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Joel Pautsch v. Maryland Real Estate Commission, No. 9, September Term 2011, filed October 28, 2011. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/9a11.pdf

ADMINISTRATIVE LAW – MARYLAND REAL ESTATE COMMISSION – DISCIPLINE OF REAL ESTATE PROFESSIONAL FOR FELONY CONVICTION – SANCTION – REVOCATION OF PROFESSIONAL LICENSE

Facts: Joel Pautsch, Petitioner, sought judicial review, pursuant to Section 17-329 of the Business Occupations and Professions Article, of the Maryland Real Estate Commission's decision to revoke his real estate licenses after he was convicted of two felonies relating the sexual abuse of minor children. In rendering its final order, the Commission found persuasive the attorney grievance jurisprudence of the Court of Appeals, primarily *Attorney Grievance v. Thompson*, 367 Md. 315, 786 A.2d 763 (2001), which related to an attorney's indefinite suspension from the practice of law for his stalking a thirteen-year old boy. In all of the judicial review proceedings, Mr. Pautsch asserted that the Commission's finding that his convictions bore a relationship to his activities as a licensed real estate professional as well as his trustworthiness and fitness were unsupported by evidence in the administrative record and that the Commission's sanction, the revocation of his real estate licenses, was arbitrary and capricious. The trial court affirmed the Commission's decision. The Court of Special Appeals affirmed.

Held: The Court of Appeals affirmed. The Court applied the standard of review set forth in *Maryland Aviation Administration v. Noland*, 386 Md. 556, 873 A.2d 1145 (2005), which requires the court to determine whether the Commission's findings were supported by substantial evidence in the administrative record. As to the Commission's finding that Mr. Pautsch's convictions bore a nexus to his activities as a licensed real estate professional, the Court observed that the Commission's reliance upon *Thompson,* and other attorney grievance cases, for the proposition that responsibility, maturity, and trustworthiness were lacking when a professional victimized minor children, was appropriate. As to the Commission's revocation of Mr. Pautsch's licenses, the Court instructed that it would not reverse a lawful and authorized sanction unless it was so extreme or egregious that it constituted arbitrary or capricious agency action.

Because the Commission found that Mr. Pautsch had been engaged in sexually abusive behavior towards minor children throughout a "fifteen-year period," which, according to the Commission, showed a lack of responsibility, maturity, and trustworthiness on the part of Mr. Pautsch, the Court determined that the sanction was not arbitrary or capricious.

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Charles Muskin, Trustee v. State Department of Assessments and Taxation, No. 40, September Term 2010, filed 25 October 2011, Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/140a10.pdf

CONSTITUTIONAL LAW - GROUND RENTS REGISTRATION - EXTINGUISHMENT IF NOT REGISTERED BY A CERTAIN DATE - VESTED RIGHTS

Facts: Petitioner, Charles Muskin, is the trustee of two trusts owning over 300 ground leases in Baltimore City. In 2007, the General Assembly passed Chapter 290 (Maryland Code (1974, 2010 Repl. Vol) Real Property Article, §§ 8-701 to 8-711), the Ground Rent Registry Statute, which required ground lease owners to register their leases with Respondent, the State Department of Assessments and Taxation ("SDAT"), by 30 October 2010. If the owners failed to register, the SDAT was required issue a certificate extinguishing the ground lease owner's reversionary interest and conclusively vesting the entire fee simple title for the property in the leasehold tenant. Muskin did not register the trusts' leases with the SDAT, choosing instead to file an action in the Circuit Court for Anne Arundel County (subsequently transferred to the Circuit Court for Baltimore City) requesting a declaratory judgement that Chapter 290 was unconstitutional and an injunction prohibiting the SDAT from issuing extinguishment certificates. The Circuit Court denied Muskin's motion for summary judgment, granted the SDAT's motion for summary judgment, and issued a declaratory judgment stating that Chapter 290 was constitutional under Maryland and federal law. The Court of Appeals granted certiorari to determine whether Chapter 290 was unconstitutional because it extinguished vested property and contract rights and/or transferred impermissibly private property without just compensation and whether the trial court erred in granting summary judgment to the SDAT on the issue of whether Chapter 290's registration process was so harsh that it deprives ground rent owners of the value of their property.

Held: Reversed. The Court of Appeals held as a matter of law that, the extinguishment and transfer provisions of Chapter 290 (currently codified in Maryland Code (1974, 2010 Repl. Vol.) Real Property Article, §8-708)are unconstitutional under Maryland's Constitution and Declaration of Rights, however, the registration provisions of Chapter 290 are constitutional. The Court concluded that while the law would be upheld under the analogous federal constitutional provisions, Article 24 of Maryland's Declaration of Rights, guaranteeing due process of law, and Article III, § 40 of Maryland's Constitution, prohibiting government taking of private property without just

compensation, have been shown, through a long line of cases, to prohibit the retrospective reach of statutes that would result in the taking of vested property rights. The Court also held that Chapter 290 was not an "as applied" regulatory taking because the ground rent owners were not required to conduct a costly title search to complete the registration process and the fees for registration were not "unreasonably harsh and costly." The judgment of the Circuit Court for Baltimore City was reversed and the case remanded with instructions to grant the parties competing motions for summary judgment in part and reverse in part and for entry of a declaratory judgment consistent with the opinion.

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Frey v. Comptroller, No. 62, September Term, 2009, filed September 29, 2011. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/62a09.pdf

CONSTITUTIONAL LAW – INCOME TAX - COMMERCE CLAUSE – EQUAL PROTECTION CLAUSE - PRIVILEGES AND IMMUNITIES CLAUSE- ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS- AUTHORITY OF THE TAX COURT

Facts: Petitioners are nonresidents who draw income from their partnership with a multi-state law firm with offices in Maryland. In 2005, Petitioners received a notice of assessment from the State Comptroller on their 2004 income tax returns. The assessment explained that they owed interest and back taxes after failing to pay the State's Special Nonresident Tax ("SNRT") pursuant to § 10-106.1 of the Tax-General Article in the Maryland Code ("T.G.").

Residents and nonresidents that draw income from Maryland pay income tax differently. Residents pay a county income tax, with a rate dependent on the county they live in, on top of a state income tax. Nonresidents pay the SNRT, which is equal to the lowest county income tax rate, on top of the same state income tax.

Petitioners challenge the validity of the SNRT under the Commerce Clause, Equal Protection Clause, and Privileges & Immunities Clause of the U.S. Constitution, as well as Article 24 of the Maryland Constitution and Declaration of Rights. Petitioners claim that the tax unfairly taxes interstate commerce, and improperly discriminates between residents and nonresidents. Respondent, Comptroller of Maryland, in turn, challenges the authority of the State Tax Court to abate the interest Petitioners owed.

Held: Judgment of the Court of Special Appeals affirmed. The SNRT does not violate the Commerce Clause of the U.S. Constitution because it is a valid compensatory tax. The tax does not violate the Equal Protection Clause because it is a reasonable tax scheme with a rational purpose. Similarly, the tax does not violate the Privileges and Immunities Clause because it treats residents and nonresidents substantially equally. Finally, the tax is valid under Article 24 of the Maryland Constitution and Declaration of Rights because it substantially serves a reasonable purpose–equalizing the burden of local services between residents and nonresidents.

Additionally, the Tax Court has the power to abate owed

interest under T.G. § 13-510 and § 13-528. The former allows the Tax Court to hear appeals of interest assessments, and the latter allows the Court to abate any assessment in an appeal it hears.

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Walker v. Department of Housing and Community Development, No. 97, September Term, 2010, filed September 23, 2011. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/97a10.pdf

CONSTITUTIONAL LAW - SECTION 8 HOUSING - HCVP BENEFITS - INFORMAL HEARING - DUE PROCESS

MARYLAND ADMINISTRATIVE PROCEDURE ACT - CONTESTED CASE

Facts: Appellant Tonya Walker resided with her four children in a rental home in Salisbury, Maryland, and was a Housing Choice Voucher Program (HCVP) participant. The public housing agency tasked with administering HCVP benefits in Wicomico County is the Maryland Department of Housing and Community Development. The Department notified the Appellant that her HCVP benefits would be terminated because she was in violation of program requirements by failing to make her home open to inspection and to enter into a repayment agreement to correct alleged overpayments to her by the Department. Appellant requested an informal hearing to appeal this decision. At that proceeding, a hearing officer affirmed the Department's decision to cease payment of benefits.

Appellant then sought judicial review of the Department's decision, arguing that her informal hearing should have been treated as a "contested case" under the Maryland Administrative Procedure Act (APA), to which certain rights and procedures are applicable. The Circuit Court for Wicomico County affirmed the Department's decision. Appellant noted a timely appeal to the Court of Special Appeals. The Court of Appeals issued a writ of certiorari on its own initiative before argument was scheduled in the Court of Special Appeals. The Court of Appeals considered whether the Department of Housing and Community Development must provide, upon request, a contested case hearing under the Maryland APA before terminating housing assistance benefits pursuant to the HCVP.

Held: The Department of Housing and Community Development was required to provide Appellant with a contested case hearing prior to termination of her HCVP benefits in accordance with constitutional due process requirements as articulated by the Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Further, the informal hearing Appellant was provided did not satisfy the contested case procedures of the Maryland APA because the decision does not reflect how the hearing officer resolved conflicts in the underlying facts. Nor does the decision provide

the requisite factual findings or a clear statement of the rationale for the decision by explaining how the hearing officer applied the facts to the applicable law. For these reasons, the matter is remanded to the Department to conduct a hearing in compliance with the procedures of a contested case hearing.

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Norman Bruce Derr v. State of Maryland, No. 6, September Term 2010, filed September 26, 2011. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/6a10.pdf

CRIMINAL LAW - CONFRONTATION CLAUSE - SURROGATE TESTIMONY

Facts: In 2006, Appellant was convicted of multiple sexual offenses relating to the rape of the victim, which occurred in 1984. At the time of the offenses, physical evidence was collected from the victim and taken to an FBI crime laboratory for serological testing. The serological examiner identified sperm and semen from the samples and detailed the conclusions in a report. The case became inactive until 2002 when a detective submitted the physical evidence taken from the victim to the FBI crime laboratory for forensic analysis. An FBI DNA analyst then generated a DNA profile of the suspect using the physical evidence obtained from the victim. This profile was entered into CODIS, and in 2004, a match was discovered between Appellant's existing profile in CODIS and the profile generated in 2002. Additional DNA was then obtained from Appellant to create a reference DNA sample in order to ensure the accuracy of the profile in CODIS. The testing of the sample obtained from Appellant in 2004 was performed by a team of biologists who were supervised by an FBI DNA analyst named Dr. Jennifer Luttman. After Dr. Luttman's team of biologists performed the tests and documented their results, Dr. Luttman determined that the reference sample matched Appellant's profile in CODIS. Dr. Luttman did not perform the actual testing of the reference sample, nor is it apparent that she observed the performance of the testing by the biologists on her team. She also had no involvement in the serological testing performed in 1985 or the DNA analysis performed in 2002.

At trial, Appellant objected to Dr. Luttman's surrogate testimony, claiming that it violated the Confrontation Clause. The trial court denied Appellant's motion, and allowed admission of the serological report and the 2002 DNA analysis under the business records exception to the hearsay rule and as the basis of Dr. Luttman's expert opinion under Maryland Rule 5-703. Dr. Luttman then testified regarding the testing procedures and results of the 1985 serological testing, the 2002 DNA analysis, and the 2004 DNA analysis, and she ultimately testified as to her conclusion that Appellant's DNA profile matched that of the suspect. The analysts who performed the testing of the physical evidence did not testify. Following his conviction, Appellant appealed to the Court of Special Appeals, but the Court of Appeals granted *certiorari* on its own motion prior to the Court

of Special Appeals rendering a decision.

Held: Reversed and Remanded.

A testimonial statement may not be introduced into evidence without the in-court testimony of the declarant, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witness. DNA testing procedures and methods, DNA profiles, and resulting conclusions are testimonial in nature, and therefore the analyst who performed the DNA testing or the supervisor who observed the analyst perform the testing must testify in order to satisfy the Confrontation Clause, unless the witness is unavailable and the defense had a prior opportunity for cross-examination. The DNA profiles and analysis from 2002 and 2004, as well as the serological analysis and report, constituted testimonial statements because they contained solemn declarations of fact, reflecting the functional equivalent of in-court testimony, and they were prepared for later use at trial. These testimonial statements were offered into evidence through the surrogate testimony of Dr. Luttman, who did not participate in any of the testing procedures and who did not observe performance of the tests in 1985 or 2002; there is also no indication that Dr. Luttman observed the 2004 testing. The Court held that although Maryland Rule 5-703 allows for an expert to base his or her opinion on inadmissible evidence, to the extent that application of the Rule offends the Confrontation Clause, such testimony will not be admissible. In other words, if the evidence sought to be introduced is comprised of the conclusions of other analysts, as opposed to raw data that has not yet been subjected to scientific testing, then the Confrontation Clause prohibits the admission of such testimonial statements through the testimony of an expert who did not observe or participate in the testing. Thus, Appellant was not able to confront the witnesses who made testimonial statements against him, and he was not provided with a prior opportunity to cross-examine the witnesses. Therefore, the surrogate testimony offered by Dr. Luttman and the admission of the serological reports and DNA evidence violated the Confrontation Clause.

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Christopher Mansfield v. State of Maryland, No. 53, September Term, 2010, filed September 30, 2011. Opinion by Bell, C. J.

http://mdcourts.gov/opinions/coa/2011/53a10.pdf

CRIMINAL LAW - CONSTITUTIONAL RIGHTS - DOUBLE JEOPARDY - MANIFEST NECESSITY

Facts: The petitioner, Christopher Mansfield, was tried in a bench trial at the Circuit Court for Caroline County on five counts, charging statutory sex related offenses, arising out of his alleged sexual assault of a minor years earlier. Before the start of this trial, Mansfield had been convicted in two separate, unrelated cases of sexual offenses involving young women who were minors. Those judgments of conviction were being appealed at the time of the trial. The trial judge had presided over one of Mansfield's unrelated sexual offense cases, a jury trial, and in addition, she was aware of the other case involving a different minor, which had been presided over by a retired, recall judge.

At the close of all of the evidence, Mansfield having testified in his own defense, the trial judge, *sua sponte* and over the petitioner's objection, declared a mistrial on herself, intending to set the case in for a new trial before another judge. Prior to a new trial, Mansfield sought a motion to dismiss the indictment on the ground of double jeopardy. The motions judge denied the motion, reasoning that it was inconceivable that the trial judge could have known, prior to jeopardy attaching, that, to resolve the case, she would be required to weigh the credibility of the complaining witness against that of Mansfield, and that the case would become, in her words, a "he said/she said situation." In an unreported opinion, the Court of Special Appeals affirmed the lower court's ruling, and Mansfield appealed. This Court granted his petition for writ of certiorari to determine whether, under the facts and circumstances *sub judice*, there was "manifest necessity" for the trial judge's declaration of mistrial, thus permitting Mansfield's retrial.

Held: The Court of Appeals reversed. The Court concluded that the constitutional prohibition against double jeopardy is not excused by the doctrine of manifest necessity where a trial judge, over defense counsel's objection and on the basis of information known by the judge prior to trial, declares a mistrial at the conclusion of all of the evidence in a bench trial. The trial judge possessed knowledge, before jeopardy attached, that bore on the credibility of both the complaining

witness and Mansfield, and that had direct significance to the ultimate issue she had to decide, Mansfield's guilt. Had the judge come into the knowledge after jeopardy attached–such as from comments made during trial–then declaring a mistrial would not have been an abuse of her discretion, and retrying the case would not have been barred by double jeopardy. The judge possessed the knowledge prior to attachment of jeopardy, however, and so, knowing part of her function in this trial was to determine the credibility of witnesses, the judge should have taken alternative steps, such as recusing herself.

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Darryl K. Harrod v. State of Maryland, No. 69, September Term 2010, filed October 27, 2011. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/69a10.pdf

CRIMINAL LAW AND PROCEDURE – CONTROLLED DANGEROUS SUBSTANCES – SECTIONS 10-1001 AND 10-1003 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE – CHEMIST REPORT – NOTICE OF INTENT TO ADMIT CHEMIST REPORT WITHOUT THE PRESENCE OF THE CHEMIST

Facts: Darryl Harrod, Petitioner, was retried on one count of possession with intent to distribute cocaine after a mistrial was declared due to a hung jury. At the retrial, the State sought to introduce a chemist report without the presence of the chemist, pursuant Section 10-1001 of the Courts and Judicial Proceedings Article, as evidence of the identity of the substance seized from Harrod. Defense counsel objected. While the State had not mailed, delivered, or made a copy of the chemist report available to Harrod prior to the retrial, it had apparently done so prior to Harrod's first trial. Moreover, at the first trial, the chemist had appeared pursuant to Harrod's timely demand, testified, and was subjected to cross-examination. At Harrod's retrial, however, the State asserted that Harrod was required to once again timely demand the appearance of the chemist prior to trial, the absence of which entitled the State to admit the chemist report without the chemist's presence. The trial judge agreed with the State's argument and admitted the report into evidence. Harrod was convicted. The Court of Special Appeals affirmed.

Held: The Court of Appeals reversed. The Court instructed that, under the circumstances in Harrod's case, the effect of a mistrial was to create a procedural blank slate, or "tabula rasa," rendering it incumbent upon the State to once again timely mail, deliver, or make available a copy of the chemist report pursuant to Section 10-1003 of the Courts and Judicial Proceedings Article in order to admit the report without the presence of the chemist at trial. As the beneficiary of the notice, the burden of proving the report was made available fell upon the State, not upon Harrod to prove he did not receive it, according to the Court. The notice requirement, the Court further determined, was a strict one, the failure of which obviated the State's ability to admit the chemist report without the presence of the chemist. The erroneous admission of the report and its attendant testimony could not be harmless, the Court determined, because they "were adduced to satisfy proof of the elements of the crime."

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Patuxent Riverkeeper v. Maryland Department of the Environment, et al. No. 139, September Term 2010, Opinion filed September 30, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/139a10.pdf

ENVIRONMENT – WATER AND WATER RESOURCES – JUDICIAL REVIEW OF FINAL DETERMINATION BY MARYLAND DEPARTMENT OF THE ENVIRONMENT – STANDING – ENVIRONMENTAL ORGANIZATIONS – THRESHOLD STANDING REQUIREMENTS UNDER FEDERAL LAW

Facts: A non-profit environmental group, Patuxent Riverkeeper, ("Riverkeeper"), sought to initiate a judicial review action of a decision of the Maryland Department of the Environment ("MDE"), to issue a "non-tidal wetlands permit" to Petrie/ELG Inglewood, LLC, now known as Woodmore Towne Centre, LLC, in connection with the development of Woodmore Towne Centre at Glenarden in Prince George's County. Nontidal wetlands are commonly referred to as "marshes, swamps, bogs, wet meadows, and bottomland forests" and are protected by a permitting process administered by the Maryland Department of the Environment from unnecessary and avoidable impact. Specifically, Woodmore Towne Centre had applied for the permit to construct a road extension and stream crossing at Ruby Lockhart Boulevard in order to provide primary access into the development. During the administrative proceeding before MDE, Riverkeeper submitted written comments against the permit, asserting that Woodmore Towne Centre had not demonstrated that the proposed road extension and stream crossing had "no practicable alternative" that would "avoid or result in less adverse impact on nontidal wetlands." After MDE approved the permit, Riverkeeper initiated a judicial review action in the Circuit Court, after which both MDE and Woodmore Towne Centre filed motions to dismiss for lack of standing. The Circuit Court dismissed the judicial review action, and the Court of Appeals granted certiorari prior to any proceedings in the intermediate appellate court.

Held: The Court of Appeals reversed the decision of the Circuit Court. The Court interpreted, for the first time, Section 5-204(f) of the Environment Article, enacted by Chapters 650 and 651 of the Maryland Laws of 2009 and effective January 1, 2010, which enables a person to seek judicial review of an administrative determination by the Maryland Department of the Environment regarding certain environmental permits, including those affecting non-tidal wetlands, if the person satisfies the federal rubric for standing, as follows:

(f) *Judicial review of final determination by*

> *Department*. — A final determination by the Department on the issuance, denial, renewal, or revision of any permit under Title 5, Subtitle 5 or Subtitle 9, § 14-105, § 14-508, § 15-808, or § 16-307 of this article is subject to judicial review at the request of any person that:
> (i) Meets the threshold standing requirements under federal law; and
> (ii) 1. Is the applicant; or
> 2. Participated in a public participation process through the submission of written or oral comments, unless an opportunity for public participation was not provided.

The Court considered the touchstone case involving environmental standing in the federal arena, *Friends of the Earth v. Laidlaw Environmental Services*, a judicial review action to enforce a permit authorizing the limited discharge of pollutants, pursuant to the Clean Water Act, 33 U.S.C. § 1342. In that case, the Supreme Court determined that to satisfy standing in an environmental action, a plaintiff must show that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." The Court further noted that an environmental group can satisfy standing federally if "its members would otherwise have standing to bring suit in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

After reviewing the Supreme Court's environmental standing jurisprudence, as well as other federal appellate decisions interpreting the tenets of the Supreme Court cases, the Court determined that Riverkeeper had standing, because its member, David Linthicum had demonstrated aesthetic, recreational, and economic interests in the Western Branch of the Patuxent River as an avid paddler and cartographer. The Court reasoned that the Circuit Court judge failed to credit the reasonable concern that Mr. Linthicum manifested about the future harm to the ecology of the Western Branch that would result from "diverting or compromising" upriver streams. The Court further reasoned that the injury suffered by Mr. Linthicum shared a sufficient nexus to the issuance of the non-tidal wetlands permit, because Mr.

Linthicum alleged, referring to scientific articles as well as his own experiences, that stream crossings at headwaters and wetlands, such as that constructed at Ruby Lockhart Boulevard, can cause negative affects downstream on the Western Branch watershed. Finally, the Court noted that at a hearing before the Circuit Court regarding the motions to dismiss, Frederick Tutman, Chief Executive Officer of Riverkeeper, described methods to abate the harm caused by the issuance of the permit, including rescission of the permit, as well as more intensive mitigation efforts. As a result, the Court concluded that the motions to dismiss for lack of standing on the part of Riverkeeper should not have been granted, and the judicial review action should be permitted to proceed.

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COURT OF SPECIAL APPEALS

Kathy Mesbahi, et al. v. Maryland State Board of Physicians, Case No. 2791, September Term 2009, filed September 30, 2011. Opinion by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/2791s09.pdf

ADMINISTRATIVE LAW AND PROCEDURE - APPEAL AND ERROR - PHYSICIANS AND SURGEONS - CONSTITUTIONAL LAW - STATUTES

Facts: On May 11, 2009, the Maryland Board of Physicians ("the Board") concluded
that Dr. Kathy Meshabi had violated Declaratory Ruling 00-1 (DR 00-1) by aiding an unauthorized person in the practice of medicine. Specifically, the Board said that the physician had impermissibly delegated laser hair removal procedures to her business manager and office receptionist. The Board found that these actions constituted unprofessional conduct in the practice of medicine, and imposed several sanctions against Dr. Meshabi, including a $20,000 fine and an order to permanently cease and desist from the practice of laser hair removal. As to her staff, the Board concluded that both had engaged in the unlicensed practice of medicine, ordered them cease and desist from doing so, and imposed monetary fines on them.

The Circuit Court for Montgomery County upheld the Board's decision on the merits, but vacated the fines and the permanent cease and desist order against Dr. Mesbahi as arbitrary and capricious because the record did not reflect the Board's grounds for imposing the sanctions. The court remanded the case, with instructions to the Board to specifically articulate its reasons for those sanctions, a result challenged by the Board.

Dr. Mesbahi and her employees sought judicial review of the administrative agency's decision, arguing that the Board (1) erroneously relied on DR 00-1 in concluding that laser hair removal constitutes the practice of medicine; (2) deprived appellants of due process by failing to notify them about the issuance of DR 00-1; and, (3) failed to prove that appellants knowingly violated DR 00-1 before imposing sanctions on them. In response to the Board's cross-appeal, appellants also argued that the sanctions imposed against them were arbitrary and capricious.

Held: The Court of Special Appeals affirmed in part and reversed in part, remanding the case to the circuit court with

instructions to affirm the decision of the Board in its entirety. The Court said that the Board gave DR-00-1 appropriate weight as a binding precedent. Noting that the Practice of Medicine Committee and the American Medical Association determined that laser hair removal constituted a surgical act, and that appellants failed to offer any expert testimony to the contrary, the Court held that the Board reached a reasonable conclusion.

The Court next considered whether appellants' due process rights had been violated because they were not notified of the illegality of their conduct. The Court said that just as a motorist is charged with knowledge of the laws regulating motor vehicles, "a physician is. . . presumed to know the laws regulating the practice of medicine, as are other individuals who provide services to patients in a medical setting." Moreover, the Court noted, DR 00-1 and preceding Practice of Medicine Committee advisory letters concerning laser hair removal were readily available to the public. Appellants are responsible for maintaining up-to-date knowledge of the laws of their practice, and should inquire with the Board before delegating or engaging in conduct that may constitute the unauthorized practice of medicine.

With regard to appellants' claim that HO §§ 14-301, 14-601, and 14-404(a)(2), (3) and (18), required the Board to find a "knowing or willful violation" before imposing sanctions, the Court found that, unlike other provisions in the same statutory scheme, the statutes under which appellants were charged did not contain a *mens rea* requirement. Therefore, the Board was not required to make a finding of a knowing or willful violation. Additionally, the appellate court said sound public policy required rejection of appellants' "defense of ignorance" and found them strictly liable for the charge of practicing medicine without a license.

Finally, with respect to sanctions, the Court noted that an administrative agency has broad discretion in imposing sanctions, and its decisions are given great deference. It said that the circuit court erred by concluding that the Board needed to articulate its basis for the sanctions. The party challenging the sanction has the burden of proving that it was arbitrary and capricious. Here, appellants offered no evidence that the fines or the permanent cease and desist order were grossly disproportionate to their conduct.

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Baltimore County, Maryland v. Virginia W. Barnhart, Case No. 1196, September Term 2010, filed October 27, 2011, Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2011/1196s10.pdf

ATTORNEYS - LEGAL ETHICS - CLIENT RELATIONS - ACCEPTING REPRESENTATION - CONFIDENTIALITY OF INFORMATION - CIVIL PROCEDURE - COUNSEL DISQUALIFICATION

Facts: This is an appeal from a grant of summary judgment by the Circuit Court for Baltimore County in an action for declaratory judgment brought by Baltimore County, Maryland (the "County"), appellant, against Virginia W. Barnhart, appellee. The County sought a ruling as to whether appellee, the former County Attorney, violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") by providing legal representation to David Willis, Jr., a former County employee, in an administrative appeal of the County's calculation of his retirement benefits, and sought to have appellee disqualified from representing Willis. The County appealed arguing that the circuit court erred in finding: (1) that there was no genuine dispute of material fact as to whether appellee violated MLRPC 1.9 and 1.11, and thereby in granting summary judgment; (2) that the County waived its right to request disqualification of appellee from representing Willis in the administrative appeal; (3) that it did not have jurisdiction to rule on whether appellee violated MLRPC 1.9 and 1.11 in a request for declaratory judgment; and (4) that declaratory judgment was an inappropriate vehicle for determining whether appellee violated MLRPC 1.9 and 1.11.

Held: The Court of Special Appeals affirmed the circuit court's grant of summary judgment.

MLRPC 1.9, titled "Duties to Former Clients," provides in pertinent part: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

MLRPC 1.11 titled "Special Conflicts of Interest for Former

and Current Government Officers and Employees," largely mirrors MLRPC 1.9. MLRPC 1.11(a)(2) provides that "a lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation."

When evaluating the meaning of the phrase "the same or a substantially related matter," as set forth in MLRPC 1.9, for the purpose of determining attorney disqualification, this Court, in Gatewood v. State, 158 Md. App. 458, 468 (2004), aff'd, 388 Md. 526, observed that "[t]he case law in Maryland on this issue is sparse, but this is a point of law that crosses jurisdictional lines, and rulings from courts that have addressed similarly worded professional conduct rules are relevant."

We held that the circuit court correctly determined that no genuine dispute of material fact existed as to whether appellee, during her tenure as County Attorney, was "substantially and personally involved" in the same matter being considered in Willis' administrative appeal. Similarly, the record reveals no genuine dispute of material fact as to whether appellee possessed confidential government information acquired during her tenure as County Attorney, which could have been used to the material disadvantage of the County in Willis' administrative appeal.

Disqualification is a drastic remedy since it deprives litigants of their right to freely choose their own counsel. Disqualification at the urging of opposing counsel is permitted only where the conflict is such as clearly to call in question the fair and efficient administration of justice.

In evaluating a disqualification motion, a court must first determine whether an attorney-client relationship existed between the challenged law firm and the objecting client, and then resolve whether the matter at issue in the challenged representation is the same or substantially related to the matter involved in the prior representation.

A delay in filing a motion to disqualify is certainly an important factor; however, the mere length of delay is not dispositive and the Court should not deny a motion to disqualify based on delay alone. If the former client "was concededly aware of [the challenged law firm]'s representation of [the former client] but failed to raise an objection promptly when [it] had the opportunity," this failure will result in the waiver of the right

to raise the disqualification issue. When determining whether a party has waived its right to move to disqualify counsel, the Court must examine whether the party filed its motion in a timely manner. Timely service of a motion to disqualify helps to curb the potential use of the motion as a litigation tactic or to harass the opposing party. Courts analyze a number of factors when considering whether the motion was timely made, including: when the movant learned of the conflict; whether the movant was represented by counsel during the delay; why the delay occurred, and, in particular, whether the motion was delayed for tactical reasons; and whether disqualification would result in prejudice to the nonmoving party.

Here, we analyzed the four factors listed above. We held as to the first factor, when the movant learned of the conflict, that appellee notified the County in March 2007, that she intended to represent Rowe, and on August 13, 2008, notified the County that she intended to represent Willis. It was not until January 21, 2009, nearly two years after the County became aware of appellee's representation of Rowe, that the County filed the first complaint for declaratory judgment, seeking a ruling that appellee violated MLRPC 1.9 and 1.11 in her representation of Willis, and first sought appellee's disqualification on June 9, 2009, in its Amended Complaint. As to the second factor, whether the County was represented by counsel for the entire period of delay, we held that appellee's correspondence with the County during this period was primarily with the County's Office of Law. As to the third factor, why the delay occurred, and, in particular, whether the motion was delayed for tactical reasons, we concluded that the timing of the County's formal request on January 21, 2009, for appellee's disqualification, six days before Willis' appeal was scheduled to be heard on January 27, 2009, suggests tactical reasons for the request, as the County had been aware for at least two months that the matter would not be resolved informally, and that appellee would proceed with her representation of Willis. As to the fourth factor, whether disqualification would result in prejudice to the nonmoving party, we note that the appeal in Willis' case has been delayed for more than two years due to litigation of this issue. Forcing Willis to start the appeal anew with new counsel would undeniably result in the prejudice of further delay. All of the factors discussed above lead to the conclusion that the circuit court properly determined that through the County's inaction, despite ample prior notice of appellee's representation of Willis, and indeed, Rowe, the County waived the ability to request appellee's disqualification.

The Court of Appeals has exclusive jurisdiction in proceedings involving an attorney's alleged violation of ethical rules.

The section of the MLRPC titled "Scope" confirms that a violation of a professional conduct rule does not give rise to an independent cause of action, nor does an opposing party have standing to seek enforcement of the rule through a collateral proceeding.

In this case, we conclude that the circuit court correctly determined that it does not have jurisdiction to determine whether appellee violated MLRPC 1.9 and 1.11 in a declaratory judgment action. Maryland case law and the MLRPC are clear – the Court of Appeals is the sole arbiter of whether a Maryland attorney has violated a rule of professional conduct.

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Juan Maximo Perez v. State of Maryland, No. 2000, September Term, 2009, filed September 30, 2011. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2011/2000s09.pdf

CRIMINAL LAW - MARYLAND RULE 4 -325 - SUPPLEMENTAL JURY INSTRUCTIONS

Facts: The victim's mother forced her to take a drug test and threatened to report the positive result to the police. Appellant entered the victim's bathroom and told her he would throw away the drug test if she let him "test her virginity" by digitally penetrating her vagina. Fearing more trouble from her mother or from the police if she refused, the victim let appellant test her virginity. The victim reported appellant's conduct to her mother, who called the police. At trial, in response to a jury question regarding consent in a fourth degree sexual offense case, the circuit court wrote: "Consent means actually agreeing to the act, rather than merely submitting as a result of threats or coercion." A jury sitting in the Circuit Court for Montgomery County convicted appellant of child sexual abuse and fourth degree sexual offense by.

Held: The Court of Special Appeals affirmed. The trial court did not err in providing the supplemental instruction. A trial court is required to provide a supplemental instruction in response to a jury question when the query involves an issue central to the case. Because the issue of consent was central to the jury's decision and its definition was not fairly covered by any of the other jury instructions, the circuit court properly looked to the Maryland Criminal Pattern Jury Instructions and appropriately modified the definition of consent set forth in the second degree rape instruction. The circuit court's jury instruction on the definition of consent was an accurate statement of the law. Fourth degree sexual offense does not require proof of force; it requires only lack of consent. It was appropriate for the circuit court to omit the first two sentences from the pattern instruction for second degree rape (pertaining to the element of force), and to alter the remaining definition in accordance with the facts of the case.

Additionally, the victim's testimony was more than sufficient to permit the jury to find that she did not consent to the sexual contact. The standard for appellate review of evidentiary sufficiency is whether a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. The jury chose to believe the victim's testimony that she was threatened or coerced into submitting to the sexual contact, as it

was entitled to do.

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Lakisa Dinkins, et al. v. Charles Grimes, et al., Case No. 2829, September Term 2009, filed September 30, 2011. Opinion by Zarnoch, Robert A.

http://mdcourts.gov/opinions/cosa/2011/2829s09.pdf

CONSTITUTIONAL LAW - VENUE - EQUAL PROTECTION - DUE PROCESS

Facts: In this constitutional tort case, appellant, Lakisa Dinkins, as Next Friend of Gerard Mungo, Jr. and Devon Johnson, sought damages from appellees, the Baltimore City Police Department and six of its officers. Gerard was seven years old when he was arrested for sitting on a dirt bike which was not "securely locked or otherwise immobilized,"as required by Baltimore City ordinance. Upset about the circumstances surrounding her son's arrest, Dinkins filed a complaint with the Police Department. Eleven days later, during a drug investigation, Dinkins was arrested, an arrest she claimed was in retaliation for her earlier complaint against the police. Even before suit was filed, the case received pervasive publicity that was largely critical of the police department and the officers involved. Appellants filed suit in the Circuit Court for Baltimore City. As the litigation progressed, appellees filed a motion for removal. This motion was initially denied, but later granted because the publicity critical of appellees had intensified, convincing the court that the jury pool in Baltimore City would be tainted. The Administrative Judge ordered the case removed to the Circuit Court for Howard County.

Following removal, appellants sought to return the case to majority black Baltimore City, primarily because the racial composition of majority white Howard County denied appellants the right to a fair trial. Their motion was denied, as was appellants' renewal of the motion before jury selection. The jury found in favor of the City and awarded no damages against the officers. Appellants now appeal the decision in Baltimore City to transfer venue and the decision in Howard County denying their requests to return the case to Baltimore City.

Held: Affirmed. The Court said that there was a reasonable ground to believe appellees could not receive a fair and impartial trial in Baltimore City. Under *Hoffman v. Stamper*, 155 Md. App. 247, 284 (2004), the party seeking removal bears the burden of proof, and must show, "not only that there has been publicity about this case but also that there is reason to believe that the publicity about him will prejudice his rights." Based on the extensive evidence of local prejudice in the record, including statements by high-ranking city officials, pervasive critical publicity, and community demonstrations against appellees, the

circuit court properly found that appellees had met this burden. The Court also held that equal protection did not require the case to be transferred to a jurisdiction with Baltimore City's racial demographics. After surveying various federal and out of state cases, the Court found there was no such right. The Court also determined that a race-neutral reason existed to transfer the case, namely to avoid the prejudicial publicity in Baltimore City. Finally, the Court held that Due Process did not require appellants to be heard in the transferor court on the designation of a new venue. Under Maryland Rule 2-505(b), the circuit court correctly determinated that the selection of a new venue, "did not require a hearing and that designation of the new venue was 'an administrative function.'" With respect to the appellants' due process argument, the Court cited *Boddie v. Connecticut,* 401 U.S. 371(1971), to distinguish the due process requirements in a civil case from those in a criminal case. *Boddie* held, "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits." *Id.* at 378. Further, the Court held that appellants had no property right to a particular venue or to a jury of their same racial background, a claim which has been routinely rejected by out-of-state authorities. Additionally, since administrative factors govern the venue selection once a case must be removed to another jurisdiction, a hearing would have offered little benefit to appellants. Accordingly, the decision was affirmed.

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Matthew C. Baker, et al. v. Montgomery County, Maryland, et al., Case No. 1038, September Term 2010, filed October 27, 2011, Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2011/1038s10.pdf

GOVERNMENTS - LOCAL GOVERNMENTS - LEGISLATION - INTERPRETATION - STATUTORY REMEDIES & RIGHTS - CIVIL PROCEDURE - JUSTICIABILITY - MOOTNESS

Facts: This appeal arises from the Circuit Court for Montgomery County's grant of summary judgment in favor of Montgomery County (the "County"), the Mayor and Council of Rockville ("Rockville"), the City of Gaithersburg ("Gaithersburg"), and Chevy Chase Village ("Chevy Chase"), appellees, against Matthew C. Baker; Thomas J. Wheatley; Aristone L. Pereira, Jr.; Johnny R. Garza; Kenneth K. Sleeman; David A. Schiller; Walter McKee; Janet Marburger; and those similarly situated, collectively referred to as appellants. The class action lawsuit in this matter was initiated by appellants, all of whom received speeding citations resulting from photographs taken by speed monitoring camera systems located in appellees' respective jurisdictions. Appellants claim that appellees violated Md. Ann. Code. Transportation Article ("T.A.") § 21-809 by entering into contracts in which contingent fees were paid to ACS State & Local Solutions Inc., ("ACS"), the contractor who allegedly operated appellees' speed monitoring camera systems, and as such, the fines were unlawful. On appeal, appellants argue that the circuit court erred in failing to find that a private cause of action exists for appellants to challenge appellees' alleged misapplication of T.A. § 21-809.

Held: The Court of Special Appeals affirmed the circuit court's grant of summary judgment.

The determination of whether a private cause of action exists as to a statute which does not expressly provide for such an action, involves an analysis of three factors. The Supreme Court explained these factors in Cort v. Ash, 422 U.S. 66 (1975). The first factor involves determining whether the plaintiff is one of the class for whose special benefit the statute was enacted. The second factor involves examining whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one. The third factor involves determining whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.

In Erie Ins. Co. v. Chops, 322 Md. 79, 82-83, 91 (1991), the Court of Appeals of Maryland reiterated the factors described in

Cort, stating that in order to determine whether a private cause of action exists, Maryland courts have analyzed three factors: (1) "the presence or absence of an indication of legislative intent to create a private remedy"; (2) "whether the plaintiff is one of the class for whose special benefit the statute was enacted"; and (3) "whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff."

In determining legislative intent, various factors are examined including: the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, and the existence of express statutory remedies to serve the legislative purpose.

Where the legislature has provided a remedy, the litigant must pursue that designated form of remedy, rather than seek some alterative form to circumvent the procedures promulgated by the legislature.

Maryland courts have consistently declined to find that a private cause of action exists where the person bringing the action is not in the class of people for whose special benefit the statute was enacted.

In this case, the Court of Special Appeals held that the legislative history of the statute demonstrates a lack of intent by the General Assembly to create a private cause of action; the appellants are not among the class for whose special benefit the statute was enacted; and it is inconsistent with the purpose of the statute to provide such a remedy for appellants.

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John Doe v. Buccini Pollin Group, Inc. d/b/a PM Hospitality Strategies, Inc. et al., No. 812, September Term, 2010, decided October 3, 2011. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2011/812s10.pdf

LABOR & EMPLOYMENT - WORKERS' COMPENSATION - EMPLOYEES INJURED BY INTENTIONAL NEGLIGENCE AND NEGLIGENCE ACTS OF A THIRD-PARTY

MARYLAND CODE ANN., LABOR AND EMPLOYMENT ARTICLE (LE) § 9-101 (b)(1) (defining accidental personal injury as "an injury that arises out of and in the course of employment") and LE § 9-101 (b)(2) (defining accidental personal injury as "an injury caused by a willful or negligent act of a third person directed against a covered employee in the course of the employment of the covered employee").

THE "GOING AND COMING RULE"; *Bd. of County Comm'rs for Frederick County v. Vache*, 349 Md. 526, 531 (1998); *Montgomery County v. Wade*, 345 Md. 1 (1997).

Facts: Appellant, a banquet houseman at the BWI Hilton Hotel, who was responsible for setting up tables at the banquet hall, attempted to retrieve a cart that a co-worker had taken in his absence. In his attempt to take possession of the cart, appellant's hand touched that of the co-worker who became angry, began to curse and upset several banquet tables that appellant had prepared. Enraged, the co-worker called a friend and told him that "[appellant] touched my hand and you should come get your thing and take care of him." As appellant, accompanied by another co-worker, drove away from the hotel, they were pursued at a high rate of speed for sixteen miles by the irate co-worker's friend who pulled up behind appellant's car, emerged and shot appellant, rendering him a paraplegic. Subsequently, the Worker's Compensation Commission awarded appellant temporary total benefits, but the employer filed a petition for judicial review and the Circuit Court for Baltimore County reversed the Commission. The gravamen of appellant's contention, on this appeal, is that his co-worker and her friend entered into a conspiracy to kill him and that the conspiracy originated while he was engaged in his employment. He cites the fact that the time and place where the irate co-worker conspired with her friend to kill him was when she was engaged in her duties and while she was present at work.

Held: Because appellant was injured by a third party *en route* to his home, his injury did not "occur" in the course of his employment and is, therefore, not compensable.

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M. Hasip Tuzeer, et al. v. Yim, LLC, et al., No. 2585, September Term, 2009. Opinion filed October 3, 2011 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/816s10.pdf

REAL PROPERTY - ZONING - NONCONFORMING USE; DISCONTINUANCE - SUBSTANTIAL EVIDENCE - OPEN MEETINGS ACT - ARTICLE 66B - TELEPHONE PARTICIPATION IN ADMINISTRATIVE HEARINGS; METHOD OF APPROVING RESOLUTIONS

Facts: YIM, LLC owns a property on W. 27th Street in a residential zoning district in Baltimore, Maryland. The property was built in the 1940s, and YIM has owned it since November 2006. From the date YIM purchased the property until the end of May 2008, a restaurant and/or bar operated on the property pursuant to a nonconforming use permit.

After the bar operating on the property closed in May 2008, YIM sought a new tenant to operate a restaurant. In December 2008, YIM leased the property to David Weishaus, and they began the process of procuring the proper permits to operate a restaurant with a liquor license. Later that month, however, YIM learned of a rift between Mr. Weishaus and a local community organization, and the lease was cancelled. YIM proceeded to seek a new tenant.

YIM filed with the Department of Housing and Urban Development two applications for a Use and Occupancy Permit to use the property as a lounge & restaurant. After these applications were denied, YIM appealed to the Board.

On August 18, 2009, the Board held a hearing on YIM's request to use a portion of the first floor of the W. 27th Street property as a restaurant with a liquor license. All Board members participated in the hearing, although one member participated via telephone. The Board approved YIM's application for a non-conforming use permit.

Held: Affirmed. A nonconforming use is a lawfully existing use of a structure or land that does not conform to the applicable use regulations of the district in which it is located. A nonconforming use may be eliminated by discontinuance or abandonment. The abandonment or discontinuance, however, "must be active and actual." *Trip Assocs. Inc. v. Mayor and City Council of Balt.*, 392 Md. 563, 577 (2006). Here, there was not a failure to act for 12 months. YIM introduced evidence demonstrating its efforts to obtain alternate tenants, including signing a lease with Mr. Weishaus in December 2008, and, after the community had an acrimonious meeting with Mr. Weishaus, signing a new lease with

Mr. D'Souza. YIM filed two permit applications, one in March 2009 for interior and exterior painting, and one on May 11, 2009, for a continuation of a restaurant use permit. Under these circumstances, the Board properly could find there was not an "active and actual" abandonment or discontinuation after the previous restaurant closed at the end of May 2008.

The Board did not violate the Open Meetings Act or Article 66B. The Board heard testimony and conducted its deliberations at a public meeting, during which the Board voted. There is nothing in Maryland's Open Meetings Act or Article 66B that prohibits a meeting with one or more members participating by telephone conference, as long as the conference call is broadcast over a speakerphone so it can be heard by members of the public. Accordingly, the Board did not violate the Open Meetings Act or Article 66B in approving YIM's nonconforming use permit where one voting member was present by speaker phone.

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Frederick R. Deinlein v. Andrew R. Johnson, et al., No. 788, September Term, 2010, filed September 30, 2011. Opinion by Berger, J. (Specially Assigned)

http://mdcourts.gov/opinions/cosa/2011/788s10.pdf

TAX LAW – TAX DEEDS & TAX SALES – REIMBURSEMENT OF EXPENSES – ATTORNEY'S FEES

Facts: On May 12, 1997, Frederick Deinlein, appellant, purchased a 4.0-acre parcel of land (the "subject property") at a tax sale in Prince George's County. Prior to the sale, the subject property was originally part of a larger 7.8023-acre parcel ("Original Tract"), whose deed was held in trust for Andrew Johnson, appellee. In 1996, the Maryland Department of Assessment and Taxation ("SDAT") divided the Original Tract into two separate parcels, each with its own tax account number. Following the division, the SDAT failed to include any legal descriptions of the properties' boundaries, and the only legal property description on record referred to the Original Tract in its entirety.

In 1997, the property taxes on both accounts fell into arrears, and Prince George's County ("the County"), appellee, sold both properties at a tax sale without a metes and bounds description for either property. Two years after he purchased the property, Deinlein initiated an action to foreclose the right of redemption in the subject property. While the foreclosure action was pending in the circuit court, Deinlein discovered the nonexistence of any metes and bounds description of the subject property. Deinlein attempted to resolve the inadequate property description issue with both SDAT and the County without success.

On August 13, 2002, the circuit court entered an order foreclosing the right of redemption in the subject property ("foreclosure order"). After the SDAT and the County denied Deinlein relief, he brought an action to quiet title in the subject property on October 10, 2007. Approximately one year later, Johnson filed a motion to vacate the foreclosure order in addition to filing his own counterclaim to quiet title in the subject property. On June 17, 2009, the circuit court vacated the foreclosure order but later reversed this decision and vacated the June order, thereby reinstating the original foreclosure order. The court gave Johnson the opportunity to redeem the subject property, but Johnson never redeemed the subject property.

Deinlein filed a motion for repayment of extraordinary attorney's fees pursuant to Section 14-843(a)(4)(ii) of the Tax-Property Article ("T.P.") on December 14, 2009. At a subsequent hearing on the quiet title action, Deinlein advanced his

request for extraordinary fees. On May 6, 2010, the circuit court voided the tax sale and vacated the foreclosure order. The court denied Deinlein's request for extraordinary attorney's fees but ordered the County to reimburse Deinlein for certain taxes and costs paid concerning the tax sale.

Held: Affirmed. The lower court did not err in denying Deinlein's request for extraordinary attorney's fees to which he was not entitled under T.P. § 14-843(a)(4)(ii), which governs the reimbursement of expenses arising from an action to foreclose the right of redemption (the "extraordinary fees provision"). Inasmuch as T.P. § 14-848, which governs the repayment of costs and expenses following a judicially voided tax sale, permitted Deinlein to recover the tax sale amount, interest, and taxes paid, once the circuit court voided and set aside the original tax sale, any reimbursement of attorney's fees, extraordinary or otherwise, was still subject to T.P. 14-843(a).

Here, T.P. § 14-843(a)(4)(ii) does not apply to Deinlein. The General Assembly amended the Tax Property Article in 2008 to include T.P. § 14-843(a)(4)(ii) as a remedy for certain expenses incurred in the event that a property previously sold at a tax sale is redeemed. In so doing, the legislature specifically intended for the provision to apply prospectively to tax sales that take place after April 24, 2008, the provision's effective date. Deinlein purchased the subject property at a tax sale on May 12, 1997. As a result, he is not entitled to recover extraordinary attorney's fees pursuant to T.P. § 14-843(a)(4)(ii).

Assuming, *arguendo*, that the pre-2008 version of T.P. § 14-843(a) applied to this case, Deinlein failed to satisfy the condition precedent of redemption. Johnson never redeemed the subject property. Consequently, in the absence of redemption, Deinlein could not recover any qualified expense under T.P. § 14-843(a).

The Court further held that while Deinlein was precluded from relief under T.P. § 14-843(a)(4)(ii), he was entitled to partial relief under T.P. § 14-848 following the judgment of the lower court to void and set aside the original tax sale. The lower court did not err in granting Deinlein alternative relief while denying his request for extraordinary fees. T.P. § 14-848 authorizes the repayment of certain enumerated expenditures, as well as other expenses properly incurred under T.P. § 14-843(a). Thus, while the lower court properly awarded Deinlein taxes, legal fees in the amount of $500, costs, and accrued interest, the inapplicability of T.P. § 14-843(a)(4)(ii) defeated Deinlein's claim for extraordinary attorney's fees.

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James E. Troxel, 3D v. Iguana Cantina, LLC, et al., No. 820, September Term, 2010, filed October 3, 2011. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2011/820s10.pdf

TORTS - NEGLIGENCE – PREMISES LIABILITY – RELATIONSHIP TO DRAM SHOP LIABILITY

Facts: James E. Troxel sued the proprietors of a nightclub, Iguana Cantina, for injuries he allegedly received from unknown third parties on the club's dance floor. The complaint alleged that Iguana Cantina was negligent for failing to protect its patrons against foreseeable risks of physical harm. Troxel presented evidence, through Baltimore City Police reports and affidavits from former employees of Iguana Cantina, indicating that numerous assaults, robberies and other incidents of violence occurred within the premises of Iguana Cantina in the months and years leading up to the night of Troxel's altercation.

The Baltimore City Circuit Court granted Iguana Cantina's motion for summary judgment, finding that (1) Troxel's claim was an attempt to assert Dram Shop liability in Maryland and that, regardless, (2) there was no evidence to show that Iguana Cantina breached a duty owed to Troxel or that any such breach proximately caused Troxel's injuries.

Held: Summary judgment vacated. Troxel's claim was not an attempt to assert Dram Shop liability; it was a claim for premises liability negligence. This type of liability provides relief to plaintiffs who are subjected to dangerous conditions on an establishment's premises and it exists whether alcohol is involved or not. The gravamen of the cause of action is that the injury resulted from appellees' failure to protect patrons from a dangerous condition, and not from the furnishing of alcohol. The claim should have been analyzed in this context.

Once viewed in this light, Troxel provided sufficient evidence of negligence to survive a motion for summary judgment. The evidence of prior violence occurring within the premises of the club imposes a duty on Iguana Cantina to take reasonable measures to eliminate the conditions contributing to the violence. On the question of breach, Troxel presented evidence, through expert testimony, that Iguana Cantina should have had more security guards patrolling the nightclub or should have had security guards stationed in more strategic locations. A fact finder could reasonably conclude that Iguana Cantina, given the history of criminal conduct occurring within its premises, breached its duty to provide adequate security to protect its

patrons from violent attacks.

Finally, Troxel presented sufficient evidence for a fact finder to conclude that Iguana Cantina's acts or omissions proximately caused his injuries. On the issue of cause-in-fact, a jury could reasonably conclude that Iguana Cantina's failure to provide adequate security was a substantial factor in bringing about Troxel's injuries. On the question of legal causation, the evidence suggested that his injuries were the foreseeable result of a typical night at Iguana Cantina. It was foreseeable from the previous incidents of violence that a large, rowdy crowd might accumulate in Iguana Cantina; that a physical altercation might occur on the dance floor; that it might be difficult to detect a physical altercation without certain security measures in place; and that a person like Troxel might suffer a physical injury as a result of violence inflicted by third persons at the nightclub.

Troxel's negligence claim should have survived a motion for summary judgment.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated September 19, 2011, the following attorney has been indefinitely suspended by consent, effective October 1, 2011, from the further practice of law in this State:

VALERIA N. TOMPLIN
*

By an Order of the Court of Appeals dated October 3, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

TIMOTHY SHAWN GORDON
*

By an Order of the Court of Appeals dated October 6, 2011, the following attorney has been indefinitely suspended from the further practice of law in this State:

ROBBYN RENEE McINTOSH
*

By an Order of the Court of Appeals dated October 6, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

HILARY MARLENE NEIMAN
*

By a Per Curiam Order of Appeals dated October 7, 2011, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

AARON GREGORY SELTZER
*

By an Order of the Court of Appeals of Maryland dated October 18, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

BARRY MAURICE JOHNSON
*

By an Opinion and Order of the Court of Appeals dated October 25, 2011, the following attorney has been disbarred from the further practice of law in this State:

ANDRE LEVELL BRADY
*

RULES ORDERS AND REPORTS

A new Rules Order pertaining to the One Hundred and Seventy-Second Report of the Standing Committee on Rules of Practice and Procedure was filed on October 12, 2011:

http://mdcourts.gov/rules/reports/172report.pdf