Amicus Curiarum

VOLUME 26
ISSUE 12 DECEMBER 2009
A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Joseph Cornelius Ruddy, Jr., Misc. Docket AG No. 7, September Term, 2008. Opinion filed on October 6, 2009 by Adkins, J.

http://mdcourts.gov/opinions/coa/2009/7a08ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – REPRIMAND

Facts: Respondent Joseph Ruddy violated the Maryland Rules of Professional Conduct ("MRPC") in his capacity as personal representative of the estate of his aunt, Mary Fitzsimmons. Before her death, Fitzsimmons loaned Ruddy $95,000, intending that he repay that principal to her estate upon her death. After allegations that Ruddy misused his power of attorney to obtain the loan, Ruddy and his wife signed a promissory note whereby they agreed to repay the amount loaned, without interest, no later than 120 days after Fitzsimmons death. The note was silent as to interest after the 120-day period. Ruddy, however, did not repay the loan until approximately five years after it was due, and even then he did not make any arrangements for the payment of interest during the time he was in arrears.

Held: Reprimand. Ruddy's indebtedness to the estate did not preclude him from acting as its personal representative. Rather, Ruddy's ethical violation was his failure to make provisions for the collection of interest when doing so would have benefitted the estate. The Court of Appeals held that Ruddy violated MRPC Rule 1.7 (Conflict of Interest), although it agreed with the trial court's finding that Ruddy was not intentionally dishonest. The facts, however, did not support a finding of additional violations, namely MRPC Rule 1.3 (Diligence); (2) MRPC Rule 3.3 (Candor Toward the Tribunal); and (3) MRPC Rule 8.4 (Misconduct). In light of Ruddy's otherwise unblemished record and other mitigating factors, a simple reprimand was appropriate.

***

Nathan Shenker, et al. v. Laureate Education, Inc., et al., No. 8, September Term 2009, filed 12 November 2009, Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2009/8a09.pdf

CORPORATIONS - SHAREHOLDER DIRECT SUITS AGAINST CORPORATE DIRECTORS - STATUTORY AND COMMON LAW DUTIES OF CORPORATE DIRECTORS - WHERE CORPORATE DIRECTORS EXERCISE NON-MANAGERIAL DUTIES OUTSIDE THE SCOPE OF MD. CODE, CORPORATIONS AND ASSOCIATIONS ARTICLE § 2-405.1(a), SUCH AS NEGOTIATING THE PRICE THAT SHAREHOLDERS WILL RECEIVE FOR THEIR SHARES IN A CASH-OUT MERGER TRANSACTION, AFTER THE DECISION TO SELL THE CORPORATION ALREADY HAS BEEN MADE, THE DIRECTORS MAY BE LIABLE DIRECTLY TO THE SHAREHOLDERS IN A DIRECT ACTION FOR ANY BREACH OF THEIR COMMON LAW FIDUCIARY DUTIES OF CANDOR AND MAXIMIZATION OF SHAREHOLDER VALUE.

Facts: Laureate Education, Inc. is a successful publicly-held Maryland corporation. In June 2006, at a meeting of Laureate's Board of Directors, Douglas Becker, Laureate's Chairman and CEO, spoke to the Board about the possibility of exploring a transaction between Laureate and a group of private equity investors that would cause Laureate to "go private." The Board authorized Becker to investigate the potential valuation of Laureate's stock in such a transaction. In August 2006, Becker contacted members of the Board's conflicts committee and requested permission to approach Sterling Capital Partners II, LP, a private equity firm in which Becker held an interest, regarding the proposed transaction. The committee granted permission.

On 8 September 2006, Becker informed the Board that he intended to make an offer to purchase Laureate, at which time the Board created a Special Committee composed of three of its existing independent directors to assess any proposed offers. Three days later, Becker submitted a letter to the Board stating that he and Sterling Capital proposed to acquire Laureate for $55 per share. The Special Committee requested that Becker withdraw his proposal so that an appropriate process could be put in place regarding the Committee's evaluation of proposals. Becker complied with this request and withdrew his offer. The Special Committee adopted thereafter a set of procedures intended to govern the due diligence process.

Becker submitted a second offer to the Special Committee, on behalf of a group of investment firms (which included Sterling Capital), to purchase Laureate for $60.50 per share, which constituted an 11.1% premium over Laureate's then most recently

traded stock price. The proposal included a 45-day "go shop" provision which allowed Laureate to solicit other offers, but required that Laureate pay the investor group a significant financial penalty if it reached an agreement with another acquirer. Several of Laureate's largest institutional shareholders contended at the time that this offer was unfair financially. Nevertheless, the Special Committee unanimously recommended that the Board approve the proposed transaction, and the Board unanimously agreed. Neither Becker nor another director who held an interest in Sterling Capital participated in the Board's meeting concerning approval of the offer.

In January 2007, shareholders of Laureate filed a shareholder direct complaint in the Circuit Court for Baltimore City relating to the proposed merger at the $60.50 per share price. The complaint alleged that, during the course of the acquisition, (1) the Board members breached their fiduciary duties that they owed to the shareholders, (2) the Board members and the investor group conspired to breach those duties, and (3) the Board members and the investor group aided and abetted that breach. The Board members and the investor group filed motions to dismiss, and the Circuit Court granted the motion of the investor group (excluding Sterling Capital), on the ground that the shareholders failed to allege a cognizable duty owed them by the investor group. The court deferred ruling on the remaining motions.

On 3 June 2007, Laureate announced that it accepted an increased offer from the investor group to acquire Laureate at a price of $62 per share by way of a tender offer and second-step (or short-form) merger, a process whereby the investor group would purchase, at a share price equal to the offer price, a number of newly issued shares of Laureate common stock sufficient to provide them with 90% ownership of the total number of outstanding shares, and then, by virtue of their 90% ownership, convert all remaining shares into the right to receive the same price paid per share in the tender offer. Despite opposition from Laureate's institutional shareholders, the Special Committee unanimously recommended that the Board approve the transaction, and the Board, excluding the interested directors, approved unanimously the transaction.

Following approval of the tender offer, the shareholders filed a second complaint against the Board members alleging one count, that the Board members breached their fiduciary duties owed to the shareholders. The Circuit Court granted the Board members' motion to dismiss the second complaint, with prejudice, based on its conclusion that § 2-405.1(g) of the Corporations and Associations Article barred all direct shareholder actions

against corporate directors. The court also held that the Board members' statutory fiduciary duties ran only to Laureate itself, and not directly to the shareholders.

On appeal, the Court of Special Appeals affirmed the Circuit Court's dismissal of the shareholders' action, holding that, based on § 2-405.1(a) and (g), directors of Maryland corporations owe no common law fiduciary duties directly to their shareholders and that, in a cash-out merger transaction, any claims shareholders may have against directors for breach of fiduciary duties must be brought derivatively on behalf of the corporation. The Court of Special Appeals also affirmed the Circuit Court's dismissals of the conspiracy claim against the investor group, concluding that the investor group did not owe a fiduciary duty to the shareholders and thus were legally incapable of committing the underlying tort of breach of fiduciary duty, and the aiding and abetting claim against the investor group, finding that the actions of the investor group were merely those attendant to a private entity pursuing the private acquisition of a public corporation.

We granted the shareholders' petition for writ of certiorari to consider whether the Court of Special Appeals erred in upholding, based on the provisions of § 2-405.1, the Circuit Court's dismissal of the shareholders' direct action against the Board members for breach of fiduciary duty, as well as whether that Court erred in upholding the dismissals of the shareholders' claims against the investor group for civil conspiracy and aiding and abetting.

Held: Reversed in part and affirmed in part. Where corporate directors exercise non-managerial duties outside the scope of § 2-405.1(a), such as negotiating the price that shareholders will receive for their shares in a cash-out merger transaction, after the decision to sell the corporation already has been make, the directors may be liable directly to the shareholders for any breach of their common law fiduciary duties of candor and maximization of shareholder value.

The Court analyzed the sources of directorial duties in Maryland. The Court acknowledged the general duty of care contained in § 2-405.1(a) owed by directors when they undertake managerial decisions on behalf of the corporation. The duties of directors change, however, the Court noted, after any decision is made to sell the corporation. Beyond that point, in negotiating the price that shareholders will receive in a cash-out merger, directors assume long-standing common law fiduciary duties of candor and maximization of shareholder value that exist independently of § 2-405.1, based on the confidence reposed in

them by the shareholders, their ability to affect significantly the financial interests of the shareholders, and the inherent conflict of interest that arises between directors and shareholders in any change-of-control situation. Rather than superseding these pre-existing common law fiduciary duties, § 2-405.1(a) merely codifies the managerial duty of care owed by directors to the corporation and its shareholders. Thus, the Court held, § 2-405.1(a) does not provide the sole source of directorial duties.

Regarding the viability of direct shareholder actions against directors in Maryland, the Court noted that, where a shareholder's action is based on a breach of a duty owed directly to the shareholder, and where the only injury allegedly suffered as a result of the claimed breach is to the shareholders, rather than the corporation, a shareholder may bring a direct action against the directors. The Court found that the duties alleged to have been breached in the present case were owed directly to the shareholders, and that a higher or lower price received by shareholders for their shares in the cash-out merger implicated only interests of the shareholders, rather than Laureate itself. Thus, the Court concluded, the shareholders could proceed in a direct action against the Board members. In this regard, the Court held that § 2-405.1(g), which states that "[n]othing in this section creates a duty of any director of a corporation enforceable otherwise than by the corporation or in the right of the corporation," plainly means that, to the extent § 2-405.1 creates duties on directors such as the duty of care contained in § 2-405.1(a), those duties must be enforced through a derivative action. The language of § 2-405.1(g), however, has no bearing on shareholder direct actions where such actions are based on duties imposed otherwise than by § 2-405.1, such as the common law fiduciary duties of candor and maximization of shareholder value.

As to the shareholders claim of civil conspiracy against the investor group, the Court noted that a defendant may not be adjudged liable for civil conspiracy unless that defendant was legally capable of committing the underlying tort alleged, here, breach of fiduciary duty. Because the investor group owed no fiduciary duty to Laureate's shareholders, the Court upheld the dismissal of the shareholders' action for civil conspiracy, based on breach of fiduciary duty, against the investor group.

The Court also affirmed the dismissal of the shareholders' claim against the investor group for aiding and abetting the Board members' breach of fiduciary duty. The crux of the shareholders' allegations concerned the restrictive nature of the merger agreement presented by the investor group to the Board. Agreeing with the Court of Special Appeals, the Court found that

merely offering an agreement containing penalties if the Board members solicited or accepted competing bids for Laureate did not rise to the level of inciting the Board members' alleged breach of fiduciary duties; rather, the actions of the investor group were nothing more than those normally attendant to a private entity pursuing the private acquisition of a public corporation.

***

State of Maryland v. John Wesley Huntley, Jr., No. 157, September Term 2008, filed 12 November 2009. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2009/157a08.pdf

A CRIMINAL PROCEDURE - NOLLE PROSEQUI - *HICKS* RULE - WHERE THE STATE ENTERS A NOLLE PROSEQUI IN RESPONSE TO THE TRIAL COURT'S DENIAL OF ITS MOTION TO AMEND A FLAWED INDICTMENT, THE 180-DAY LIMITATION PERIOD FOR BRINGING DEFENDANT TO TRIAL BEGINS ANEW UPON A SUBSEQUENT RE-INDICTMENT OF THE DEFENDANT, ABSENT A SHOWING BY THE DEFENDANT OF BAD FAITH ON THE PART OF THE STATE TO DELAY TRIAL BEYOND THE 180-DAY PERIOD BY ENTERING THE NOLLE PROSEQUI.

Facts: On 27 August 2007, a Wicomico County grand jury indicted John Wesley Huntley, Jr., on charges of child sexual abuse. The original indictment alleged that the offenses took place between 1 September 2005 and 30 September 2006, based on statements from the child victim. Huntley first appeared in the Circuit Court for Wicomico County on 6 September 2007. Therefore, to comply with the requirements of Maryland Code, Criminal Procedure Article § 6-103(a) and Maryland Rule 4-271(a)(1), which state that a trial in a circuit court prosecution must begin no later than 180 days after the earlier of (1) the entry of the appearance of the defendant's counsel or (2) the first appearance of the defendant before the circuit court, Huntley's trial had to begin by 4 March 2008.

After several postponements of earlier trial dates, the Circuit Court set a trial date of 3 March 2008, the day before the expiration of the 180-day period. On that date, the State moved to amend the indictment to change the date of the offenses to the period of 1 April 2003 to 31 July 2005. The State claimed that it received, within the prior week, new information from the victim's family that, when cross-referenced with other information provided by the victim regarding where she lived at the time of the offense, suggested the dates alleged in the original indictment were incorrect. Huntley objected to the amendment. During the hearing on the State's motion, the State made the Circuit Court aware of its intention to enter a nol pros if its motion were to be denied. The court denied the State's motion. Rather than proceed to trial under the indictment containing the purported incorrect dates, the State dismissed the charges by entering a nol pros.

Three weeks later (and twenty days after the expiration of the original 180-day period), the State re-indicted Huntley on the same charges as the original indictment, but provided as the date of the offenses the period from 1 April 2003 to 31 July

2005. In response, Huntley filed a motion to dismiss the second indictment under *Hicks*. After a hearing, the motions judge granted Huntley's motion, finding that the purpose of the State's nol pros was to evade the effect of the trial judge's ruling denying the motion to amend.

The State appealed to the Court of Special Appeals. We granted certiorari, on our initiative and prior to the intermediate appellate court deciding the case, to determine whether the *Hicks* sanction of dismissal for failure to comply with § 6-103(a) and Rule 4-271(a)(1) is appropriate where, after the trial court's denial of the State's motion to amend the dates contained in the charging document, made on the 179th day of the 180-day period, the State files a nol pros of the original indictment, and subsequently re-indicts under a new charging document containing the "correct" dates.

Held: Reversed and remanded. Ordinarily, where criminal charges are nol prossed and identical charges are refiled, the 180-day time period for commencing trial begins to run anew after the refiling. There are, however, two exceptions to this general rule, identified in *Curley v. State*. Where (1) the purpose of the State's nol pros, or (2) the necessary effect of its entry, is to circumvent the statute and rule governing time limits for trial, the 180-day period for trial begins with the triggering event under the initial prosecution, rather than beginning anew with the second prosecution. If trial does not begin then within 180 days of the first appearance of the defendant or defense counsel in the initial prosecution, the subsequent indictment must be dismissed under *Hicks*.

The Court held, however, that, absent a showing by the defendant of bad faith or evidence of the State's motive to delay trial, an analysis under the *Curley* two-pronged exceptions framework (and any potential *Hicks* sanction) is inappropriate where the State nol prosses an indictment, legitimately flawed due to reasons beyond the control of the State, based on the trial court's denial of its motion to amend the indictment. The Court noted that the *Curley* prophylactic framework was designed to confront scenarios where the State's nol pros is used strategically as a clear stand-in for a failed continuance request in an effort to try a case beyond the 180-day deadline, often based on the need to gather additional evidence or complete laboratory testing. The present case, on the record presented to the Court, did not fit within this category, and thus, should not have been analyzed under *Curley* and *Hicks*.

Where the State is prepared to try the case on the trial date, pending approval of its motion to amend the flawed

indictment, that motion is denied, and the State nol prosses the indictment in order to re-indict later on corrected charges, the concerns of § 6-103(a), Rule 4-271(a)(1), *Curley*, and *Hicks* regarding the prompt disposition of charges and the elimination of excessive scheduling delays is absent. In such cases, the State has no obvious or secret motive to delay prosecution of the defendant beyond 180 days and there is no ruling by the trial court regarding its calendar that the State may be said to be circumventing. Because the record in the present case evinced some disagreement as to whether the State should have discovered the incorrect breadth of the dates in the initial indictment before in fact it did (an issue that goes to the question of whether the State entered its nol pros here in good faith), the Court remanded the case to the Circuit Court to determine whether the State in fact exercised good faith when it entered the nol pros of the initial indictment.

***

COURT OF SPECIAL APPEALS

Ford Motor Credit Co. v. Nicole Ferrell, et al., No. 1336, September Term, 2008, filed November 2, 2009. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2009/1336s08.pdf

CIVIL PROCEDURE - APPEALS - APPELLATE JURISDICTION - INTERLOCUTORY ORDERS
CIVIL PROCEDURE - APPEALS - APPELLATE JURISDICTION - COLLATERAL ORDER DOCTRINE
CIVIL PROCEDURE - CLASS ACTIONS - CERTIFICATION

Facts: John and Sarah Shumaker filed a class action complaint in the Circuit Court for Howard County against Ford Motor Credit Company ("FMC") for alleged violations of various commercial law statutes. The Shumakers allege that Koons Dealerships ("Koons") "concocted a scheme" to overcharge its customers for the costs of title, tags, and registration in connection with motor vehicle purchases. The Shumakers allege that Koons represented to its customers that they were charged the actual cost of government fees, and that Koons collected the money only to pass it along to the Motor Vehicle Administration ("MVA"). The Shumakers further allege that Koons intentionally inflated the government fees by $25.00 to $55.00 per transaction, submitted to the MVA only the government fees actually due, and retained the balance. The Shumakers argue that FMC is likewise responsible for this "scheme" because it financed numerous sales that included these overcharges. After filing a complaint and request for jury trial, the Shumakers filed a renewed motion for certification of the class. The court held a hearing on the motion and issued a memorandum opinion and order granting the Shumakers' motion for class certification under Maryland Rules 2-231(b)(2) and 2-231(b)(3). FMC appealed. The Shumakers argued that the appeal should be dismissed because class certification orders are non-final judgments, and as such, are not ripe for appellate review.

Held: The Court of Special Appeals dismissed the appeal. First, FMC argued that the collateral order doctrine vests the Court with jurisdiction to hear the appeal. Class certification orders are not final judgments, and ordinarily, a party cannot appeal from a non-final judgment. The collateral order doctrine is a limited exception to this rule, and is applied to a narrow class of non-final judgments in extraordinary circumstances. In order for the collateral order doctrine to apply, the non-final

order must: (1) conclusively determine a disputed question; (2) resolve an important issue that is completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. FMC argued that these requirements were met because: (1) the class action order conclusively determined the disputed question of whether the action should proceed as a class action; (2) it resolved the important issue, separate form the merits of the action, of whether a class action is the appropriate vehicle to resolve the claims asserted; and (3) litigating the case as a class action would impose an "extraordinary and irreparable burden," which would be unreviewable on appeal.

The Court concluded that the non-final order did not fall within the scope of the collateral order doctrine. With respect to the first and second requirements, the Court concluded that virtually all class action certification orders, at least initially, determine that the action will proceed as a class action, and that class action is the proper avenue to resolve the claims. The Court also noted, in addressing the third requirement, that the defendant in a class action suit will always incur additional time and expenses that are unreviewable on appeal. The Court concluded that there is no magic number of potential class members, claims, time, or dollars spent, that will render a class action certification immediately appealable.

Second, FMC argued that, because appellate courts entertain interlocutory appeals from class notice orders, class certification orders should also be reviewable. The Court rejected that argument because the class certification order at issue did not impose any costs or burdens on FMC with regard to providing notice to the class.

Third, FMC argued that the Court should review the order because it would be appealable under federal jurisprudence, and Maryland state courts have historically looked to federal class action cases for guidance. The Court noted that the federal rule had been amended to expressly authorize federal courts of appeal to review class action certification orders. The Court of Appeals has shown no inclination to change the Maryland class action rule to permit discretionary review of class certification orders; therefore, federal jurisprudence is not relevant.

***

Gebhardt & Smith, LLP v. Maryland Port Administration, No. 1326, September Term, 2008, filed October 29, 2009, Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2009/1326s08.pdf

CONTRACTS - CONDITION PRECEDENT - IMPLIED TERMS - WAIVER OF RIGHT TO JUDICIAL REVIEW OF THIRD PARTY DETERMINATION.

Facts: Gebhardt & Smith, a law firm, leased office space from 1977 until 2006 in the World Trade Center ("WTC"), an office building operated by the Maryland Port Authority ("MPA") and located in Baltimore, Maryland. In 1992, the parties executed the Lease at issue, with Gebhardt & Smith renting office space on three floors of the WTC. Gebhardt & Smith agreed to pay base rent, plus its proportional share of "additional rent," which was comprised of "real estate taxes" and "operating expenses." Article 4(d) of the Lease provided that the statements of operating expenses to be furnished by Lessor "shall be as determined by Lessor's certified public accountant" and that the statements furnished "shall constitute a final determination" of the amount of operating expenses owed by Gebhardt & Smith to the MPA.

In 2003, a dispute arose regarding the charges for operating expenses. Gebhardt & Smith continued to pay its base rent, but it did not pay the invoices for operating expenses.

Suit was instituted in the Circuit Court for Baltimore City. Following a bench trial, the circuit court found that Gebhardt & Smith breached the Lease, and it entered a judgment in favor of the MPA for $328,186.88, plus interest.

Held: Judgment affirmed. The parties entered into a Lease providing that the tenants would pay operating expenses "as determined by Lessor's certified public accountant," and that the statement of operating expenses "shall constitute a final determination" between the parties. Gebhardt & Smith's contention that it was not obligated to pay operating expenses because there was a condition precedent to pay, which was not satisfied, is without merit.

The Lease did not contain clear language providing that the determination of the operating expenses by "Lessor's certified public accountant" was a condition precedent to Gebhardt & Smith's obligation to pay these expenses. Nor does the contract include language typically used to create a condition precedent. It does not state that Gebhardt & Smith is obligated to pay operating expenses "if," "when," "after," or "provided that" "Lessor's certified public accountant" determines the operating

expenses. As such, it did not create a condition precedent to Gebhardt & Smith's obligation to pay such expenses.

When a contract provides that a determination rendered by a designated person is "final," that determination is binding on the parties and cannot be contested in court in the absence of fraud or bad faith.

***

Dickson v. State, No. 2521, September Term, 2007, filed October 28, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/2521s07.pdf

CRIMINAL LAW - INVOCATION OF FIFTH AMENDMENT PRIVILEGE BY STATE'S WITNESS - PROCEDURE FOR DETERMINING WHETHER INVOCATION OF PRIVILEGE IS PROPER - PREJUDICE TO DEFENDANT FROM TRIAL COURT'S FAILURE TO PROPERLY ASSESS INVOCATION OF PRIVILEGE.

Facts: In murder case against defendant, whose co-defendant already had been separately tried and convicted, the State sought to call as a witness a woman who had been the State's star witness in the co-defendant's trial. That witness had been threatened by the defendant's mother. Also, in the defendant's trial, he was accusing the witness herself OF having arranged the murder, as a "hit." The witness refused to be sworn and then invoked her Fifth Amendment privilege not to testify. Without holding a hearing or taking evidence, the trial judge ruled that the witness did not have any Fifth Amendment privilege and threatened to hold her in contempt for every question she refused to answer and sentence her to "decades" of prison time based upon a six-month sentence for every non-answer. Eventually, witness agreed to testify. In answers to all but the most innocuous questions, she recanted her testimony given at the co-defendant's trial and two statements she gave to the police soon after the murder.

Held: Reversed and remanded for further proceedings. Trial court erred by ruling that witness was compellable without conducting a hearing on whether there was reasonable cause for her to apprehend danger of self-incrimination from directly answering questions or from explaining her refusal to answer, and whether the witness was acting in good faith by invoking the privilege. As a consequence of the court's failure to follow the proper procedure and threatening the witness with decades of prison time for contempt, the witness testified but recanted, and her former testimony and prior statements to the police, all damaging to the defendant, were admitted as prior inconsistent statements. Although the rights that were violated were the witness's, the defendant likely suffered harm as a consequence, in that the witness's former testimony and written statements would not have been admissible had she not recanted on the witness stand.

***

Charles F. Williams Jr. v. State of Maryland, No. 199, September Term, 2008, filed October 30, 2009. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2009/1999s08.pdf

CRIMINAL LAW - SECOND AMENDMENT - INCORPORATION - DISTRICT OF COLUMBIA V. HELLER'S EFFECT ON MARYLAND'S HANDGUN REGULATIONS AND PERMIT SCHEME

Facts: Charles F. Williams Jr. ("Williams") purchased a handgun from a licensed dealer in Forestville, Maryland. Williams went to his girlfriend's house and picked up the gun. While Williams was en route to his home, an officer with the Prince George's County Police Department observed him rummaging through a backpack near a wooded area. The officer then turned his cruiser around and observed Williams turn and place something in the brush area "as if he was hiding something." The officer approached and asked Williams what he had hidden in the bushes, to which Williams replied, "my gun." The officer recovered a black handgun from the brush area and Williams gave a written statement in which he acknowledged possession of the gun. The Circuit Court for Prince George's County found that the exceptions to the ban on the wearing, carrying or transporting of a handgun as set forth by the Maryland legislature in Md. Code (2002), § 4-203 of the Criminal Law Article ("CL") complied with the holding of the United States Supreme Court in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The Court convicted Williams of unlawful possession of a handgun in violation of CL § 4-203 and sentenced him to three years of incarceration, with all but one year suspended. Williams filed a timely notice of appeal.

Held: The Court of Special Appeals affirmed the trial court's judgment. The Court held that *Heller* did not disturb established Supreme Court precedent regarding non-incorporation of the Second Amendment. Other state courts and federal circuit courts that have addressed the issue in the aftermath of *Heller* have regarded the right as unincorporated. Even if the *Heller* holding applied to the states, Maryland Criminal Law Article § 4-203 does not violate the right outlined, namely the right to right to keep and bear arms in the home for the purpose of immediate self-defense, because it contains an exception for possession of a gun on real estate that the person owns or leases or where he/she lives. The Court also held that Maryland was properly exercising its police power when it enacted the handgun permit scheme (Public Safety Article § 5-301- § 5-314) because the scheme reflects the legislature's purpose of ensuring public safety by discouraging and punishing the possession of handguns on the streets and public ways.

Olde Severna Park Improvement Association Inc. v. John Barry et ux., No. 1458, September Term, 2008, decided October 29, 2009. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2009/1458s08.pdf

REAL PROPERTY - EQUITABLE ESTOPPEL - *Markov v. Markov*, 360 Md. 296, 307 (2000) (holding that three essential and related elements are generally necessary to establish equitable estoppel: 1) voluntary conduct or representation; 2) reliance; and 3) detriment. *Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners*, 380 Md. 106, 126 (2004) (holding that a claim of equitable estoppel, with respect to the title of real property, can only succeed where: ". . . the party claiming to have been influenced by the conduct or declaration of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties or both have the same means of ascertaining the truth, there can be no estoppel." *White v. Pines Cmty. Improvement Ass'n*, 173 Md. App. 13 (2007), *affirmed in part and rev'd in part on other grounds*, 403 Md. 13 (2008); *Dahl v. Brunswick Corp.*, 277 Md. 471, 488 (1976) (holding that "[S]ilence will not raise an estoppel where there is no duty to speak or act.").

DEED CONSTRUCTION - *Gunby v. Olde Severna Park Improvement Ass'n*, 174 Md. App. 189, 242 (2007), quoting *Morrison v. Brashear*, 38 Md. App. 693, 698 (1978) (holding that ordinarily, "the court gives effect to the intention of the parties, gleaned from the text of the entire instrument" but "when the words in a deed 'are susceptible of more than one construction,' the deed is 'construed against the grantor and in favor of the grantee. . . .'").

Facts: Appellees/cross-appellants sought to construct a driveway to their .35 acre property over a swath of unimproved land that abutted the western boundary of their property in order to reach an improved roadway on Park Drive. Both the unimproved land and the improved roadway are owned by appellant. After a representative of appellant opposed appellees' application for a variance, appellant filed a complaint and, subsequently, an Amended Complaint for Declaratory Judgment and Injunctive Relief in the Circuit Court for Anne Arundel County to preclude appellees from constructing their proposed driveway, arguing that the unimproved land was not part of Park Drive and was actually an area of the "Park" that it owned and which appellees had no right to use for the installation of a driveway. Appellees responded that Park Drive was comprised of both undeveloped land

and the improved roadway and, thus, they had the right of use of the Undeveloped Land to install a driveway to link their property with the improved roadway.

Held: Equitable estoppel requires a showing of voluntary conduct or representation as the source of the estopping party's detriment. Appellees failed to produce evidence of conduct, declaration or other overt act of appellant upon which appellees relied; therefore, the circuit court erred in finding equitable estoppel.

In light of the ambiguities in the original Deed, a review of other deeds and extrinsic documents was appropriate. The circuit court erred in failing to construe the original Deed against the grantor. Construing the ambiguities in the deed against the grantor, Severn Realty Company, the 1910 deed to the Halls established that the western boundary of Lot J, now the western boundary of the Barry Parcel, abutted a right-of-way to Park Drive and not the Park. Accordingly, appellees prevailed.

***

Wincopia Farms, LP v. Goozman, No. 1297, September Term 2008, filed October 29, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/1297s08.pdf

REAL PROPERTY – FORECLOSURE SALE – MOTION TO STAY SALE UNDER RULE 14-209 – NECESSITY TO POST BOND OR PAY INTO COURT.

Facts: Wincopia Farms, LP ("WFLP") was the owner of a farm in Howard County ("the Property"). Beginning in 2002, Wincopia Farms, Inc. ("WFI"), a related corporate entity, borrowed 4.5 million dollars from G&G, LLC, a Virginia limited liability company. WFLP guaranteed the loans and granted an Indemnity Deed of Trust in the Property. The loan was structured to include a $360,000 "interest reserve account," which was a capital contribution in G&G. In 2006, after entering into four modifications and extensions of the loan, WFI was indebted to G&G in the amount of more than 9.8 million dollars. In December of 2006, WFI defaulted on the loan. Martin Goozman and Jeffrey W. Bernstein, the Substitute Trustees on the deed of trust, brought a foreclosure action in the Circuit Court for Howard County.

After the expiration of a bankruptcy stay, a foreclosure sale was scheduled. The day before the scheduled sale, WFLP moved to stay the foreclosure under Md. Rule 14-209(B)(1). WFLP contended that the portions of the underlying notes that set up "interest reserve accounts" constituted the unlawful sale of securities, in violation of federal and Maryland securities laws. The only evidence offered was that the State of Virginia was conducting an investigation into G&G's loans in that state. The circuit court heard argument and denied the motion and WFLP noted this appeal.

Held: The circuit court correctly determined that WFLP failed to comply with the requirements for a stay under Rule 14-209(b) that the debtor acknowledge the amount of the debt due and payable and, if an amount is admitted, include a statement that the moving party has paid that amount into court with the filing of the motion. The Rule also requires that, if fraud is alleged, that the moving party include a detailed statement that the fraud was caused by the lender in obtaining the lien. WFLP's failure to comply with these requirements justified denial of the motion for stay.

***

Elste v. ISG Sparrows Point, LLC, et al., No. 1625, September Term, 2008, filed October 29, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/1625s08.pdf

WORKERS' COMPENSATION ACT – NOTICE OF INJURY UNDER SECTIONS 9-704 AND 9-706 OF THE LABOR AND EMPLOYMENT ARTICLE – BURDEN OF EMPLOYER TO SHOW PREJUDICE FROM EMPLOYEE'S FAILURE TO COMPLY WITH NOTICE REQUIREMENT.

Facts: Melody Elste, the appellant, injured her knee while on the job. Elste did not immediately report the injury in accordance with the internal policies of her employer, ISG Sparrows Point LLC ("Sparrows Point"). Rather, Elste, believing her injury was not serious, continued to work for several days and then went on a week-long vacation. Upon returning from vacation, Elste immediately saw a doctor and learned she had suffered a significant injury. Elste gave formal notice of her injury to Sparrows Point that same day, which was nineteen days after she suffered the injury, and nine days after the ten-day notice period specified by Labor and Employment Article ("LE") section 9-704 had expired.

Elste filed claim with the Workers' Compensation Commission ("Commission"), which, pursuant to LE 9-706, was required to excuse her failure to give timely notice unless Sparrows Point proved it was prejudiced by the delay. The Commission ruled in favor of Elste and awarded her total temporary disability benefits. Sparrows Point and its insurer, the appellees, sought judicial review before a jury in the Circuit Court for Baltimore County. The issues before the court were whether Elste's injury arose out of and happened in the course of her employment and whether she gave timely notice. Elste moved for judgment at the close of the appellees' case and at the close of all evidence. The court denied both motions and submitted the case to the jury for decision. The jury returned a mixed verdict, finding that Elste's injury was caused by a workplace accident but that she did not give timely notice. Thus, Elste's claim was barred and judgment was entered for the appellees. Elste moved for judgment notwithstanding the verdict ("JNOV"). The court denied her motion.

On appeal, Elste contended that the court should have granted her motions for judgment and motion for JNOV because the appellees failed to produce legally sufficient evidence that they were prejudiced by her untimely notice. The appellees argued that Elste's failure to immediately report her injury, as Sparrows Point's internal policy required, caused them prejudice because they were unable to immediately investigate the accident

or compare the condition of Elste's knee before and after she went on vacation.

Held: Reversed. Prejudice under LE 9-706 means harm to the employer's legal interests, which in this context means its ability to defend itself against the compensation claim. Although the appellees focused on Elste's failure to immediately report the injury, the relevant inquiry is whether the delay in giving notice beyond the ten days allowed by the statute resulted in prejudice. In this case, the appellees produced no evidence that the additional nine days it took Elste to report the injury interfered with their investigation of the accident or their ability to evaluate her injury. In fact, the employer produced no evidence that it even attempted an investigation, and did not examine her injury until approximately one month after being notified of the accident. Thus, the employer's arguments that it suffered prejudice amounted to no more than conjecture and, consequently, the circuit court should not have submitted the issue of notice to the jury.

***

Return to TOC

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated November 6, 2009, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

DEAIRICH RAY HUNTER
*

By an Order of the Court of Appeals of Maryland dated November 6, 2009, the resignation of the following attorney from the further practice of law in this State has been accepted:

ALAN HANCE STOCKSDALE
*

By an Opinion and Order of the Court of Appeals of Maryland dated November 13, 2009, the following attorney has been disbarred from the further practice of law in this State:

RICHARD NELSON FOLTZ, III
*

By an Opinion and Order of the Court of Appeals of Maryland dated November 16, 2009, the following attorney has been indefinitely suspended from the further practice of law in this State:

DAVID MICHAEL ROBATON
*

By an Opinion and Order of the Court of Appeals of Maryland dated November 16, 2009, the following attorney has been disbarred from the further practice of law in this State:

GEORGE SIMON JAROSINSKI
*

By an Order of the Court of Appeals of Maryland dated November 17, 2009, the following attorney has been disbarred by consent from the further practice of law in this State:

DAVID MICHAEL ROBATON
*