in Indore, India. In the same month, Ms. Garg filed an action for "maintenance" in Mumbai, India. In May 2002, when Ms. Garg left India with the couple's son, no custody order had been issued by an Indian court.

Ms. Garg filed her action in the Circuit Court for Baltimore County on February 24, 2003, alleging that Mr. Garg physically abused her and their child. On March 7, 2003, Ms. Garg filed an "Ex Parte Motion for Emergency Custody," notifying the trial court that Mr. Garg filed an action in India but maintaining that jurisdiction was proper in the circuit court.

On April 11, 2003, Mr. Garg filed a "Verified Emergency Motion to Dismiss Pursuant to Maryland Uniform Child Custody Jurisdiction Act Because Custody Proceedings Are Pending in India." He alleged that Ms. Garg "abducted" Chaitanya from India to Maryland; the court in Indore had jurisdiction of the custody dispute as of April 8, 2002; and Ms. Garg was served in Baltimore with an ex parte order issued by the Indian court on February 25, 2003. Therefore, Mr. Garg urged the trial court to decline jurisdiction in Ms. Garg's action pursuant to the UCCJA.

On April 28, 2003, Ms. Garg filed a request for an emergency custody hearing and a motion to strike Mr. Garg's motion to dismiss. She agreed with Mr. Garg that she received a summons from the Indore court on February 25, 2003. However, she maintained that this date was one day after she filed her complaint in the circuit court. Ms. Garg further urged the court to assume jurisdiction over her action, claiming that Maryland was Chaitanya's "home state." Ms. Garg's motion was denied by the trial court.

Thereafter, on May 2, 2003, Ms. Garg filed a Motion to Appoint Counsel for Minor Child, pursuant to F.L. §1-202. Mr. Garg opposed the motion, arguing that it would be "premature" to appoint counsel for Chaitanya.

On May 6, 2003, Mr. Garg moved to dismiss Ms. Garg's action, claiming insufficiency of service of process. He also filed an opposition to Ms. Garg's motion to strike his motion to dismiss. Mr. Garg argued that India was Chaitanya's home state, and that Ms. Garg could not "create home state jurisdiction through her own illegal actions," such as "abduct[ing]" the child from India and bringing him to Maryland. Mr. Garg also alleged that Ms. Garg was aware of pending custody proceedings in India when she filed her

complaint in Maryland.

On September 3, 2003, the circuit court issued a "Ruling" stating that Ms. Garg's motion to appoint counsel for Chaitanya would be "held in abeyance by the court" until after the court "rule[d] on the issue of jurisdiction."

On September 23, 2003, the court held an evidentiary hearing, at which numerous witnesses testified. At the conclusion of the hearing, the court declined to accept jurisdiction and dismissed the entire case, including the divorce action. It determined that the UCCJA applies to foreign nations, so long as their laws do not offend public policy. Further, the court ruled, based on the testimony of the parties' experts, that there was no ground to find that Indian law was at odds with the public policy of Maryland. And, it found that Maryland was not Chaitanya's "home state," in view of the fact that Ms. Garg improperly removed Chaitanya from India. Moreover, the court determined that Ms. Garg was properly served by the Indian court and had already submitted to that court's proceedings. The court also found no emergency based on alleged abuse. Thereafter, the court awarded Mr. Garg travel costs and attorney's fees.

Held: Dismissal vacated; case remanded for further proceedings.

Preliminarily, the Court decided that the trial court erred in dismissing the divorce action when it dismissed the custody case. According to the Court, Ms. Garg was entitled to pursue her divorce action in the circuit court, separate form the custody case. The Court noted, however, that, upon remand, the circuit court should resolve, *inter alia*, Mr. Garg's claim that he was not properly served with process.

The Court further concluded that, under the circumstances, the trial court should have granted Ms. Garg's request for appointment of counsel for the child. The Court recognized the complexities of the UCCJA, the importance of the custody issue, and the recent enactment of the UCCJEA, and explained that, because Chaitanya would be profoundly affected by the outcome of the case, fundamental fairness suggested that he should have had a lawyer to articulate his interest and to assist on the critical issues that were determinative of his future.

However, the Court agreed with the circuit court that the UCCJA and UCCJEA apply to international custody disputes, so long as the foreign country's child custody laws do not violate fundamental principles of public policy. The Court noted that

effective October 1, 2004, the UCCJA, F.L. §§ 9-201 through 9-224, was repealed by ch. 502, Acts 2004. The provisions are now codified in Title 9.5 of the Family Law Article and are known as the "Maryland Uniform Child Custody Jurisdiction and Enforcement Act," or "UCCJEA." The Court explained that the UCCJEA resolved the ambiguity present in the UCCJA regarding whether that statute had international application. In the Court's view, the plain meaning of the UCCJEA makes clear that the term "state" applies to foreign nations, so long as the foreign custody law does not offend public policy. Moreover, the Court concluded that the trial court properly determined that India is deemed a state for purposes of this custody case, so long as its child custody law does not violate "fundamental principles of human rights." F.L. § 9.5-104(c).

In light of its decision to remand, the Court vacated the award of attorneys' fees and costs, pending the outcome of the custody case. The Court explained that, if the trial court concludes that an award of attorney's fees and costs is appropriate under the UCCJEA, it should determine whether the lodestar analysis applies under *Friolo v. Frankel*, 373 Md. 501 (2003), and *Manor Country Club v. Flaa*, 387 Md. 297, 300 (2005).

Deepa Garg v. Ajay K. Garg, No. 1707, September Term, 2003, filed September 2, 2005. Opinion by Hollander, J.

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CRIMINAL LAW - CONFESSIONS - VOLUNTARINESS - POLICE DECEPTION.

Facts: The appellant, Leroy Lincoln, Jr., was arrested and charged with murder and conspiracy to commit murder of his father, Leroy Lincoln, Sr. He moved to suppress oral and tape-recorded statements he gave during a police interview. The interview took place in a 6x9 room, with the appellant sitting in a chair at a table. He was not handcuffed, nor under the influence of alcohol or drugs. The appellant, a high school graduate, was given his *Miranda* rights and signed an "Explanation of Rights" form to

indicate that he understood them. The police did not threaten or coerce the appellant, or make promises of lenient treatment in exchange for his statements. The interview lasted one hour and 30 minutes, during which time the appellant never asked for use of the bathroom, for medicine, or for food or beverages.

During the interview, a Baltimore City Police Detective told the appellant that he was "willing to discuss the contents of the case files." He removed three photographs from the files and showed them to the appellant. One was a photograph of the appellant. On the back was written in a messy script, "That's Junior whose father he and I killed for Ms. Geralene." It appeared to have been signed by "John Ulrich," another suspect in the murder, although the detective later admitted that he wrote the statement and signature. Another photograph was of John Ulrich. On the back was printed, "This is John[.] Junior Said He Hit Junior's Father in the Head, While They Smoked Weed With Him And Killed Him[,]" which was followed by the apparent signature of "Monique Peterson," the appellant's girlfriend at the time of the murder. The detective also had written that statement and signature. The third photograph was of the appellant's mother, and the reverse contained the statement, "That's Ms. Geralene. She set up the murder of Junior's dad." That statement, which was also written by the detective, was unsigned.

After the appellant was shown the photographs, he denied knowing anything about the murder and his demeanor did not change. When the Detective later told the appellant that his mother had implicated him, however, the appellant confessed to participating in the murder. The Circuit Court for Baltimore City denied the appellant's motion to suppress, and a jury convicted him of conspiracy to commit murder.

Held: Affirmed. The Court rejected the bright-line rule in *State v. Cayward*, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989), that, when police used fabricated documents in interrogation, any statement obtained is rendered involuntary *per se*. Instead, the Court determined that the operative question is whether, under the totality of the circumstances of the interrogation, including the use of fabricated documents, the statement was freely and voluntarily made by the defendant, who knew and understood what he was saying when he said it. It observed that, in this case, the statements on the photographs were handwritten and did not create the appearance of authority or reliability. Further, the statements contained information that was mostly true, gathered during the course of the investigation. Finally, the Court found it significant that the appellant did not confess immediately after viewing the photographs, but confessed only after hearing that his

mother had implicated him in the murder. Because there was nothing else coercive about the interrogation, the Court held that the totality of the circumstances established that the statement was voluntary.

Lincoln v. State, No. 742, September Term, 2004, filed September 14, 2005. Opinion by Eyler, Deborah S., J.

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CRIMINAL LAW - UNANIMOUS VERDICT - FINALITY OF VERDICT - DECISION TO TAKE PARTIAL VERDICT.

Facts: Appellant, Corey Caldwell, was charged with crimes arising from the shooting of two individuals, which were tried together before a jury. During jury deliberations, the court was alerted to the early closure of the courthouse on Thursday, September 18, 2003, and the probability of a total closure the next day, due to Hurricane Isabel. The court interrupted the deliberations and was informed that the jury had not reached a unanimous verdict on three of the counts at that time. Juror Number Two reminded the court of her inability to resume deliberations the following Monday. Further questioning evinced confusion about the number of votes for each count. The court, over defense objection and refusal to accept an 11-member jury, elected to accept partial verdicts on 11 counts and declared a mistrial on the three remaining counts on which no verdict was returned.

Held: Reversed and remanded. The trial court erred in accepting partial verdicts that were numerically complete but were tentative votes. The State constitutional requirement of unanimity of assent for a verdict in a criminal case means that verdict must be unambiguous, unconditional, and final in the sense of not being provisional or tentative. Tentative votes, like conditional votes, are not given with unanimous consent because they are not intended to be final. The court's authority to accept a partial verdict does not encompass the power to accept a tentative verdict, thereby

making it irrevocable. The verdicts actually returned by the jury were tentative verdicts. The foreperson's statements before, during, and after he read the verdicts revealed that the jury was still engaged in the bargaining process on all counts when it was abruptly interrupted, and that uncertainty existed as to the number of votes on each count. A tentative verdict is defective and cannot be cured by polling or hearkening. The partial verdicts were accepted and entered in error. The court's decision to grant a mistrial on three counts did not result in any judgment on those counts, and therefore is not subject to appeal. The guilty verdict on the attempted first-degree murder charge reflected on the docket sheets must be amended to reflect the not guilty verdict announced by the jury and evidenced on the transcript.

Caldwell v. State, No. 2439, September Term, 2003, filed September 8, 2005. Opinion by Eyler, D. S., J.

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CRIMINAL LAW - VOIR DIRE - NOT CRIMINALLY RESPONSIBLE (NCR), ADVICE OF RIGHTS - MIRANDA VIOLATION.

Facts: James Logan was convicted by a jury in the Circuit Court for Prince George's County of two counts of second degree murder and two handgun offenses, arising out of the shooting deaths of two Prince George's County Deputy Sheriffs on August 29, 2002. Prior to trial, Logan moved to suppress his post arrest statements, claiming the warnings violated *Miranda v. Arizona*, because the detective, *inter alia*, told Logan during the advisement that the truth would not hurt him. The court denied the motion. At trial, Logan asked the judge to pose voir dire questions to the venire panel concerning his defense that he was not criminally responsible. The court asked the panel whether any members or their immediate families had "any experience, training, or education in the mental health field, such as psychiatry or psychology." However, the court declined to inquire whether the panel would be able "to find the defendant not criminally responsible" if he met "his burden in this regard."

Held: Reversed and remanded. Relying on a host of appellate cases, the Court of Special Appeals concluded that the appellant was entitled to voir questions designed to elicit a bias about aNCR defense. The Court was mindful that the "overriding principle or purpose" of voir dire is to ascertain cause for disqualification. Although the Court recognized the trial court's broad discretion in this area, the Court agreed with the appellant that his NCR defense was integral to his case and that there is an issue of potential juror bias as to such a defense. The Court said: "Precisely because the subject matter of an NCR defense is a controversial one, the trial court should have inquired whether any prospective jurors had reservations or strong feelings regarding such a defense."

With regard to the *Miranda* issue, the Court agreed with the appellant that the advisement of rights was defective. The Court explained that appellant's claim was not predicated on alleged involuntariness. Rather, he focused on the advisement itself. During the advisement, and before appellant signed the waiver of rights, the detective told Logan that "the only way this jeopardizes you is if you don't tell the truth." Because that "representation flatly contradicted the *Miranda* warning," the Court was of the view that it "nullified what had been said" with respect to the warnings. However, because the defense relied vigorously on the statement to establish its NCR defense, the Court found harmless error as to the admission of appellant's statements to the detective.

James Ramiah Logan v. State of Maryland, No. 2361, September Term, 2003, filed September 7, 2005. Opinion by Hollander, J.

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CRIMINAL LAW - WAIVER OF JURY TRIAL - MARYLAND RULE 4-246(b)

Facts: This case came to the Court of Special Appeals from the Circuit Court for Baltimore County. Appellant, Tavony Wayne Zylanz, rejected a plea agreement, waived a jury trial, and was found

guilty by the trial judge of fourth degree burglary, felony theft, resisting arrest, and lesser included offenses. Appellant was sentenced to a total of six years and eleven months incarceration, and a term of probation.

On appeal to the Court of Special Appeals, appellant argued that his jury trial waiver was constitutionally flawed because 1) the record did not demonstrate that it was knowingly and voluntarily made; and 2)the trial court failed to make any findings on the record that the waiver was constitutionally effective.

Held: Affirmed. Appellant's claims were not supported by the record. The court, counsel, and appellant engaged in a substantial colloquy regarding appellant's options for trial. Although the court did not state equivocally that it found the jury trail waiver to have been knowingly and intelligently made, the record demonstrates that, in the totality of circumstances, the court was fairly satisfied that appellant had the requisite knowledge of his right to trial by jury and that the requirements of Md. Rule 4-246(b) were satisfied.

Zylanz v. State, No. 1111, September Term, 2004, filed September 16, 2005. Opinion by Sharer, J.

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EMPLOYMENT - DISCRIMINATION - DISABILITY - "REGARDED AS" DISABLED CLAIM.

Facts: The appellant, Donald Ridgely, was employed as a firefighter with the Montgomery County Department of Fire and Rescue Services. After ten years of service, in 1990, he was promoted to the rank of Fire/Rescue Captain. In 1998, Ridgely was diagnosed with narcolepsy and related cataplexy and was prescribed several medications. He reported his condition to the Department, and provided a statement by his neurologist that he was qualified to work full duty without restriction. In 2002, a physician of the Department, following Ridgely's annual evaluation, requested and

received a report from his neurologist regarding Ridgely's medical conditions. The Department's physician placed Ridgely on no duty status upon a finding that Ridgley's episodes, involving knee buckling lasting 10-15 seconds, six to seven times per week, were not controlled and represented a threat to himself, coworkers, and the public, and was analogous to a seizure disorder, implicating the limitations imposed by the National Fire Protection Association's published medical standards. Ridgely was then placed on light duty. Following reports from both doctors, the Department Chief determined that Ridgley no longer was medically qualified to work as Captain and terminated his employment. Ridgely still was permitted to work on light duty status. In 2003, Ridgely filed suit in the Circuit court for Montgomery County, alleging disability discrimination. Following the medical recommendation of his neurologist and the Department physicians, Ridgely was permitted to return to full duty status in October 2003. The circuit court granted the County's motion for summary judgment in 2004.

Held: Affirmed. Summary judgment was properly granted, based upon these facts, because Ridgely, a firefighter who has narcolepsy and cataplexy, could not make out a *prima facie* case for a "regarded as" disabled employment discrimination claim. The evidence presented on the summary judgment record could not support a finding that the employer regarded Ridgely as having an impairment that substantially limited a major life activity. Maintaining consciousness, balance, and motor control are not major life activities. Moreover, Ridgley offered no evidence to support an inference that the County regarded him as substantially limited in any of these asserted major life activities. The inability to perform the job of firefighter is not, as a matter of law, a substantial limitation on the major life activity of working. Further, Ridgely failed to show that the County regarded him as substantially limited in a broad range of jobs in various classes.

Ridgely v. State, No. 580, September Term, 2004, filed September 15, 2005. Opinion by Eyler, Deborah S., J.

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EMPLOYMENT - DISCRIMINATION - CODE ARTICLE 49B, SECTION 42 - CAUSE OF ACTION FOR VIOLATION OF LOCAL ANTI - EMPLOYMENT DISCRIMINATION LAW IN CERTAIN COUNTIES, INCLUDING PRINCE GEORGE'S - SECTION 2-185 OF PRINCE GEORGE'S COUNTY CODE; REMEDIES - BACKPAY; PUNITIVE DAMAGES.

Facts: Appellant, Wendy Shabazz ("Shabazz"), was employed at a Bob Evans restaurant in Bowie, Maryland, when she made a complaint to her superiors and to the United States Equal Employment Opportunity Commission of racial discrimination within the organization. Shabazz was thereafter terminated from her employment. She sued Bob Evans Farms, Inc. ("Bob Evans"), and the restaurant's manager, Brian Martin ("Martin"), alleging retaliatory discharge in violation of Md. Code (1957, 1998 Repl. Vol.), article 49B, section 16(f) and section 2-185(a) of the Prince George's County Code, as well as unlawful employment discrimination in violation of article 49B, section 16(a) and section 2-185(a) of the Prince George's County Code. She sought "economic damages, compensatory damages, and punitive damages to be determined at trial, plus attorneys' fees." She did not seek backpay or any sort of equitable relief.

In the Circuit Court for Prince George's County, the judge instructed the jury that, "if you find for the plaintiff and award damages to compensate for the injuries suffered, you may go on to consider whether to make an award of punitive damages." The verdict sheet directed the jurors to decide liability issues separately for each defendant, but set forth two damages questions: (1) "What compensatory damages, if any, do you award the Plaintiff as a direct result of unlawful conduct on the part of the Defendants?" and (2) "What punitive damages, if any, do you award the Plaintiff against the Defendants?" Shabazz did not ask the court to include a nominal damage question.

The jury found Bob Evans not liable on both counts, but found Martin liable for retaliatory discharge. It awarded Shabazz "0" in compensatory damages and $85,000 in punitive damages.

Shabazz moved to revise the judgment against Martin to reflect that Bob Evans was jointly and severally liable. Martin moved for a judgment notwithstanding the verdict ("JNOV") on the ground that the punitive damages award against him was not supported by a compensatory damages award. The judge granted Martin's motion for JNOV. The court denied a post trial motion by Shabazz for "backpay," and to submit additional evidence on that issue. It further denied Shabazz's petition for attorney's fees and costs.

Held: Affirmed. With respect to the denial of Shabazz's

motion to revise the judgment, the Court noted that the jury had found Bob Evans not liable on all counts. Because such a finding necessarily means the jury did not find Martin was acting within the scope of his employment when he committed the retaliatory discharge, Bob Evans could not be jointly and severally liable for the punitive damages award against Martin.

Regarding the JNOV, the Court held that recovery of punitive damages in a cause of action under article 49B, section 42, for violation of a Prince George's County anti-employment discrimination ordinance is governed by the Maryland common law of punitive damages, not punitive damages law developed under Title VII of the federal civil rights act. A compensatory damages award, which may include a nominal damages award, must be a predicate for an award of punitive damages. Here, nominal damages were not sought, and the jury was instructed, without objection, that punitive damages could be awarded only if the jury awarded compensatory damages.

Also, as regards the denial of Shabazz's motion for backpay, the Court held that, under article 49B, section 42, an employee may not recover backpay against a supervisory co-employee. In addition, a plaintiff who does not seek a backpay award during trial, does not inform the court that she is seeking backpay as an equitable remedy, voluntarily withdraws her claim for lost wages from the jury's consideration, and asks for backpay only after the trial is completed in a post trial motion has waived that issue.

Finally, the Court held that, because the trial court had not erred in its other rulings, Shabazz was not a "prevailing party" under article 49B, section 42. She was not, therefore, entitled to attorneys' fees.

Shabazz v. Bob Evans Farms, Inc., No. 976, September Term, 2003, filed September 2, 2005. Opinion by Eyler, Deborah S., J.

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LOCAL GOVERNMENT - GOVERNMENTAL FUNCTION - PROPRIETARY FUNCTION - PUBLIC PARK - PUBLIC SIDEWALK - CONSTRUCTIVE NOTICE.

Facts: Suzanne Whalen, who is blind, visited Baltimore in February 2000, to attend a meeting at the National Federation of the Blind ("NFB"). Whalen was injured when she fell into an uncovered utility hole while walking her guide dog within the boundaries of Leone Riverside Park (the "Park"), located directly across from the NFB office. Thereafter, Whalen filed an action against the Mayor and City Council of Baltimore (the "City").

Whalen claimed that the hole was "an uncovered, cement-lined pit, approximately 19" x 19" and 41" deep." She averred that the hole was "located exterior" to a chain link fence that surrounded a play area "within the Park." Moreover, Whalen claimed that the hole was "adjacent to the sidewalk" in the area where she walked her service dog. Whalen maintained that because "this area was mowed, it was an area that was frequented by City employees."

According to Whalen, the City, which owns and maintains the Park, negligently failed to assure that the hole was properly covered. As a result of her fall, Whalen allegedly sustained serious injuries to her back and ankle, requiring her to use a wheelchair.

In response, the City asserted defenses of governmental immunity, statutory immunity under a recreational land use statute, and lack of actual or constructive notice of the danger. The City subsequently moved for summary judgment. In support of its motion, the City argued that there was no evidence that it had actual or constructive notice that the hole existed. The City maintained that Whalen failed to establish how long the hole existed prior to her fall, or how it came to exist. In support of its immunity claim, the City argued that the maintenance of public parks is a governmental function and that local governments enjoy immunity with respect to torts arising out of governmental, as opposed to proprietary, functions.

In her opposition to the City's motion, Whalen argued that the City was not protected by "sovereign" immunity. According to Whalen, the City was obligated to maintain streets and sidewalks, as well as areas "adjacent thereto." Moreover, Whalen claimed that the hole "had no recreational use," and the area where it was located did not serve the governmental function of the Park. Further, Whalen asserted that City had constructive notice that the hole existed because employees who maintained the Park would have observed the "deteriorated condition" of the hole.

By Order dated June 9, 2004, the Circuit Court for Baltimore City granted the motion.

Held: Summary judgment vacated; case remanded for further proceedings. The Court determined that the circuit court erred in granting summary judgment because the area where the hole was located arguably served a dual purpose, both governmental and proprietary. Consequently, the Court declined to hold, as a matter of law, that because the accident occurred within the boundaries of the Park, the City was automatically protected by governmental immunity.

Preliminarily, the Court considered the dichotomy between governmental and proprietary functions of a municipality and determined that a public park may serve a dual purpose. The Court explained that a local government is immune from tort actions for governmental functions but not for proprietary ones. Noting that a municipality's operation and maintenance of a public park is generally regarded as a governmental function, the Court stated that a municipality ordinarily is not liable for negligence in regard to park maintenance or management.

However, the Court also commented that a municipality retains a proprietary obligation to maintain, in a reasonably safe condition, its streets, sidewalks, and areas contiguous to them. Accordingly, the Court explained that a local government is not immune from a tort action arising out of its obligation to maintain public streets and highways.

The Court concluded that while the municipality's duty to maintain the Park is governmental, the City's maintenance of sidewalks, streets, and contiguous areas is a proprietary function. Therefore, because the grassy area adjacent to the sidewalk arguably served a dual purpose, the Court explained that a jury could reasonably conclude that someone on the sidewalk could meander off, without expecting to fall into an open pit.

The Court also concluded that it was for the factfinder to determine whether the City had constructive notice of the danger. The Court observed that there was no evidence that the City had actual notice of the hole. As to constructive notice, the Court explained that the hole was readily observable during daylight hours, except to a blind person. Further, photographs of the hole suggested that it had existed in that condition for a considerable period of time. Therefore, the Court determined that Whalen's evidence was sufficient to give rise to a reasonable inference that the defect was one of considerable duration.

Suzanne Whalen v. Mayor & City Council of Baltimore, No. 862, September Term, 2004, filed September 16, 2005. Opinion by Hollander, J.

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PRISONERS - DIMINUTION OF CONFINEMENT CREDITS - SPECIAL PROJECTS - DOUBLE-CELLING - *EX POST FACTO*

Facts: In *Smith v. State,* 140 Md. App. 445 (2001), the Court was called upon to interpret certain Division of Corrections ("DOC") regulations relating to diminution of confinement credits. Our decision resulted in the enlargement of the availability of special project diminution credits for some DOC inmates. In response to *Smith,* the Secretary of Public Safety and Correctional Services ("the Secretary") amended the regulation regarding double-celling diminution credits by adding certain non-eligible offenses.

Appellants, Quintin Demby, Jesse Baltimore, Earl F. Cox, Jr., Kenneth E. Woodall, and Daniel Falcone, all serving sentences for offenses that were both eligible and ineligible for double-celling credits, filed inmate grievances asserting that the post-*Smith* amended regulation was in violation of *ex post facto* standards. After pursuing their grievances each appellant petitioned for judicial review by the circuit court for the county in which he was incarcerated. The trial courts entered judgment in favor of the Secretary in all five cases. The cases were consolidated for this appeal.

Held: Reversed and remanded as to appellants Demby, Cox, Woodall, and Falcone. Appellant Baltimore's appeal dismissed as moot.

When, as in the case of these appellants, an inmate is serving both eligible and ineligible sentences, credits may not be denied for the sole reason that part of the term of confinement is an ineligible sentence. Moreover, an inmate may not be denied credits

for sentences that are ineligible under the amended regulation, but were eligible under the former regulation.

Demby v. Sec'y, Dep't of Pub. Safety & Corr. Servs., Nos. 1230, 1408, 1490, 1491, & 1741, September Term, 2003, filed July 1, 2005. Opinion by Sharer, J.

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TRANSPORTATION — REASONABLE AND PRUDENT SPEED REQUIRED — EVIDENCE — LAY OPINION TESTIMONY

Facts: Officer John Kennedy testified that he was sitting in his patrol vehicle in the parking lot of a restaurant when he saw appellant, Jon Patrick Warren, walking towards a Ford Thunderbird. Officer Kennedy described appellant as "staggering" and "swaying," and "unsteady on his feet." After sitting in the driver's seat of the car for about ten minutes, while repeatedly looking over at Officer Kennedy, appellant got out of the car and "staggered" back in the bar.

Officer Kennedy returned to the parking lot about two hours later, and set up surveillance on the opposite side of the street. The officer soon saw appellant drive the car out of the parking lot and followed him. Appellant made "a very wide turn," was drifting between lanes, and rapidly accelerated. The officer determined that appellant was traveling 55 mph in a 40 mph zone, and stopped appellant's car.

Officer Kennedy noticed the odor of alcohol about appellant, that his eyes were watery and bloodshot, and that his speech was slurred. When the officer asked appellant for his driver's license, appellant fumbled through his wallet, passing over the license several times. Appellant failed to comply with the officer's repeated requests to turn off the ignition and exit the car, prompting the officer to use his Taser to stun appellant on his shoulder.

The officer then helped appellant out of the car and leaned him against the vehicle because he was very wobbly and unsteady on his feet. Appellant refused to perform field sobriety tests, and was arrested.

Appellant collapsed while walking up the steps of the police station, so Sergeant Tim Falcinelli assisted Officer Kennedy in taking appellant to the processing room. There, appellant refused to take a breath test. After sitting at the processing table for about fifteen minutes, appellant vomited. Officer Kennedy opined, based on his training and personal experience, that appellant was "highly impaired by alcohol."

Two other officers testified for the State. Officer Craig Cupiello testified that he observed that appellant's eyes were bloodshot and watery, that he had an odor of alcohol about him, and that he seemed confused and incoherent. Officer Cupiello opined that appellant was "driving under the influence of alcohol." Sergeant Falcinelli testified that appellant was "drunk" and "under the influence of alcohol" when he came into the station house. The sergeant based this opinion on his observations that appellant could not walk, "reeked" of alcohol, slurred his words, and had red, watery, and bloodshot eyes.

Appellant was convicted by a jury of driving in excess of a reasonable and prudent speed, under Maryland Code (1977, 2002 Repl. Vol.), § 21-801(a) of the Transportation Article, and driving while impaired ("DWI"), under § 21-902(b).

Held: Reversed in part, affirmed in part. The State did not present sufficient evidence to sustain appellant's conviction for driving in excess of a reasonable and prudent speed under Maryland Code (1977, 2002 Repl. Vol.), § 21-801 of the Transportation Article. This section requires drivers to reduce speed to a reasonable and prudent level to account for existing conditions that create "actual and potential dangers." Darkness that attends nightfall is not a condition of the sort contemplated by § 21-801(a). Nor is driver behavior, such as exceeding the speed limit or driving erratically, a condition covered by § 21-801(a). Because no evidence was offered to establish that conditions existed that required appellant to reduce his speed, the conviction for violating § 21.801(a) is reversed.

The DWI conviction is affirmed. The trial court did not abuse its discretion in permitting three police officers to offer lay opinion testimony that appellant was "drunk," "under the influence of alcohol," and "highly impaired by alcohol," because perceiving whether someone is intoxicated does not require specialized

knowledge.

Warren v. State of Maryland, No. 476, September Term, 2004, filed September 8, 2005. Opinion by Barbera, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated September 20, 2005, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

BURMAN AARON BERGER
*

By an Order of the Court of Appeals of Maryland dated September 20, 2005, the following attorney has been indefinitely suspended by consent, effective immediately, from the further practice of law in this State:

KEITH A. ROSENBERG
*

By an Order of the Court of Appeals of Maryland dated September 20, 2005, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

ROBERT RYAN TOUSEY
*