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COURT OF APPEALS

CRIMINAL LAW - CAPITAL PUNISHMENT - SENTENCING – AGGRAVATING AND MITIGATING CIRCUMSTANCES - WEIGHING - PREPONDERANCE OF THE EVIDENCE

Facts: The present case is Oken's fourth appeal in this Court of his death sentence, *see Oken v. State*, 367 Md. 191, 786 A.2d 691 (2001), *cert. denied,* 535 U.S. 1074, 122 S. Ct. 1953, 152 L. Ed. 2d 855 (2002)(*Oken III*)(application for leave to appeal denials of motion to re-open post-conviction case and motion to correct illegal sentence, both based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)); *Oken v State,* 343 Md. 256, 681 A.2d 30 (1996), *cert. denied*, 519 U.S. 1079, 117 S. Ct. 742; 136 L. Ed. 2d 680 (1997)(*Oken II*)(post-conviction case); *Oken v. State*, 327 Md. 628, 612 A.2d 258 (1992), *cert. denied*, 507 U.S. 931, 113 S. Ct. 1312; 122 L. Ed. 2d 700 (1993)(*Oken I*)(direct appeal). *Oken III* was the result of Oken filing three pleadings in the Circuit Court for Baltimore County, all addressing the applicability of *Apprendi* to the Maryland death penalty statute: (1) a Motion to Correct Illegal Sentence and/or Motion for New Sentencing Based on Mistake or Irregularity; (2) a Motion for New Trial (filed by Oken, *pro se*); and (3) a Motion to Reopen Post-Conviction Proceeding. All were denied. The Court of Appeals granted Oken's Application for Leave to Appeal and, on 14 December 2001, denied relief on the *Apprendi* claim. A petition for *Writ of Certiorari* was denied by the U.S. Supreme Court on 13 May 2002.

On 27 January 2003, a Warrant of Execution issued from the Circuit Court for Baltimore County commanding that Oken be executed at some time during a five day period commencing 17 March 2003. Also on 17 March, Oken filed in the Circuit Court for Baltimore County a Motion to Correct Illegal Sentence and/or Motion for New Sentencing Based Upon Mistake or Irregularity. The motion argued that the U. S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) overruled, *sub silentio*, this Court's decisions in *Borchardt v State*, 367 Md. 91, 786 A.2d 631 (2001), *cert denied* 535 U.S. 1104, 122 S.Ct. 2309, 152 L.Ed.2d 1064 (2002) and *Oken*

III. On 29 January 2003, the Circuit Court denied the Motion to Correct Illegal/Irregular Sentence. Oken thereafter filed a Notice of Appeal. On 10 February 2003, Oken filed in this Court a Motion for Stay of Execution. On 11 February 2003, the Court of Appeals issued an Order granting the request for a stay of execution, pending resolution of the present case.

As he did in ***Oken III,*** Oken claimed that his death sentence for the murder of Dawn Garvin in November of 1987 was illegal and irregular, as those terms are used in Maryland Rule 4-345, because Maryland's death penalty statute unconstitutionally (under the Sixth and Eighth Amendments to the U.S. Constitution) provides for the imposition of the death sentence if the sentencing authority determines, by a preponderance of the evidence, that aggravating circumstances outweigh any mitigating circumstances. Throughout the years since Maryland's last major overhaul of its capital punishment statute in obedience to the holdings of the U.S. Supreme Court, and most recently in *Borchardt* and *Oken III* (adopting *Borchardt* as dispositive), the Court of Appeals has concluded otherwise. Oken argued that *Borchardt* had been overruled by *Ring* and, therefore, the Circuit Court judge erred when he declined to invalidate Oken's sentence of death.

Held: Affirmed. The Court of Appeals held that nothing in *Ring* overruled the pertinent holding in *Borchardt.* Prior Supreme Court jurisprudence in this area forced states to adopt systems of sentencing dividing the sentencing process into two distinct phases, each with separate and distinct constitutional requirements. The first line of cases, running directly from *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), addresses the first phase of the sentencing process, the determination of eligibility. With regards to the eligibility phase, the Supreme Court has made it clear that state statutes must function to limit the class of individuals who may be deemed death-eligible. This is usually accomplished by requiring the sentencing authority to find an aggravating factor. It is the finding of an aggravating factor which turns a convicted defendant into a death-eligible defendant.

The second line of cases addresses the second phase of the sentencing process, the selection phase. In this phase, the sentencing authority is allowed to identify and consider factors in mitigation and is allowed to elect to impose a sentence less than death if it views the circumstances as warranting a lesser

punishment. While the Supreme Court repeatedly has stated that there are no constitutional requirements as to how the states must design the selection phase, other than that they may not curtail the sentencing authority's ability to consider factors in mitigation, the states generally have adopted one of two methods. In some states the sentencing authority, after determining the existence of at least one aggravating factor making the defendant death-eligible, is instructed to determine if there are mitigating factors which justify not imposing the death penalty. In other "weighing" states, like Maryland, the sentencing authority is instructed, after determining the existence of at least one aggravating factor making the defendant death-eligible, to weigh the mitigators against the aggravators.

Ring only addresses the eligibility phase of the sentencing process. *Ring* only requires that those aggravating factors which narrow the class of death-eligible defendants for Eighth Amendment purposes be found by a proper sentencing authority beyond a reasonable doubt in order to comply with the requirements of the Sixth Amendment. Contrary to the assertions of Oken, because the Maryland statute already requires that the finding of the existence of an aggravating circumstance must be made by a sentencing authority beyond a reasonable doubt, the Maryland statute is unaffected by the *Ring* holding.

Oken v. State. No. 117, September Term, 2002, filed 17 November 2003. Opinion by Harrell, J.

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CRIMINAL LAW - DISCOVERY - PRE-TRIAL – STATE'S EXPERT WITNESSES – SCIENTIFIC TESTING OF ALLEGED CDS – CRIMINAL DEFENDANT WAS ENTITLED TO OBTAIN RELEVANT INFORMATION RELATING TO THE POLICE LAB'S TESTING OF SUSPECTED COCAINE.

Facts: Rico Cole was convicted in the Circuit Court for

Prince George's County of possession of cocaine and possession of cocaine with intent to distribute, based in part on the testimony of Milagros Mayo, a chemist at the Prince Georges Police Drug Analysis Laboratory ("the laboratory"). Mayo testified that seized samples of materials taken from an apartment where Cole was arrested were cocaine.

During pre-trial discovery, Cole filed a motion to compel discovery seeking twenty-six items of information from the State related to Mayo and the operation of the laboratory. The trial judge granted only two of his requests. Among the items that the trial judge did not require the State to produce were the calibration records for the equipment used to test the seized samples, the written standard operating procedures of the laboratory, and Mayo's proficiency testing record. As a result of the State's refusal to provide the information, Cole was not permitted to present the testimony of James Slunt, an expert witness who was prepared to testify that the quality control procedures at the laboratory might be inadequate and that the State had not proven, to a reasonable scientific certainty, that the tested substances were cocaine. Instead, the trial judge ruled that Slunt did not have a sufficient factual predicate on which to base his testimony. The Court of Special Appeals, by a divided panel and in an unreported opinion, affirmed.

Held: Reversed and remanded for a new trial. The State should have produced (and the trial judge should have granted Cole's motion to compel the State to produce) the calibration records for the equipment used to test the seized samples, the written standard operating procedures of the laboratory, and Mayo's proficiency testing record.

Maryland Rule 4-263(b)(4) requires the State, upon request, to provide a criminal defendant with the reports and statements of each expert it has consulted. The purpose of this Rule is to allow the defense to prepare for expert testimony. The Rule's scope extends to relevant written information necessary for the defense to understand the nature of the tests conducted or to ascribe proper weight to the expert's testimony. The calibration records for the equipment used to test the seized samples in this case and the written standard operating procedures employed by the laboratory in testing cocaine at the time the seized samples in this case were tested were relevant and necessary for the defense to understand the nature of the tests conducted. Mayo's proficiency testing records, if any existed, were also relevant and necessary to ascribe the proper

weight to her testimony.

This information could have given Cole's expert witness, Slunt, a sufficient factual predicate on which to base his proffered testimony. Had Slunt been allowed to testify, the jury might not have found, beyond a reasonable doubt, that the substance seized by the police was not cocaine.

Cole v. State, No. 5, September Term 2003, filed 12 November 2003. Opinion by Harrell, J.

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CRIMINAL LAW – DISORDERLY CONDUCT – SUFFICIENCY OF THE EVIDENCE – FIRST AMENDMENT – IN A HOSPITAL, A POLICE OFFICER'S ORDER TO A FORMER HOSPITAL EMPLOYEE TO KEEP QUIET DID NOT VIOLATE THE FIRST AMENDMENT TO THE U.S. CONSTITUTION BECAUSE IT WAS PRIMARILY DIRECTED TOWARD VOLUME RATHER THAN CONTENT

Facts: Rhonda Polk was arrested at Peninsula Regional Medical Center (the Hospital) on 8 June 2001. Polk, whose employment at the Hospital recently was terminated, returned to the Hospital to retrieve her final pay check. Corporal Raymond Sperl, a special police officer employed at the Hospital for security, was asked to bring the check to the Hospital's Human Resources Department. When he refused to give the check to Polk, telling her that he had to deliver it to a Human Resources employee first, Polk shouted obscenities at Corporal Sperl and began screaming in protest to the Human Resources employees. At the direction of a Human Resources employee, Sperl gave Polk the check, at which point she again shouted obscenities at him.

Corporal Sperl ordered Polk to "keep [her] mouth shut, stop [her] cursing, [and] just leave the property." Over the next several minutes, as Corporal Sperl escorted Polk out of the building to the Hospital parking garage, Polk continued her loud and obscene tirade directed at the officer. Once in the parking garage, Corporal Sperl told Polk she was under arrest and grabbed her shoulder. Polk pulled away and bit Corporal Sperl's wrist, breaking the skin. During the scuffle, other security officers arrived and eventually subdued and arrested Polk. Polk

was charged with disorderly conduct, assault, and resisting arrest.

At trial, Polk filed a motion for judgment of acquittal on all counts, arguing that Corporal Sperl's command to "stop cursing" was an unlawful, content-based order which made the subsequent arrest illegal via a "domino effect." The trial court denied the motion, finding that a rational trier of fact could find that Corporal Sperl's orders were, in the main, directed at Polk's volume. The jury convicted her of disorderly conduct (failure to obey the reasonable and lawful orders of a law enforcement officer) and resisting arrest, but acquitted Polk of assault. On appeal, the Court of Special Appeals, in an unreported opinion, affirmed both convictions for essentially the same reasons that the trial court relied on in denying the motion for judgment of acquittal.

Held: Affirmed. The Court of Appeals held that the trial court was correct in determining that, because Corporal Sperl's orders, in the main, were directed at the volume the Polk's voice, his orders were lawful and reasonable. The trial court was not clearly erroneous in finding that Corporal Sperl's orders, in the main, were directed at the volume of Polk's voice rather than the content of her speech. There was ample evidence in the record before the trial court to support such a finding. Furthermore, the Court found that the State has a compelling interest in maintaining peace and quiet in the environs of hospitals. Because Polk's arrest for failure to obey a lawful and reasonable order was not illegal, she had no right to resist arrest. Therefore, the trial court properly denied the motion for judgment of acquittal.

Rhonda Michelle Polk v. State of Maryland, No. 101, September Term, 2002, filed 12 November 2003. Opinion by Harrell, J.

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CRIMINAL LAW - SEARCH AND SEIZURE - POLICE DECEPTION IN HAVING SUSPECT OPEN DOOR TO RESIDENCE DOES NOT NECESSARILY VITIATE VOLUNTARINESS OF CONSENT TO SUBSEQUENT ENTRY AND SEARCH.

Facts: Police received anonymous information about criminal drug activity at Room 109 of the Super Eight Motel in Aberdeen, Maryland - the room where appellant, Roger Brown, was staying. Upon arriving at the motel, Trooper George Wooden knocked on Brown's door. When Brown asked who was knocking, Wooden replied, "maintenance." He also told Brown that he wanted to check the thermostat. When Brown opened the door, Wooden displayed his law enforcement credentials, and identified himself as a police officer. After Brown learned of Wooden's real identity, Wooden asked him if he could enter the room to speak with him. Brown said "yes" and then held the door open while backing away so as to allow Wooden and other officers to enter the motel room. Upon entering the room, Wooden noticed evidence of marijuana use. Wooden then asked Brown for permission to search the room. Brown consented to this search. The police subsequently found a digital scale and cocaine. At a suppression hearing, the trial court concluded the police deception used to get Brown to open the door did not vitiate his express consent to the police entry and search of his room. The Court of Appeals granted *certiorari* prior to proceedings in the Court of Special Appeals.

Held: Affirmed. A review of the "totality of the circumstances" indicates that the police did not need a search warrant prior to their entry and search of the motel room because Brown voluntarily consented to both. Deception can be a legitimate and permissible means of obtaining police entry into private residences because of the need to discover and disclose criminal activity which might not lend itself to traditional police investigatory tactics. Here, the deception did not vitiate Brown's consent because the ruse ended when he opened the door. Brown knew he was letting police enter and search his room, and permitted this without any coercion. Consequently, the facts establish that Brown voluntarily consented to the police entry and subsequent search of his motel room.

Roger Brown v. State of Maryland, No. 140, September Term, 2002, filed November 19, 2003. Opinion by Wilner, J.

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REAL PROPERTY - TENANT HOLDING OVER - EFFECT OF LANDLORD PARTICIPATION IN THE FEDERAL LOW INCOME HOUSING TAX CREDIT PROGRAM ON LANDLORD REMEDIES UNDER MARYLAND TENANT HOLDING OVER STATUTE.

Facts: Rhonda Carter leased a townhouse from Maryland Management Company with the help of rent subsidies from the Section 8 Voucher Program, a federal low-income housing program. Maryland Management received a tax credit from the Federal Low Income Housing Tax Credit (LIHTC) Program for renting a certain percentage of its rental units to low-income persons like Carter. Subsequent housing inspections, required by the Section 8 program, noted various problems and damage to the residence including holes in the living room and bedroom walls, a dirty kitchen floor and stove, stains in the bathtub, dirty bedroom floors and walls, and dirty carpeting and floors throughout the townhouse.

In December, 2001, Maryland Management sent a lease termination notice to Carter, insisting she vacate at the end of the lease term in February, 2002 due to her failure to keep the townhouse in a neat, clean, sanitary and safe condition. When she failed to vacate in February, Maryland Management subsequently filed both a tenant holding over action and a breach of lease action. The District Court found good cause existed to evict Carter, and that the tenant holding over statute applied. Because the lease had been validly terminated under federal and state law, Carter was a tenant unlawfully holding over. The Circuit Court, on appeal, affirmed the decision of the District Court. This Court subsequently granted *certiorari*.

Held: Affirmed. Federal law dictates that a landlord participating in the LIHTC program may not terminate the lease of a low-income tenant except for good cause. Consequently, landlords pursuing a tenant holding over claim against a

Section 8 tenant in a LIHTC property must also show good cause in addition to the other elements required by that state law. However, this good cause requirement does not convert an otherwise periodic tenancy into a never-ending lease. Even a LIHTC tenant is holding over when the term of his lease has expired. Consequently, Maryland's tenant holding over statute remains a procedural remedy for landlords. Furthermore, the trial court was correct in concluding that good cause existed because a history of poor housekeeping habits and property destruction are among the enumerated examples of "good cause" contained within the definition of that term in federal law.

Rhonda Carter v. Maryland Management Company, No. 7 September Term, 2003, filed November 10, 2003. Opinion by Wilner, J.

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SECURED TRANSACTIONS – MOTOR VEHICLES – PERFECTED PURCHASE MONEY SECURITY INTEREST – GARAGEMAN'S LIEN – A GARAGEMAN'S LIEN TAKES PRIORITY OVER A PERFECTED PURCHASE MONEY SECURITY INTEREST WHEN THE VEHICLE IS TO BE SOLD TO EFFECTUATE THE LIEN.

Facts: Friendly Finance Corporation (Friendly) sought to replevy a vehicle possessed by Orbit Chrysler Plymouth Dodge Truck, Inc. (Orbit). Orbit held a garageman's lien on the vehicle. The vehicle's owner, Israel Atkins, failed to pay Orbit for repairs and maintenance. Orbit intended to conduct a statutory sale of the vehicle pursuant to Md. Code (1975, 2000 Repl. Vol.), § 16-207 of the Commercial Law Article.

Friendly held a purchase money security interest that was perfected before Orbit came into possession of the vehicle. Atkins defaulted on the purchase loan. Friendly sought, by replevin, to forestall Orbit's sale of the vehicle and to take possession of the vehicle without having to pay Orbit for its

repair services. The District Court of Maryland, sitting in Prince George's County, granted Orbit's motion to dismiss. The Circuit Court for Prince George's County affirmed.

Held: Affirmed. The General Assembly intended the holders of garageman's liens to retain priority of possession over the holders of perfected secured interests throughout the process of conducting a § 16-207 statutory sale. The Court of Appeals also held that Friendly was not entitled to replevy the vehicle under § 16-208 of the Commercial Law Article (Replevy by owner) because Friendly is not an "owner" of the vehicle within the meaning of the statute.

Friendly v. Orbit, No. 18, September Term 2003, filed 18 November 2003. Opinion by Harrell, J.

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STATE EMPLOYEES - MARYLAND WHISTLEBLOWER STATUTE - GRIEVANCE PROCEDURE - THE MARYLAND WHISTLEBLOWER STATUTE, LIKE ITS FEDERAL COUNTERPART AFTER WHICH IT WAS PATTERNED, DOES NOT EMBRACE A STATE EMPLOYEES'S COMPLAINT AGAINST HER EMPLOYER THAT HER SUPERVISOR, AGAINST WHOM SHE HAD FILED PREVIOUSLY A GRIEVANCE CONTAINING PERSONAL ALLEGATIONS OF HOSTILE WORKPLACE CONDITIONS, RETALIATED BY TRANSFERRING HER TO ANOTHER POSITION. HER SUBSEQUENT COMPLAINT REGARDING THE RETALIATORY ACTION, BECAUSE IT LACKED A "PUBLIC INTEREST" COMPONENT REQUIRED UNDER MARYLAND'S WHISTLEBLOWER STATUTE, SHOULD HAVE BEEN FILED AS A GRIEVANCE.

Facts: On 9 September 1999, Petitioner, Sheila Montgomery, an administrative assistant in the Warden's Office at the Eastern Correctional Institution ("the ECI"), filed a personnel grievance against her supervisor, the then Acting Warden. Approximately two months later, Montgomery was reassigned by the newly appointed Warden (not the same person as the Acting Warden) to an administrative assistant position in the ECI's Maintenance Department. Montgomery, a few months

after that event, filed a "Whistleblower" complaint with the Secretary of the Maryland Department of Budget and Management ("the Department") that Montgomery contended came within the ambit of subtitle 3 of section 5 of the State Personnel and Pensions Article of the Maryland Code (1993, 1997 Repl. Vol.), entitled "Maryland Whistleblower Law in the Executive Branch of State Government" ("Whistleblower Law"). In the "Whistleblower" complaint, Montgomery complained that her reassignment was in retaliation for having filed the initial personnel grievance against the Acting Warden. The Department found no merit in Montgomery's "Whistleblower" complaint. Montgomery then appealed that action to the Maryland Office of Administrative Hearings ("OAH").

An administrative law judge ("ALJ") of the OAH, relying on federal precedent interpreting the federal Whistleblower Protection Act upon which the Maryland statute was based, ruled that the information contained in Montgomery's "Whistleblower" complaint regarding the actions of the Acting Warden towards her was not a protected disclosure within the meaning of the Maryland Whistleblower Law. The ALJ ruled further that Montgomery's complaint did not allege facts sufficient to show that she had made disclosures that were protected by Maryland's Whistleblower Law.

Montgomery filed a petition for judicial review of the ALJ's decision in the Circuit Court for Somerset County. After a hearing, the judge concluded that Montgomery's complaint about the behavior of her supervisor was not a protected disclosure under Maryland's Whistleblower Law and affirmed the ALJ. The Court of Special Appeals, in an unreported opinion, affirmed.

Held: Affirmed. Maryland's Whistleblower Law, Maryland Code §§ 5-301 thru 5-313 of the State Personnel and Pensions Article, prohibits a reprisal against a State employee who makes a protected disclosure of "information that the employee reasonably believes evidences: (i) an abuse of authority, gross mismanagement, or gross waste of money; (ii) a substantial and specific danger to public health or safety; or (iii) a violation of law . . . ." Md. Code (1993, 1997 Repl. Vol.), § 5-305(1) of the State Pers. & Pens. Article.

The Department, the OAH, the Circuit Court, and the Court of Special Appeals applied the same legal principles in the present case to conclude that Montgomery's grievance

complaining of her supervisor's "derogatory" and "belittling" behavior did not amount to a "protected disclosure" under Maryland's Whistleblower Law. As this conclusion is supported by the language of the relevant Maryland statutes and regulations, persuasive federal precedents, and the assertions of Montgomery's grievance itself, the Court of Appeals affirmed.

Montgomery claimed that the Acting Warden was guilty of "gross mismanagement," "an abuse of authority," and a "violation of law." "Gross mismanagement" is a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. An "abuse of authority" is the arbitrary or capricious exercise of power by an employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. The Court of Appeals found that the allegations of wrongdoing set forth in Montgomery's grievance were fundamentally a government employee complaining about, or grieving, how she was treated by her supervisor, and she was not moved by a concern for the public well being. The Court of Appeals concluded that the types of illegality and impropriety that the Maryland Whistleblower Law was designed to protect against were of the public sort, such as fraud, waste, and corruption, not the type of individual or idiosyncratic harassment disclosed in Montgomery's grievance.

The Court of Appeals held that a state employee has no election of remedies to chose between the Whistleblower Law and the State Personnel Grievance Procedures when, as here, the employee failed to allege facts showing that he or she made a disclosure that was protected under the Whistleblower Law.

Sheila Montgomery v. Eastern Correctional Institution, No. 13, Sept. Term, 2003, filed November 10, 2003. Opinion by Harrell, J.

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COURT OF SPECIAL APPEALS

ARBITRATION - WAIVER OF ARBITRATION

Facts: Augustus C. Harris filed a complaint with the Maryland State Bar Association Committee ("Committee") on the Resolution of Fee Disputes to resolve a fee dispute with his former counsel, Clifford R. Bridgford, Esquire, through binding arbitration. Both parties signed and executed an Attorney's Consent to Arbitration form with the Committee. The form provided that the arbitration would be conducted in accordance with the Maryland Uniform Arbitration Act and that any right to further court proceedings would be waived. Thereafter, Harris withdrew from the arbitration process, and the Committee dismissed his complaint.

Nearly eighteen months later, Bridgford filed a complaint in the District Court of Maryland for Frederick County alleging breach of contract. The case was removed to the Circuit Court for Frederick County, and Harris answered the complaint and filed a counterclaim for breach of contract and fraud. Soon thereafter, Bridgford filed a motion to arbitrate, asking the court to stay its proceedings pursuant to Md. Code (1974, 2002 Repl.) § 3-209(a) of the Courts and Judicial Proceedings Article ("CJ"). The circuit court granted Bridgford's motion, finding that the consent to arbitrate is "irrevocable unless of course there's some grounds for revocation." Furthermore, the court found that Bridgford did not waive his right to arbitration by filing suit in District Court.

Held: Affirmed. The right to arbitrate is a contractual right that can be waived. Waiver of that right, however, must be knowing and intentional. Furthermore, whether there has been a waiver involves a matter of intent that turns on the factual circumstances of each case.

Harris instituted the arbitration process, but then abandoned it when he unilaterally withdrew from arbitration. Bridgford's resort to litigation did not constitute, as a matter of law, a knowing and intentional waiver of his right to arbitrate.

Furthermore, Harris's counterclaims asserting fraud and breach of contract are within the scope of the arbitration agreement. Harris raised those issues in his complaint to the Committee, therefore, he clearly intended to have all elements of the fee dispute between the parties included as part of the arbitration.

Harris v. Bridgford, No. 1391, September Term, 2002, filed November 5, 2003. Opinion by Kenney, J.

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CONSUMER PROTECTION ACT - SALE - LEASEBACK AGREEMENTS - - CONSUMER PROTECTION DIVISION - CONSUMER LOAN LAW - USURIOUS LOAN

Facts: B&S Marketing Enterprises advertised that it would, through its sale-leaseback program, provide $200 cash to any consumer who gave B&S the serial numbers for two household items. The consumer would "sell" each item to B&S for $100. B&S would then lease the items back to the consumer for fifteen day terms at $30 per item. Once the consumer had paid back the initial $200 and was up-to-date on all rent, the lease would end. Consumers signed a lease agreement, which gave customers the right to terminate the lease agreement by returning the item to B&S and paying all accrued charges. Consumers were also given a customer option sheet explaining the termination options; but, this option sheet did not include the provision about returning the item. B&S later revised the option sheet to include that provision, but repeat customers, were not told of this revision. Of 56,208 sale-leaseback transactions, the "leased" property was surrendered in only eight-four instances.

The Consumer Protection Division filed a statement of charges and petition for hearing and the matter was referred to the Office of Administrative Hearings for a public hearing before an administrative law judge (ALJ). The ALJ recommended that the Division issue an order requiring B&S to cease and desist its practice in violation of the Consumer Protection Act and pay restitution to consumers.

After hearing the parties exceptions to the ALJ's recommendation, the Division found that B&S violated the Consumer Loan Law by engaging in small loan transactions disguised as sale-leaseback transactions without being licensed under the law, by charging a 730% annual interest rate, and by failing to provide the required disclosures. The Division also found that B&S had engaged in unfair or deceptive trade practices by failing to reveal that the transactions were actually loans and by omitting the option to terminate the lease agreement by returning the property, and held B&S officers personally liable for those violations. The circuit court affirmed the Division's decision, remanding the case for clarification that any change to the lease agreement forms would not make the sale-leaseback valid. From that order, B&S appealed.

Held: Affirmed. The Consumer Protection Division did not err in looking into the substance of B&S's "sale-leaseback transaction" to find that it was really a usurious loan, violating Maryland's Consumer Loan Law. Substantial evidence existed in the record to support the Division's findings that B&S, in presenting its sale-leaseback program, misrepresented the terms of the transaction. The Division did not err in ordering B&S to pay customers as restitution the "rent payments" received, without a showing of customer reliance because B&S had made unlicensed usurious loans. Substantial evidence also existed to support the Division's finding that B&S's officers were subject to civil penalties because they did not act in good faith in committing "unfair or deceptive trade practices" in violation of Maryland's Consumer Protection Act.

B&S Marketing Enterprises, LLC v. Consumer Protection Division, No. 1672, September Term, 2002, filed November 4, 2003. Opinion by Krauser, J.

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CORPORATIONS – PARTNERSHIPS – DISSOLUTION – TRANSFER OF ASSETS.

Facts: This litigation arose as a consequence of the dissolution of the 91st Street Joint Venture, the general partnership that controls the Princess Royale Hotel and Convention Center in Ocean City. The partners in the 91st Street Joint Venture are Joint Venture Holding, Inc., Princess Hotel Limited Partnership (collectively "the Berman Partners"), and Edward Goldstein. Malcolm Berman controls the Berman Partners who own 99.9671 percent of 91st Street Joint Venture. Goldstein owns the remaining .0329 percent.

Disputes arose between the parties in the 1990's and were submitted to arbitration. The arbitrator entered an award that provided, in part, that the partnership be dissolved in accordance with the Maryland Uniform Partnership Act. A dispute arose as to whether the partnership should be dissolved pursuant to section 9-609(a) or 9-609(b) of the Corporations and Associations Article of the Maryland Code. That dispute formed the basis for a lawsuit brought in the Circuit Court for Baltimore County in which the trial court ruled that the partnership should be dissolved in accordance with section 9-609(b). That decision was appealed to the Court of Special Appeals, which reversed and held that dissolution should occur pursuant to section 9-609(a).

In April 1998, while the parties were awaiting a decision by the arbitrator, all of the partnership's assets were transferred to an entity known as 91st Street Joint Venture, LLC ("the LLC"). The transfer was made over Goldstein's objection. Goldstein contended that Berman lacked the authority to transfer the assets to the LLC.

After remand of the case from the Court of Special Appeals, the circuit court appointed a trustee to sell the assets of the 91st Street Joint Venture. The trustee rejected the first two proposed contracts for the purchase of the assets. The third proposal, submitted by the Berman Partners on January 14, 2002, offered $97,000,000 subject to a 99 percent purchase-price credit. The proposed contract

provided, in part, that the buyer shall receive all of the partnership's assets subject to all of the partnership's liabilities. The agreement was accepted by the trustee. An addendum dated February 6, 2002, increased the sale price to $98,819,808.

The trustee received no other bids and, on March 25, 2002, filed a notice of sale and a report of sale in the circuit court. Goldstein filed timely exceptions to the sale. On July 12, 2002, the circuit court denied the exceptions and approved the sale.

On appeal, Goldstein contended that the sale should be set aside for three reasons: (1) the Berman Partners should not have been given a 99 percent credit toward the bid price; (2) the transfer to LLC of partnership assets, in 1998, to LLC was illegal because Goldstein, a general partner, objected; (3) therefore before any sale could be made, LLC should be required to transfer all assets back to the 91st Street Joint Venture; and (4) additionally, the sale should be set aside because, pursuant to section 9-609(a), all debts of the 91st Street Joint Venture were required to be paid out of the sale proceeds, which the trustee did not do.

Held: Under section 9-609(a) of the Maryland Partnership Act, upon dissolution of the partnership, all partnership assets must be sold and all indebtedness paid. The remainder must then be distributed in accordance with the partners' respective interests. Because this dissolution was not conducted in compliance with section 9-609(a), the exceptions should have been sustained and the sale vacated.

The Court, however, agreed with the Berman Partners that the trial court did not err in allowing a 99 percent credit toward the bid price. It said that requiring the Berman Partners to put up 100 percent of the bid price when they owned over 99.6 percent of the assets would cause them to go through an "idle ceremony," which would waste both time and money. The Court also ruled that it was unnecessary for the LLC to formally transfer its interest in the assets back to the original owner inasmuch as the LLC was willing to waive its interest in the assets.

Edward Goldstein v. 91st Street Joint Venture, et. al., No. 1356, September Term, 2002, filed November 5, 2003. Opinion By Salmon, J.

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FAMILY LAW - TERMINATION OF PARENTAL RIGHTS - NOTICE TO ATTORNEY WHO REPRESENTED NATURAL PARENT IN PRIOR CHILD IN NEED OF ASSISTANCE (CINA) PROCEEDING.

Facts: On August 19, 2002, Genara A. was adjudged a Child in Need of Assistance ("CINA") by the Circuit Court for Baltimore City. On October 31, 2002, the Baltimore City Department of Social Services ("the Department") filed a guardianship petition and show cause order seeking termination of the parental rights in Genara. Genara's lawyer in her CINA case was served with a copy of the petition and show cause order on November 18, 2002. Genara's mother, Gabriella A., was served with a copy of the petition on November 19, 2002. On November 22, 2002, the Department mailed a copy of the petition and show cause order to Nenutzka Villamar, a staff attorney at the district Office of the Public Defender. Genara's father, who was unknown, was served by publication on March 7, 2003. No objections to the petition were filed.

On April 17, 2003, the court held a hearing on the petition. The court concluded that, due to their failure to object, Gabriella and Genara's unknown father both were deemed to have consented to the termination of their parental rights in Genara by operation of law. The court issued a written order that same day terminating their parental rights in Genara. Gabriella, through counsel, William Fields, filed a notice of appeal.

On April 30, 2003, the Department filed a "Motion to Reconsider," citing Rule 2-535 and stating that there were additional facts requiring the court's further review. At a hearing on the motion, counsel for the Department explained that Mr. Fields had in fact represented Gabriella in Genara's CINA case, not Ms. Villamar. Counsel argued, however, that because both attorneys are staff attorneys with the district Office of the Public Defender, that the office had been served. Mr. Fields responded that because he was not personally notified the appellant was not notified about the

petition, and therefore one of the factual predicates for the termination of her parental rights was not shown. At the conclusion of the hearing, the court decided not to disturb its April 17, 2003 order.

Held: Reversed and remanded. Family Law Article section 5-322(a)(1)(ii)(2) and implementing Rule 9-105(f) require that the petitioner for adoption or guardianship give notice to the attorney who represented a natural parent in a prior juvenile proceeding in which the child was adjudicated a CINA, and that notice be effected by sending that attorney a copy of the petition and show cause order. The notice requirement is not satisfied when the petitioner sends those documents to another lawyer in the attorney's office. The documents must be sent to the particular lawyer who represented the natural parent in the CINA case.

The time period in which a natural parent may object to the termination of parental rights is tolled until all notice requirements of the governing statute and rule are satisfied. Accordingly, when notice is not given to the natural parent's attorney in the prior CINA proceeding for the child in question, the natural parent cannot be deemed to have consented for failure to file a timely objection, because the time period for filing such an objection is tolled.

In Re: Adoption/Guardianship of Genara A., No. 246, 2003 Term, filed October 29, 2003. Opinion by Eyler, Deborah S., J.

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FAMILY LAW - USE AND POSSESSION OF MARITAL HOME - TERMINATES WHEN YOUNGEST CHILD GRADUATES FROM HIGH SCHOOL, EVEN IF OVER 18.

FAMILY LAW - MONETARY AWARD - ALL STATUTORY FACTORS SHOULD BE EVALUATED WHEN DETERMINING WHETHER A BONUS EARNED AFTER THE PARTIES WERE LIVING SEPARATE AND APART SHOULD BE INCLUDED IN MONETARY AWARD.

FAMILY LAW - INDEFINITE ALIMONY - WHEN EVALUATING, SHOULD BE BASED ON PRESENT CONDITIONS, AND COURT MUST EXPLAIN DENIAL OF

INDEFINITE ALIMONY WHEN THERE EXISTS A GROSS DISPARITY OF INCOMES.

Facts: Beth and Robert Kelly were married in 1980 and had two sons, Matthew, born December 5, 1983, and David, born March 19, 1986.

Mr. Kelly has worked at Alex.Brown, Inc., in the technology division since 1985. At the time of the trial, he was an Alex.Brown director and the Chief Technology Officer for its Correspondence Services Business Units. Between 1997 and 2001, his average income was $250,831 per year. His income included a bonus in addition to a base salary. The bonus was based upon performance during the previous year. Because of the company's poor performance in 2001, Mr. Kelly did not anticipate a bonus in 2002.

Ms. Kelly is a landscaper and earned $37,601 in 2001, which was, by far, the highest amount she has earned in the last five years.

Matthew, the oldest child, attends community college, where his tuition, paid by Mr. Kelly, is $250 a month. David is a high school student. He intends to attend either a four-year college or a technical school.

During the marriage, two Uniform Gifts to Minors Act accounts were created for the children. Each account has a balance of approximately $30,000.

The Kellys built a four-bedroom home in Carroll County, Maryland, in 1986. Mr. Kelly now resides in the family home.

The Circuit Court for Baltimore County granted the Kellys a divorce in January 2002. In a March 25, 2002, memorandum opinion the court denied Ms. Kelly's request for indefinite alimony, denied her request for attorney's fees, granted Mr. Kelly's request for use and possession of the marital home for three years, and granted Ms. Kelly a monetary award. Upon Ms. Kelly's motion to alter or amend the judgment, two changes were made: (1) A monetary award of $66,472 was awarded to Ms. Kelly; and (2) Mr. Kelly was to transfer to Ms. Kelly one-half the value of his 401K plan valued at $141,378 on an "if, as, and when" basis. Ms. Kelly appealed.

Held: Reversed and remanded. The Legislature amended section 5-203 of the Family Law Article of the Annotated Code

of Maryland so that child support continues past the age of eighteen if the child is enrolled in high school. The Court held that this rule extends to the use and possession of the family home.

The Court also held that bonuses received prior to the divorce should be included when the court is computing a monetary award and that all factors of section 8-205(b) of the Family Law Article should be considered. Mr. Kelly argued that Ms. Kelly was not entitled to his $89,000 bonus under factor 8 of section 8-205(b) because she did not contribute to his receiving it. Upon remand, the circuit court is to consider ALL the factors of section 8-205(b), including factor 3, the non-economic contributions of Ms. Kelly.

The Court further held that, when deciding indefinite alimony, a court should include gross income including bonuses, not net income, as a party's income. In determining whether to award indefinite alimony, the trial judge improperly relied upon Mr. Kelly's promise to pay for college for the children and on the possibility of Mr. Kelly losing his job in the future. The judge should have based his decision on present conditions. When, as in the present case, there exists a gross disparity of incomes, the trial judge is not required to grant indefinite alimony, but if it is not granted, the judge must explain why it was not granted.

The Court chose not to rule on the issue of attorney's fees because the case was being remanded.

Beth Ann Ensor Kelly v. Robert W. Kelly, No. 658, September Term, 2002, filed November 3, 2003. Opinion by Salmon, J.

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GARNISHMENTS - DUTY OF GARNISHEE BANK - ENTRY OF JUDGMENTS; ENFORCEMENT & EXECUTION - WRIT OF GARNISHMENT

COMMERCIAL LAW - BANK DEPOSITS AND COLLECTIONS (ARTICLE 4) - PAYOR BANKS

Facts: The Hanlon Park Condominium Association ("Hanlon Park") obtained a default judgment against the Sickle Cell Association of Maryland ("Sickle Cell"). To collect that judgment, Hanlon Park served The Harbor Bank of Maryland ("Harbor Bank"), where Sickle Cell maintained two checking accounts, with a writ of garnishment at 11:41 am on June 25, 2001. But, at 2:14 pm that day, the Bank was presented with a Sickle Cell check in the amount of $15,000, made payable to "Petty Cash Cashier" and signed by an officer of Sickle Cell. In accordance with that check, Harbor Bank released $15,000 from Sickle Cell's account and those funds were then converted into a cashier's check made payable to "Torrie Johnson" and endorsed by her.

Sometime later, Harbor Bank answered the writ of garnishment, stating that it was "in possession of $5,600.58 in assets" of the judgment debtor, Sickle Cell. When Hanlon Park challenged Harbor Bank's confession of assets, it was disclosed that the Bank had released $15,000 from Sickle Cell's accounts approximately two and a half hours after it had been served with Hanlon Park's writ of garnishment. That caused Hanlon Park to move for judgment against Harbor Bank.

At the hearing on that motion, Harbor Bank argued that it was not liable to Hanlon Park for disbursing those funds because it was not given a reasonable amount of time to place a "hold" on Sickle Cell's accounts before the funds were withdrawn. According to Harbor Bank, "[i]t takes at least two or three days before a writ of garnishment can be effectuated throughout the bank." Declaring "I do not see that the law permits the bank any time" the circuit court held Harbor Bank liable for releasing the debtor's assets "from the moment that the writ of garnishment [was] served." It then granted Hanlon Park's motion and entered a judgment for $15,000 plus pre-judgment interest in favor of Hanlon Park.

Held: Judgment vacated and case remanded. Garnishee banks are not liable for releasing the debtor's assets "from the moment that the writ of garnishment [is] served." Rather, garnishee banks are liable for releasing the debtor's assets only after they have had a reasonable time to process the writ of garnishment.

Generally, a garnishee is bound to keep safely the property of a debtor in his possession. If the garnishee surrenders the property after service of the writ but prior to judgment, the garnishee is liable to the judgment creditor for the value of the debtor's property released.

An exception to this rule is set forth in Md. Code Ann. (1975, 2002 Repl. Vol.), § 4-303(a) of the Commercial Law Article ("CL"). CL § 4-303(a) provides that if a bank is presented with an item before it has a reasonable amount of time to respond to a writ of garnishment, it may properly pay that item. The words of CL § 4-303(a) plainly require a bank to secure funds it holds within a "reasonable time" after being served with a writ of garnishment to prevent the payment of an item. The unexpressed but implied corollary of this rule is that if the bank is presented with an item before it has had a reasonable amount of time to respond to a writ of garnishment, it may properly pay that item.

Hanlon Park Condo. Assoc. v. The Harbor Bank of Md., No. 2123, September Term 2002, filed October 31, 2003. Opinion by Krauser, J.

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STATUTE OF LIMITATIONS – LEGAL MALPRACTICE – WHEN A CAUSE OF ACTION ACCRUES FOR LIMITATIONS PURPOSES – ATTORNEYS' CLIENTS SUFFERED NO LOSS OR INJURY UNTIL DATE OF SETTLEMENT OF TORT CLAIMS.

STATUTE OF LIMITATIONS – LEGAL MALPRACTICE – WHEN A CAUSE OF ACTION ACCRUES FOR LIMITATIONS PURPOSES – DISCOVERY RULE – INQUIRY NOTICE – CLIENTS COULD NOT BE EXPECTED TO SEEK SECOND OPINION EACH TIME THEY DISAGREED WITH THEIR ATTORNEYS.

Facts: In 1993, Jeffrey and Shirley Supik retained Bodie, Nagle, Dolina, Smith & Hobbs, P.A. ("Bodie, Nagle") to represent them in a toxic tort action against several pest control companies, and in an action against their homeowners' insurer regarding the terms of coverage related to the damages caused by the toxic tort.

After settling with all defendants on Bodie, Nagle's advice, the Supiks came to believe they had settled the toxic tort actions against the pest control companies for less than they were worth. In 2000, the Supiks filed a legal malpractice action against Bodie, Nagle and a number of its attorneys alleging, among other things, professional negligence, breach of fiduciary duty, negligent misrepresentation, and fraudulent misrepresentation.

The Circuit Court for Baltimore County granted summary judgment in favor of Bodie, Nagle, ruling that the Supiks' negligence claim was barred by Maryland's three-year statute of limitations.

Held: Reversed. The circuit court erred in granting appellees' motion for summary judgment because a legal cause of action did not arise until the appellants settled the underlying toxic tort case, as that event fixed the date of their injury. Further, to the extent that a cause of action might have arisen prior to the date of settlement, the question of limitations is one of fact.

Supik, et ux. v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A., et al., No. 1697, September Term 2002, filed October 29, 2003. Opinion by Sharer, J.

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WORKER'S COMPENSATION – ATTORNEYS FEES – SANCTIONS FOR ATTORNEYS FEES UNTIMELY PAID – CODE OF MARYLAND REGULATIONS (COMAR) 14.09.01.24A(4)– MD. CODE. ANN., LAB. & EMPL. 9-727 – STATUTORY CONSTRUCTION – STATUTORY CONSTRUCTION OF ADMINISTRATIVE AGENCY REGULATIONS – DEFINITION OF "IMMEDIATELY"

Facts: In 1998, Kenneth D. Hewitt sustained a personal injury in the course of his employment with the Washington Metropolitan Area Transit Authority (WMATA). Hewitt filed a claim with the Worker's Compensation Commission (the Commission), and was awarded temporary total disability, permanent partial disability, and attorneys fees with some advanced costs.

After the time to seek judicial review of the Commission's order expired, neither party had filed a notice of judicial review. The checks for attorney's fees were received by Hewitt's counsel sixteen days after the time for appeal had expired. Hewitt then filed issues with the Commission requesting a hearing to determine if a penalty for late payments of attorney's fees should be assessed against WMATA. At the hearing, Hewitt argued that attorneys fees should have been paid within the time limits set forth in COMAR § 14.09.01.24A(4), while WMATA posited they deserved an additional fifteen days to pay the fees pursuant to Md. Code Ann., Lab. & Empl. 9-727.

The Commission found that WMATA failed to pay the attorneys fees in a timely manner and assessed a fine of 20% of the legal fees awarded. On appeal to the Circuit Court for Montgomery County, summary judgment was granted in favor of Hewitt, and the decision of the Commission was affirmed.

Held: Affirmed. The Circuit Court did not err in affirming the decision of the Commission. Md. Code Ann., Lab. & Empl. 9-727 does not entitle an employer or insurer to withhold payment of ordered's attorneys fees for an additional fifteen days after the expiration of time for seeking judicial review of an order of the Commission. Awarded attorneys fees should be paid immediately after the expiration of appeals period, as required by COMAR 14.09.01.24A(4). The Circuit Court did not err in affirming the Commission's award of sanctions where the employer did not establish good cause for the delay in payment.

Washington Metropolitan Transit Authority v. Hewitt, No. 1772, Sept. Term, 2002, filed October 31, 2003. Opinion by Sharer, J.

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ATTORNEY GRIEVANCE

By an Opinion and Order of the Court of Appeals of Maryland dated November 10, 2003, the following attorney has been disbarred from the further practice of law in this State:

CRAIG ROBERT TINSKY

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By an Order of the Court of Appeals of Maryland dated November 13, 2003, the following attorney has been placed on inactive status by consent effective immediately, and his name has been stricken from the register of attorneys in this State:

DAVID HANAN GREENBERG

*

By an Opinion and Order of the Court of Appeals of Maryland dated November 20, 2003, the following attorney has been indefinitely suspended, effective immediately, from the further practice of law in this State:

PATTI DIANE GILMAN WEST

*