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ADMINISTRATIVE LAW - COUNTY LIQUOR BOARD - JUDICIAL REVIEW

Facts: Petitioner applied for a Class B liquor license. During a hearing before the county liquor board, members of the community protested that a third party with an interest in multiple liquor licenses in the community would have an interest in the petitioner's license in violation of the Art. 2B, § 9-301 prohibition against having a direct or indirect interest in more than one license. The Board found that sufficient evidence had not been produced to establish that the third party would have a pecuniary interest in the license. In a judicial review action, a hearing date was scheduled for four days beyond the 90-day period provided in Art. 2B, § 16-101(e)(3) and counsel for both parties alerted the court. The judge signed an order finding " good cause to extend this hearing and any decision on this appeal beyond the 90 day period . . . ." The Court reversed the decision of the Board based on the ground that the third party had a direct or indirect interest in the petitioner's license. The Court of Special Appeals affirmed the Circuit Court judgment agreeing with the Circuit Court that the Board "erroneously ignored mounting and uncontroverted testimony" that the third party had an interest in the license at issue and other licenses.

Held: Reversed; case remanded to that court with instructions to reverse judgment of Circuit Court for Anne Arundel County and remand case to that court with instructions to affirm decision of Board of License Commissioners of Anne Arundel County. The Court of Appeals held the Circuit Court properly issued an order for good cause extending the time for a hearing and decision past the 90-day statutory requirement of Art. 2B, § 16-101. However, the lower court erred by not granting deference to the licencing board's finding that no one other than applicant would have a pecuniary interest in his liquor license.

Woodfield v. West River Improvement Association, Inc., et. al., No. 3, Sept. Term, 2006, filed November 6, 2006. Opinion by Wilner, J.

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AGENCY LAW – AGENT'S LIABILITY TO THIRD PARTY - PERSONAL LIABILITY OF AGENT FOR PRINCIPAL'S OUTSTANDING DEBT TO NURSING HOME.

Facts: Section 19-344(c)(5) of the Health-General Article provides that the agent shall apply for medical assistance, that the nursing home facility must assist and advise the agent in seeking medical assistance, and if the agent fails to seek assistance on behalf of the resident, the facility may petition the court to compel the agent to apply for assistance. Section 19-344(c)(6)(ii) provides that an agent who willfully or with gross negligence violates the requirements of § 19-344(c)(5) regarding an application for medical assistance is subject to a civil penalty not exceeding $10,000.00. The Attorney General is responsible for enforcing the civil penalties under § 19-344 (c) (6) (iii).

Appellant, Patricia Walton, signed a contract with Mariner Health of Southern Maryland, a nursing home facility, as agent for her mother, Audrey Walton, the resident. Under the terms of the contract, the agent agreed that her mother's care would be paid only through Medical Assistance or Medicare. Medicare paid for the resident's care for approximately one month. Once Medicare ceased paying, the agent did not apply for medical assistance to cover the cost of the resident's care while at the facility. Moreover, the nursing home facility failed to assist either the resident or the agent in obtaining medical assistance.

On July 6, 2004, Patricia testified at trial that she was not aware that Medicare ceased paying for her mother's care and that the nursing home debt was being incrementally calculated. Patricia stated that she would have applied for medical benefits for her mother had she been aware that Medicare had stopped paying for Audrey's nursing home bill. Patricia testified that she was not given notice of the outstanding monetary obligation until after Mariner Health sold the facility to another group. Mariner Health offered no explanation or evidence as to why it failed to notify Audrey or Patricia that Medicare had ceased paying or that a debt had been incrementally tallied for eighteen months. The nursing home bill was not paid. After rendering care for approximately 18 months, the nursing home filed suit for breach of contract and obtained a money judgment against the resident and the agent jointly and severally for damages.

On August 11, 2004, the Circuit Court for Prince George's County found both mother and daughter liable to Mariner Health for the outstanding balance incurred by mother and for attorney fees. The Waltons appealed to the Court of Special Appeals. Before that court could grant the appeal, the Court of Appeals granted certiorari.

Held: Reversed. The Circuit Court erred in holding that the financial agreement signed by the agent on behalf of the resident rendered the agent personally liable for the outstanding nursing home bill even though the agent failed to seek Medicare or Medical Assistance for the resident. In addition, this Court holds that a nursing home facility is limited to remedies prescribed by statute.

In the instant case, the agent was not personally liable for her mother's nursing home care because there was no agreement to that effect. Moreover, § 19-344(c) of the Health-General Article does not provide the nursing home facility a private cause of action against the agent for damages. Patricia, as an agent, had a primary duty to Audrey, the principal, and Patricia's duty to Mariner Health, a third party, was limited.

Agency law precludes a finding against Patricia for damages. As an agent, Patricia entered into the contract only for the benefit of Audrey and is personally insulated from liability by virtue of her station as an agent. Patricia, as agent, can bind Audrey, the principal, to a contract; however, Patricia is not personally liable in damages for breach of that contract. The trial judge's misinterpretation of the contract was based upon two provisions in the document under consideration that specifically did not apply to either Patricia or Audrey. Finally, an agent is not personally liable for the resident's nursing home care costs, unless the agent, voluntarily and knowingly agrees to pay for the resident's care with the agent's own funds.

Audrey Walton, et al. v. Mariner Health of Maryland, Inc., No. 33, September Term 2005, filed March 14, 2006, Opinion by Greene, J.

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ATTORNEYS - MISCONDUCT - DISCIPLINE - ORDER OF DEFAULT - VACATION OF DEFAULT - APPROPRIATE SANCTIONS

Facts: The Attorney Grievance Commission, acting through

Bar Counsel, filed with the Court of Appeals a Petition for Disciplinary or Remedial Action against the Respondent, Andrew M. Steinberg, alleging violations of Maryland Rules of Professional Conduct (MRPC) 1.1, 1.2, 1.3, 1.4, 1.5, 1.8, 1.16, 3.1, 3.2, 3.3, 3.4, 4.1, 8.1, and 8.4 in the representation of two clients. Respondent was served personally with the Petition and Writ of Summons on 3 November 2005. Service was supported by the Affidavit of Service of Dennis F. Biennas, an employee of Petitioner. An order of default was entered against Respondent pursuant to Maryland Rules 16-754(c) and 2-613 when he failed to respond timely to the Petition. The hearing judge denied Respondent's subsequent motion to vacate the order of default, and scheduled an *ex parte* hearing for 2 March 2006 where Petitioner would be permitted to present evidence in support of the Petition. Respondent filed a motion for continuance of that hearing because he would be in Southeast Asia for reasons of business and pleasure during the time scheduled for the *ex parte* hearing. Before the hearing judge ruled on the continuance motion, Respondent left the country knowing that the continuance had not been acted upon. The continuance request was denied on 1 March. Respondent failed to attend the hearing. After Petitioner presented its evidence, the hearing judge concluded that Respondent committed the aforementioned violations.

Both sides filed exceptions to the hearing judge's findings of fact and conclusions of law. Petitioner excepted to one minor factual issue regarding one client's knowledge of a deposition that would become the subject matter of a misrepresentation on the part of Respondent. The second exception taken by Petitioner involved the hearing judge's conclusion that Respondent violated MRPC 8.1 without express findings of the facts underlying that conclusion.

Respondent's exceptions did not challenge any express findings of fact or conclusions of law, but instead raised two issues which implicated the propriety of the hearing judge's denial of Respondent's motion to vacate default judgment and the continuance.

Held: The Court of Appeals held that an order of default was entered properly against Respondent. Steinberg failed to timely file an answer to the Petition. Though Steinberg baldly alleged that service upon him was defective, service was supported by an Affidavit of Service by the process server, which stated, under the penalties of perjury, that Respondent had been served personally with all of the proper documents. This affidavit, by itself, according to the Court of Appeals, was sufficient to support the order of default entered by the hearing judge. *Holly Hall Publ'cns, Inc. v. County Banking & Trust Co.*, 147 Md. App. 251, 259 n.6, 807 A.2d 1201, 1206 n.6 (2002).

The Court concluded that the hearing judge had not abused his broad discretion in denying Respondent's motion to vacate the order of default judgment. *Attorney Grievance Comm'n v. Ward*, 394 Md. 1, ____ A.2d __ (No. 47, Sept. Term 2004) (filed 2 August 2006), slip op. at 17. One factor in determining whether to vacate an order of default is whether the respondent presents "a satisfactory explanation . . . why he failed to answer the initial complaint within the time allowed." *Attorney Grievance Comm'n v. Middleton*, 360 Md. 34, 45, 756 A.2d 565, 571-72 (2000). Respondent's bald and conclusory allegations that he had not been served properly, unsupported by oath or affirmation, were insufficient to demonstrate abuse by the hearing judge in choosing instead to credit the process server's Affidavit of Service certifying that the Petition and Writ of Summons had been served. A reasonable hearing judge could conclude, from the totality of the circumstances here, that Steinberg did not proffer an adequate reason for his failure to file a responsive pleading.

Respondent argued that had his motion for continuance been granted, he would have been able adequately to represent himself at the *ex parte* evidentiary hearing. Specifically, he argued that because the motion was denied after he left for Southeast Asia, he was unable to attend the *ex parte* hearing to present evidence in his defense. Notwithstanding that Respondent misapprehended his ability to adduce evidence at an *ex parte* hearing for Petitioner to present its evidence, the Court of Appeals held that merely filing a continuance request does not imply automatically the right to a continuance. *Cruis Along Boats, Inc. v. Langeley*, 255 Md. 139, 143, 257 A.2d 184, 187 (1969). The decision whether to grant a continuance is within the sound discretion of the hearing judge. *Cruis Along Boats, Inc.*, 255 Md. at 143, 257 A.2d at 187. Because Respondent left the country before the continuance had been acted upon, Steinberg's absence at the evidentiary hearing was inexcusable. The Court accordingly overruled Respondent's exceptions.

The Court of Appeals concluded that Respondent, in his representation of Christine A. Serabian, failed to communicate with his client, failed to reduce the contingency fee agreement to writing, failed to appear at meetings and depositions, failed to prepare adequately for certain meetings, failed to relay to his client settlement offers made during court-ordered mediation, failed to withdraw promptly after the client terminated his representation, failed to comply with reasonable requests for discovery, and made material misrepresentations to his client and opposing counsel. As to his representation of Annie M. Adeleye, the Court concluded that Respondent failed to file a bankruptcy petition on behalf of the client in order to protect her home from

an impending foreclosure sale, and in an effort retrospectively to set aside the sale, Respondent knowingly misrepresented to the court that his client was not given sufficient notice as to the date of the foreclosure sale.

Repeated acts of dishonest, fraudulent or misleading behavior generally warrant a sanction of disbarment. *Attorney Grievance Comm'n v. Lane*, 367 Md. 633, 640, 790 A.2d 621, 625 (2002); *Attorney Grievance Comm'n v. Vanderlinde*, 364 Md. 376, 418, 773 A.2d 463, 488 (2001). Before finally concluding whether disbarment was the proper sanction in this case, the Court paused to consider any aggravating or mitigating factors, pursuant to the standards recommended by the American Bar Association. Respondent's prior disciplinary record, which included prior disciplinary proceedings in Maryland, Virginia, and the District of Columbia, weighed heavily against him. Respondent additionally failed to cooperate with Bar Counsel in the investigation of the complaints filed against him, and showed no timely good faith efforts to make restitution or rectify the damages caused by his misconduct. As an attorney with 20 years standing at the bar, Respondent was unable genuinely to claim ignorance or lack of experience.

The Court of Appeals concluded that the sanction of disbarment was appropriate.

Attorney Grievance Commission v. Steinberg, AG No. 48, September Term, 2005, filed 6 November 2006. Opinion by Harrell, J.

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CONSTITUTIONAL LAW - EQUAL PROTECTION - ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS - STRICT SCRUTINY REVIEW - 2006 FISCAL YEAR BUDGET VIOLATED ARTICLE 24 WHEN IT SOUGHT TO WITHHOLD STATE-FUNDED MEDICAL BENEFITS TO A CERTAIN CLASS OF LEGAL ALIENS BASED ON THE LENGTH OF THEIR RESIDENCY SOLELY BECAUSE OF FISCAL REASONS - PRELIMINARY INJUNCTION WAS PROPER INSOFAR AS IT PROSPECTIVELY PRESERVED THE STATUS QUO SO AS NOT TO UNDERMINE THE FINAL DISPOSITION OF THE CASE ON THE MERITS.

Facts: Appellees are all lawful permanent resident aliens of the Untied States who immigrated from their respective countries on or after August 4, 2003, and reside in Maryland. Their original complaint alleged that the State of Maryland, through Appellants Robert L. Ehrlich, Jr. (Governor of Maryland), S. Anthony McCann (Secretary of the Department of Health and Mental Hygiene), and Nancy Kopp (State Treasurer), denied them equal protection of the laws by denying them access to State-funded health care benefits.

The Federal Personal Responsibility and Work Opportunity Reconciliation Act (the "Federal Welfare Reform Act"), codified at 8 U.S.C. Sec. 1601, *et seq*. (1996), provides that the only aliens eligible for federally-funded health benefits are those resident aliens that either: (1) entered the United States prior to August 22, 1996; or (2) entered on or after August 22, 1996 and had lived in the United States for a period of at least five years. All other legal aliens living in the United States are ineligible to receive federally-funded medical benefits until they satisfy the 5-year residency requirement. Congress authorized the States to enact, in their complete discretion, any law after August 22, 2996 which covered this newly-designated class of ineligible aliens, so long as the benefits were wholly State-funded.

Pursuant to the federal grant of authority, in 1997, the Maryland General Assembly enacted Chapter 593, the "Welfare Innovation Act," and added Maryland Code (1982, Repl. Vol. 2005), Sec. 15-103(a)(2)(viii) of the Health-General Article to the Maryland Annotated Code (the "Medical Assistance Program"). This section provided that the state shall provide comprehensive medical care for all legal immigrant pregnant women and children under the age of 18 who arrived in the United States on or after August 22, 1996. This remained the case until Fiscal Year ("FY") 2006. In preparing the budget for FY 2006, the State of Maryland did not appropriate monies for these resident alien children and pregnant women, although it funded the same benefits to citizens and resident aliens who arrived before August 22, 1996.

The Circuit Court for Montgomery County granted a preliminary injunction based, in part, upon, its conclusion that Appellees likely would prevail on their claim that the failure to appropriate violated Article 24 of the Maryland Declaration of Rights. More specifically, the Circuit Court's order contained two parts. The first order preliminarily enjoined to State to reinstate, as of July 1, 2005, Appellee's coverage. The second part of the order required Appellants to reinstate coverage prospectively from the date the original complaint and Motion for Preliminary Injunction was filed (October 26, 2005). Appellants filed a timely appeal with the Court of Special Appeals. The Court of Appeals, upon its

own initiative, issued a writ of certiorari. *Ehrlich v. Perez,* 391 Md. 577, 894 A.2d 545 (2006).

Held: Judgment of the Circuit Court for Montgomery County affirmed in part and vacated in part. Case remanded to the court for further proceedings.

It was appropriate for the Circuit Court to grant a preliminary injunction because Appellees were likely to succeed on the merits of their Article 24 claim. Congressional classifications based on alienage are subject to rational review, because the federal government has broad regulatory power over naturalization and immigration. *Matthews v. Diaz,* 426 U.S. 67, 79-80, 81, 96 S.Ct. 1883, 1891, 1892, 48 L.Ed 2d 478, 489-90 (1976). Classifications based on alienage employed by the State, however, "are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired." *Graham v. Richardson,* 403 U.S. 365, 376, 91S.Ct. 1848, 1854, 29 L.Ed.2d 534, 544 (1971); *see also Murphy v. Edmonds,* 325 Md. 342, 356, 601 A.2d 102, 109 (1992). Appellants cited, among other cases, *Plyler v. Doe,* 475 U.S. 202, 219 n.19, 102 S.Ct. 2382, 2396 n.19, 72 L.Ed2d 786, 800 n.19 (1982), for the proposition that rational review should be applied to the classification because the State merely adopted the "uniform rule" for the treatment of an alien sub-class, i.e., the discretion granted to the states in 1996 Federal Welfare Reform Act. The mere congressional grant of discretion whether to provide State-funded medical benefits, without more, however, is not a "uniform policy" for purposes of determining the appropriate standard for review for equal protection analysis. Thus, strict scrutiny is the appropriate standard of constitutional review when the State draws a classification based on alienage.

The sole reason advanced by Appellants for instituting the budget cut was to create cost savings. Under strict scrutiny review, however, preserving the fiscal integrity of State benefits programs is not a sufficient basis to justify a classification based on alienage. *Shapiro v. Thompson,* 34 U.S. 618, 627, 633, 89 S.Ct. 1322, 1328, 1330, 22 L.Ed.2d 600, 611, 614 (1969).

The Circuit Court's order for relief through a preliminary injunction had two parts. The first portion was retrospective in nature and required Appellants to reinstate medical benefits to Appellees dating back to July 1, 2005. The second portion required that the medical benefits be reinstated prospectively from the date of the filing of the Complaint until final disposition of the case. Injunctive relief is not intended to redress past wrongs, but rather to be a protective and preventive remedy, *El Bey v. Moorish*

Temple, 362 Md. 339, 353, 765 A.2d 132, 139 (2001), and is designed to maintain the status quo until the final disposition of the case on the merits. *State Dep't v. Baltimore County,* 281 Md. 548, 558-59, 383 A.2d 51, 57 (1977). The Circuit Court's order for retrospective relief was not appropriate because it was, in effect, an award of past damages to Appellees, without either a final disposition on the merits or a determination of actual damages. The portion of the order which prospectively reinstated medical benefits was proper, however, as it was designed to preserve the status quo so as not to undermine whatever relief might be appropriate upon the final disposition of the case on the merits.

Ehrlich v. Perez, No. 37, September Term 2005, filed October 12, 2006. Opinion by Harrell, J.

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CONSTITUTIONAL LAW - EQUAL PROTECTION AND TAKINGS

Facts: Eugenia M. Neifert, Melvin D. Krolczyk, and Teresa A. Krolczyk, appellants, own four lots in the Cape Isle of Wight subdivision in Worcester County. Appellants have been denied sewer service and wetland fill permits and therefore are unable to develop their lots.

Appellants acquired their lots in the mid-1970's. The deed to each lot contains a restriction that any sewage disposal system conform to requirements established by the Maryland State Department of Health and the Worcester County Health authorities. Appellants' lots were denied on-site septic system permits in 1979 because the lots did not pass a seasonal percolation test. Appellants did not appeal this determination.

In the early 1980's, a central sewage collection system was proposed for the West Ocean City area to allow for the development of new homes and businesses. Appellants' lots are located within the sewer system district. The sewer system received a construction grant from the U.S. Environmental Protection Agency,

conditioned on the system not providing sewer service to any parcel of land within any wetlands, as defined by the U.S. Fish and Wildlife Service, or to any parcel of land within the 100-year floodplain if it was platted as a building lot after May 31, 1977. These requirements were formalized as commitments in a Consent Order on June 28, 1983. Worcester County subsequently used maps, based on National Wetland Inventory data, to help identify non-service areas.

In 1992, the Department of Environment adopted a policy ("1992 Policy") of allowing sewer service to lots not mapped as wetlands while denying service to mapped wetlands lots. Appellants' lots were mapped as wetlands and thus they were denied sewer service under the 1992 Policy.

Appellants have also been denied wetland fill permits.

The Circuit Court found that the denial of wetland fill permits and sewer hookups did not constitute a taking or violate appellants' equal protection rights. Appellants noted a timely appeal to the Court of Special Appeals. The Court of Appeals granted certiorari on its own initiative prior to decision by that court. *Neifert v. Department of Environment*, 393 Md. 160, 900 A.2d 206 (2006).

Held: Affirmed. The Court of Appeals held that the denial of sewer service under the 1992 Policy satisfies rational basis review under equal protection analysis and that appellants did not suffer an unconstitutional taking. Appellants' lots are not similarly situated to non-mapped lots and the Department of Environment's distinction between mapped and non-mapped wetlands lots, as set forth in the 1992 Policy, bears a rational relationship to the Department's legitimate interests in fairness, fiscal integrity, and protection of ecological areas. Appellants did not suffer an unconstitutional taking because (1) the lots were already undevelopable as of 1979 when they did not pass seasonal percolation testing, (2) prohibition of a nuisance does not constitute a taking and therefore denial of an on-site septic system on appellants' lots was proper, (3) the titles to appellants' lots required that the lots meet State and local septic regulations, (4) appellants never regained the right to develop their lots because the EPA grant that funded the sewer system prohibited service to lots in wetlands and under the 1992 Policy appellants' lots remain ineligible for sewer service, and (5) access to sewer service is not a constitutionally protected property interest.

Eugenia M. Neifert, et al. v Department of Environment, et al., No.

10, September Term, 2006, filed November 14, 2006. Opinion by Raker, J.

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CRIMINAL LAW - ILLEGAL SENTENCE - SENTENCING COURT'S FAILURE TO STATE ITS AUTHORITY TO SUSPEND ANY PORTION OF SENTENCE DOES NOT INHERE IN THE SENTENCE ITSELF - AND THUS IS NOT AN ILLEGAL SENTENCE WITHIN THE MEANING OF RULE 4-345(A).

Facts: The court sentenced Petitioner to a term of life imprisonment for first-degree rape. Between 1975 and 1985, Petitioner filed three separate petitions for post conviction relief, which the court considered and denied. In December 1974, the court considered Petitioner's motion for modification of sentence and denied that motion. In 1990, Petitioner filed a request with the court entitled, "Motion For Change of Sentence." The court in effect denied that motion, as there is no record in the file that it was ever granted. Thereafter, on December 17, 2002, approximately twenty-eight years after imposition of sentence, Petitioner filed *pro se* in the Circuit Court for Harford County a Motion to Correct An Illegal Or Irregular Sentence. The court set the matter for a hearing in open court where the Petitioner appeared with counsel. The court denied the motion. Through counsel, Petitioner filed a timely appeal to the Court of Special Appeals. In an unreported opinion, the intermediate appellate court affirmed the judgment of the Circuit Court. Through counsel, Petitioner filed a petition for writ of certiorari and we granted the petition. *Pollard v. State*, 387 Md. 462, 875 A.2d 767 (2005).

Held: A sentencing court is not required to specify, either before, during, or after the imposition of a sentence, that it does or does not have the discretion to suspend any portion of a sentence. Thus, failing to do so is not sufficient basis to infer an abuse of discretion for failing to exercise discretion. Petitioner asserted that it was unclear from the record whether the judge knew that he could suspend a portion of the life sentence.

In response to this contention, the Court of Special Appeals refused to infer an error by the sentencing judge, without an affirmative indication that the judge believed he lacked the discretionary authority to suspend the sentence, because judges are presumed to know the law.

The Court of Appeals framed the matter in terms of the nature of the sentence actually imposed rather than in terms of what the sentencing judge said or did not say about his sentencing authority. In view of that, the sentence imposed was neither illegal, in excess of that prescribed for the offense for which Petitioner was convicted, nor were the terms of the sentence itself statutorily or constitutionally invalid. The sentencing court's failure to state its authority to suspend any portion of sentence does not inhere in the sentence itself; and thus is not an illegal sentence within the meaning of Rule 4-345(a). Further, a motion to correct an illegal sentence may not be used as an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case.

Jonathan F. Pollard v. State, No. 22, September Term 2005, filed August 2, 2006, Opinion by Greene, J.

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CRIMINAL LAW - STATUTORY CONSTRUCTION - SEX OFFENDER REGISTRATION STATUTE

CRIMINAL LAW – SUFFICIENCY OF THE EVIDENCE - SEX OFFENDER REGISTRATION STATUTE

Facts: Petitioner, James William Jeandell, was a convicted sex offender required to register as a sexually violent offender under § 11-701(f) and 11-704 of the Criminal Procedure Article. Pursuant to § 11-721(a) of the Criminal Procedure Article, petitioner was charged with knowingly failing to notify the Department of Public Safety and Correctional Services within seven days of his changing

residences. At the close of all of the evidence, the trial court found as a fact that petitioner was "homeless" and "that he didn't have a place to go." Notwithstanding this finding of "homelessness," the trial court found petitioner guilty of violating § 11-721(a). Petitioner noted a timely appeal to the Court of Special Appeals, which affirmed the trial court judgment.

Held: Reversed. The Court of Appeals found that the lower courts erred in finding sufficient evidence to support a conviction beyond a reasonable doubt because they applied an incorrect interpretation of the term residence as it is used in the sex offender registration statute. As the Court of Appeals noted in *Twine v. State*, __ Md. __, __ A.2d __, No. 138, September Term, 2005 (filed ___, __, 2006), residence refers to more than just a living location; a residence refers to a fixed location to which a registrant under the sex offender registration scheme intends to return. In this case, the evidence was insufficient to convict petitioner of knowingly failing to provide written notice of a change in residences because the trial court found as a fact that petitioner was homeless and "didn't have a place to go." As such, no rational trier of fact could conclude that petitioner had a residence within the meaning of § 11-705(d).

James Jeandell v. State of Maryland, No. 113, September Term, 2005, filed November 15, 2006. Opinion by Raker, J.

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CRIMINAL LAW - STATUTORY CONSTRUCTION - SEX OFFENDER REGISTRATION STATUTE

Facts: Appellant Raymond Twine was convicted by the Montgomery County Circuit Court of failing to register as a sexually violent offender by failing to provide notice of change of address to the Department of Public Safety and Correctional Services in violation of Md. Code (2001, 2005 Cum. Supp.), § 11-721 of the Criminal Procedure Article. Appellant waived his right to a jury trial and

was tried in a bench trial on an agreed statement of facts. The parties stipulated that Twine was "homeless," and was "staying wherever he could." The Circuit Court found Twine guilty of violating § 11-721(a) and sentenced him to a term of incarceration of ten days.

Appellant noted a timely appeal to the Court of Special Appeals. The Court of Appeals granted certiorari on its own initiative prior to a decision by the Court of Special Appeals. *Twine v. State*, 392 Md. 724, 898 A.2d 1004 (2006).

Held: Reversed. The sex offender registration statute does not define "residence" or "address" and uses the words interchangeably. The ordinary meanings of "residence" and "address" connote some degree of permanence or intent to return to a place. The evidence was insufficient to convict Twine of knowingly failing to provide written notice of a change in residences, as required by the sex offender registration statute, because the evidence was insufficient to conclude that defendant acquired a new residence after leaving his previous residence. Twine was homeless and had not acquired a fixed location where he intended to return on a regular basis, and consequently, he did not have a "residence" within the meaning of the statute.

Raymond Twine v. State of Maryland, No. 138, September Term, 2005, filed November 15, 2006. Opinion by Raker, J.

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EVIDENCE - ADMISSIBILITY OG POLICE DEPARTMENT RULE OF THE ROAD - UNDER THE CIRCUMSTANCES OF THIS CASE, BALTIMORE CITY POLICE DEPARTMENT GENERAL ORDER 11-90 WAS ADMISSIBLE IN A NEGLIGENCE ACTION, BECAUSE IT WAS RELEVANT TO SHOWING THE REASONABLENESS OF THE OFFICER'S CONDUCT IN THIS PARTICULAR SITUATION. THE GENERAL ORDER WAS DIRECTLY RELEVANT TO THE OPERATION OF AN EMERGENCY VEHICLE BY A BALTIMORE CITY POLICE OFFICER IN BALTIMORE CITY, DID NOT PROVIDE THE OFFICER WITH DISCRETION IN HIS OR HER COMPLIANCE,

AND DID NOT CONFLICT WITH STATE LAW PROVIDED IN MARYLAND CODE (1977, 2006 REPL. VOL.), § 21-106 OF THE TRANSPORTATION ARTICLE.

Facts: On February 16, 2002, a Baltimore City police officer, while responding to a call, drove a marked police car through a red traffic signal without stopping and collided with a van driven by Michael Lee Hart. Hart, respondent, filed a complaint on August 20, 2003. The complaint, alleging injuries resulting from the collision, was filed in the Circuit Court for Baltimore City and named the Mayor and City Council of Baltimore ("the City"), petitioner, and Hart's insurer, Allstate Insurance Company ("Allstate"). Hart asserted a single claim of negligence against the City.

On January 14, 2005, prior to trial, petitioner filed a motion *in limine* to exclude evidence of Baltimore City Police Department General Order 11-90, which requires Baltimore city police officers to bring their vehicles to a full stop before crossing against any traffic control device. On March 3, 2005, the court denied petitioner's motion. Trial was held on March 30 and 31, 2005. At trial, evidence of General Order 11-90 was introduced by respondent. Petitioner objected to the introduction, but was overruled. When jury instructions were issued, they included an instruction on General Order 11-90. After deliberating, the jury found for respondent and returned a verdict of $46,894.05.

Petitioner noted an appeal to the Court of Special Appeals-Allstate was not a party in the appeal. In its appeal, petitioner challenged the admissibility of General Order 11-90. On February 2, 2006, the Court of Special Appeals affirmed the Circuit Court. *Mayor and City Council of Baltimore v. Hart*, 167 Md. App. 106, 891 A.2d 1134 (2006). Petitioner then filed a petition for writ of certiorari. The Court of Appeals granted certiorari on June 7, 2006. *Mayor and City Council of Baltimore v. Hart*, 393 Md. 242, 900 A.2d 749 (2006).

Held: Affirmed. The Court of Appeals held that a police department's internal rules and guidelines are admissible in specific situations in a vehicular negligence claim when they are relevant to whether an officer's conduct in that particular situation was reasonable. In this particular case, General Order 11-90 stated specifically what the conduct of a Baltimore City police officer should be when responding in an emergency mode before crossing an intersection against a red traffic signal-the officer must come to a *full* stop. Additionally, the General Order did not conflict with State law and did not provide the officer with discretion in his compliance.

Mayor and City Council of Baltimore v. Michael Lee Hart, No. 16 September Term, 2006, filed November 6, 2006. Opinion by Cathell, J.

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INSURANCE — MEANING OF "POLICY PERIOD" - LIMITS OF LIABILITY PROVISION IN HOMEOWNER'S INSURANCE FOR SUBSEQUENT POLICY PERIODS.

Facts: Petitioner, United Services Automobile Association ("USAA"), filed a complaint for declaratory relief in the Circuit Court for Baltimore City. It named Kenny A. Hooper, Jr. (who is not a party to the appeal),and Respondent Rita Towana Riley, mother of Jeremy, Christian and Wendy Carpenter ("the Carpenter children"), as defendants. USAA sought a declaration of the limits of insurance coverage of four consecutive policies issued to Hooper. The Carpenter children lived on Hooper's property from 1990 to 1993 where the children allegedly suffered lead exposure and related injuries. Respondents answered USAA's complaint and filed a counterclaim for declaratory relief. USAA filed a motion for summary judgment.

The circuit court issued a memorandum and order granting USAA's motion for summary judgment in part. The circuit court ultimately issued a Declaratory Judgment stating:

1. that the injuries allegedly suffered by the Carpenter children are confined to a single "occurrence," as "occurrence" is defined by the USAA policy;
2. that the Limit of Liability provision of the USAA policy unambiguously limited the recovery of damages because of injury of the Carpenter children to "an aggregate total of the policy limit of $300,000";
3. that the Carpenter children cannot establish, as a factual matter, that any one of them suffered bodily injury within the meaning of the USAA policies during the terms of the first two policies and therefore, the maximum number of policies implicated is two;

4. that the Limit of Liability provision in the USAA policies is ambiguous and therefore does not limit USAA's responsibility under the two implicated USAA policies to $300,000 for all bodily injury to the Carpenter children; and
5. that to the extent that Hooper is found liable in the underlying tort case, USAA's indemnification obligation is limited to providing no more than $600,000 of liability coverage.

The Court of Special Appeals (CSA) reversed and held that the circuit court erred in concluding that there was no genuine dispute of material fact as to whether the Carpenter children were injured during the first and second policy periods, and therefore remanded for further proceedings. The CSA, although not required to reach the issue of whether the circuit court erred in declaring the amount of coverage USAA's policies provided, addressed the issue in order to provide some guidance to the court and parties on remand.

Held: Affirmed. This Court, beginning with an analysis of the policies' language at issue holds that there is no reference to subsequent policies. The plain language of the policies defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in bodily injury or property damage." While "policy period" is not defined within the "definitions" section of the policy, on the "Declarations Page" at the beginning of each policy the words "POLICY PERIOD" appear, followed by the dates that the policy covers. The customary, ordinary, and accepted meaning of a policy period is the period in time that is covered by the policy. It appears from the language of the contract that occurrences that happen during a policy period are covered.

A reasonably prudent person could also read the policies to mean that each separate policy is implicated by a continuing occurrence. These contradictory interpretations of the same language clearly demonstrate an ambiguity in the policy. We find no error in the Circuit Court's determination.

Hiraldo v. Allstate Insurance Company, 778 N.Y.S.2d 50 (N.Y. Sup. Ct. 2004) addressed the exact same issue as in the instant case. A Child was exposed to lead paint chips and suffered injury over several years and several homeowner's insurance policy periods. The *Hiraldo* court held that the plain language of the policy determined that the infant's injuries arose out of a single occurrence and constituted one loss, and the insurance company "clearly intended to limit the number of policies that would be

available to satisfy a judgment in a continuous exposure case." *Id.* at 51-52. Thus, the limits of liability provision did apply.

The "Limits of Liability" provision in *Hiraldo*, while similar to the provision in the instant case, contains one important difference. In the instant case, USAA made no reference to the implication of the limit of liability provision in the event of multiple policies. In its affirmance of *Hiraldo*, the Court of Appeals of New York even cited to the intermediate appellate court's opinion in the instant case and distinguished it, noting that "[s]ome courts have held that successive policy limits may be cumulatively applied to a single loss, where the policies do not clearly provide otherwise . . . . *Riley v. United Servs. Auto. Assn.*, 161 Md.App. 573, 871 A.2d 599)." This is clearly not the situation in the instant case and for that reason, this Court affirms the Court of Special Appeals.

United Services Automobile Association v. Rita Riley, et al., No. 40, September Term 2005, filed June 6, 2006, Opinion by Greene, J.

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OPEN MEETINGS LAWS-DEVELOPMENT CORPORATIONS; RECORDS-AGENCIES OR CUSTODIANS AFFECTED

Facts: Carmel Realty Associates, *et al.*, respondents, brought suit against City of Baltimore Development Corporation (the "BDC"), petitioner, alleging that the BDC is subject to the requirements of both the Open Meetings Act and Maryland's Public Information Act. Specifically, the parties dispute involved whether the BDC is a "public body" under Maryland Code (1984, 2004 Repl. Vol.), § 10-502(h)(2) of the State Government Article and whether it is an "instrumentality" of the City under Maryland Code (1984, 2004 Repl. Vol.), § 10-611(g)(1)(i) of the State Government Article.

The City of Baltimore (the "City"), by ordinance, directed the BDC to revitalize an area in Baltimore known as the "Superblock" (an area which is part of the ongoing Westside revitalization in

downtown Baltimore). As part of that direction, the BDC was to recommend properties for condemnation to the City and to select developers for the Superblock.

The BDC is a private, not-for-profit entity. The City, however, substantially controls the BDC. The BDC acts as the economic development arm of the City of Baltimore by participating in or conducting significant aspects of the City government's deliberations with respect to development in the City. In addition to numerous other indicia of control by the City, the Mayor has the power to appoint and remove members of the Board of Directors and the City exercises control over a substantial amount of the BDC's budget.

The respondents are nine business owners whose businesses are within the Superblock and are subject to the decisions and recommendations of the BDC with respect to condemnation and development. Respondents sought access to meetings of the BDC's Board of Directors and information relating to those meetings. Those requests were denied by the BDC.

At the trial level, both parties moved for summary judgment. After hearing arguments on March 14, 2005, the Circuit Court for Baltimore City issued an Order denying Carmel Realty's motion and granting the BDC's motion. In an unreported opinion, filed January 24, 2006, the Court of Special Appeals reversed the ruling of the trial court and found that the BDC is subject to the requirements of both the Open Meetings Act and the requirements of Maryland's Public Information Act. The BDC filed a petition for a writ of certiorari on March 6, 2006, and Carmel Reality filed a cross-petition for a writ of certiorari on March 18, 2006. This Court granted both petitions on May 10, 2006.

Held: Affirmed. Remanded to the Court of Special Appeals with instructions to remand to the Circuit Court for Baltimore City with instructions to render judgment consistent with this opinion. The trial court erred as a matter of law. The City of Baltimore Development Corporation is, in essence, a public body for the purposes of the Open Meetings Act and it is also an instrumentality of the City of Baltimore for the purposes of Maryland's Public Information Act. The stated policy of the Open Meetings Act and the plain meaning of § 10-502(h)(2)(ii) make the BDC a public body for the purposes of that Act; the stated policy of the Public Information Act and the plain meaning of § 10-611(g)(1)(i) make the BDC an instrumentality of the City for the purposes of that Act.

City of Baltimore Development Corporation v. Carmel Reality Associates, *et al.*, No. 14, September Term, 2006, filed November 3, 2006. Opinion by Cathell, J.

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POST CONVICTION RELIEF - CORRECTING AN ILLEGAL OR IRREGULAR SENTENCE

Facts: On December 8, 1971, Ralph Edward Wilkins was tried before a jury in the Circuit Court for Prince George's County and convicted of murder in the first degree. On January 24, 1972, he was sentenced to life imprisonment. On direct appeal to the Court of Special Appeals, that court affirmed the judgment and sentence.

On June 16, 2003, more than thirty years after his direct appeal of the judgment and sentence entered against him, Wilkins filed a petition for post conviction relief in the Circuit Court for Prince George's County. He contended that the sentencing judge abused his discretion by failing to recognize his authority to suspend any part of the life sentence imposed. On January 6, 2004, the court determined that there was no merit to Wilkins's claim. Nonetheless, the court granted partial post conviction relief by allowing Wilkins to file a belated motion for modification of sentence within 90 days.

On February 9, 2004, Wilkins filed a notice of appeal to the Court of Special Appeals based on the Circuit Court's ruling which denied in part his petition for post conviction relief. The Court of Special Appeals dismissed the appeal as untimely. Its mandate issued on June 8, 2004. Subsequently, on June 9, 2004, Wilkins filed a second notice of appeal to the Court of Special Appeals. Wilkins based this appeal on the Circuit Court's ruling dated May 19, 2004, which denied his motion to correct an illegal sentence. Again, the Court of Special Appeals dismissed Wilkins's appeal as untimely. Although Wilkins's appeal was dismissed as untimely, the court reconsidered pursuant to Md. Rule 8-502 and reinstated the appeal. The Court of Special Appeals held that the sentencing

court's failure to recognize its right to consider suspending a portion of a life sentence renders the sentence illegal.

Held: Vacated and remanded with directions to dismiss the appeal.

A sentencing judge's failure to recognize his or her right to exercise discretion in the imposition of a sentence does not render the sentence illegal within the meaning of Md. Rule 4-345(a). A motion to correct an illegal sentence is not an appropriate vehicle to address the question raised in this case. The life sentence imposed in this case was not illegal within the contemplation of Rule 4-345(a). Clearly, the alleged defect in sentencing could have been raised on direct appeal from the conviction and sentence imposed in this case. The alleged procedural defect, in the appropriate case, may be a proper subject of post conviction relief.

State v. Ralph Edward Wilkins, No. 65, September Term 2005, filed June 9, 2006, Opinion by Greene, J.

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REAL PROPERTY - DEED OF TRUST - FORECLOSURE SALE - APPEAL - FAILURE TO POST SUPERSEDEAS BOND OR OTHER SECURITY- MOOTNESS

REAL PROPERTY - DEED OF TRUST - FORECLOSURE SALE - ABATEMENT OF INTEREST - ABUSE OF DISCRETION

REAL PROPERTY - DEED OF TRUST - TRUSTEE'S COMMISSION - LIQUIDATED DAMAGES OR ILLEGAL PENALTY

Facts: Martin Baltrotsky defaulted on a deed of trust securing three properties located in Montgomery County. The deed, held by lender and beneficiary, KH Funding Company, was overdue and unpaid in the amount of $864,170.27. The trustee appointed by the deed, Mark Kugler, commenced foreclosure proceedings in the Circuit Court

for Montgomery County. The three properties were each purchased by different third parties at a foreclosure sale. The proceeds of the sale amounted to $1,261,000.00. After the sale, Baltrotsky filed, pro se, a protracted series of motions and other papers directed at voiding the sale and staying further proceedings in the Circuit Court in light of Petitioner's pending bankruptcy petition in federal court. Kugler and the foreclosure purchasers repeatedly answered each of Baltrotsky's renewed attempts to forestall settlement over the course of approximately 11 months. Because of the delays caused by Baltrotsky's persistent litigation, the foreclosure purchasers moved for, and the Circuit Court granted, the abatement of interest on the foreclosure purchase prices from the proposed date of settlement to the actual settlement. Kugler distributed the proceeds from the sale of two properties, but retained an amount equal to the interest abated on the third property. The auditor's ratified report granted Kugler a five percent trustee commission as called for in the deed of trust.

Baltrotsky appealed to the Court of Special Appeals without posting a *supersedeas* bond or other security. That court affirmed the judgment of the Circuit Court in an unreported opinion. The Court of Appeals granted a *writ of certiorari*. 393 Md. 242, 900 A.2d 749 (2006).

Held: Affirmed. The Court of Appeals resolved that Baltrotsky's appeal with respect to the interested abated on two of the properties, the proceeds of which having been distributed, is moot because Baltrotsky failed to post a *supersedeas* bond or other security in order to stay the Circuit Court's judgment as provided in Maryland Rule 8-422(a). Maryland precedent establishes clearly that, without security posted, the Court lacks jurisdiction to entertain an appeal concerning already distributed proceeds. With respect to the remaining property, the Court found that the abatement of interest was not an abuse of discretion by the Circuit Court. Petitioner's persistent litigation, which caused delays in achieving settlement, justified, under common law equitable principles, the abatement of interest for conduct outside the control of the foreclosure purchasers. *Donald v. Chaney*, 302 Md. 465, 477, 488 A.2d 971, 977 (1985). Finally, the five percent commission allotted to the trustee under the deed of trust is not an illegal penalty or unenforceable liquidated damage provision. The Court rejected Baltrotsky's argument that the trustee's commission was akin to the illegal penalty struck down in *United Cable Television of Baltimore Ltd. P'ship v. Burch*, 354 Md. 658, 732 A.2d 887 (1999). In *Burch*, the five dollar late fee charged by the cable provider on delinquent residential accounts was invalidated as being in excess of the actual damages caused by late payments. 354 Md. at 685, 732 A.2d at 901-02. No apt analogy may

be drawn between the illegal late fee and a trustee's commission because the commission is not an assessment of damages, but rather compensation for services rendered. Trustee's commissions regularly have been permitted in Maryland for over a century and, according to a treatise cited in *Bunna v. Kuta*, 109 Md. App. 53, 67 n.1, 674 A.2d 26, 33 n.1 (1996), the five percent commission in this case seems to be the traditional rate in Maryland. Further, § 14-103(a)(1) of the Estates and Trusts Article of the Maryland Code, which invests discretion in the trial judge to adjust trustee's commissions as appropriate, implicitly validates trustee commissions. Unless special circumstances exist, of which none were found here, the rule in Maryland is to defer to the commission rate specified by the parties in the deed of trust.

Martin Baltrotsky v. Mark Kugler, Trustee, No. 18, September Term 2006, filed 13 November 2006. Opinion by Harrell, J.

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TORTS - WRONGFUL DEATH STATUTE - THE DISCOVERY RULE APPLIES TO CASES INVOLVING OCCUPATIONAL DISEASES EVEN THOUGH THE TIME PERIOD PRESCRIBED UNDER MD. CODE (1974, 2002 REPL. VOL.), §3-904(G)(2) IS A CONDITION PRECEDENT TO LIABILITY.

Facts: Mr. Benjamin, the decedent, was employed as a laborer and carpenter while (1) in the United States Navy from 1943 to 1945, (2) working for the L.H. Benjamin Co. from 1946 to 1961, and (3) working for the R.L. Benjamin Lumber Co. from 1961 to 1971. The decedent was exposed to asbestos-containing products at various times throughout his employment, including while working for the Benjamin companies, which stocked and sold several products containing asbestos. The decedent was diagnosed with mesothelioma in early 1997, and he died on May 25, 1997. The death certificate indicated that the cause of death was "cancer (metastatic mesothelioma)." Respondents (Mrs. Elise Benjamin and children Carol Jeffers and Robert L. Benjamin, II) discovered the nexus between the asbestos exposure and the cancer in late 2001, early 2002 after

decedent's daughter read an article that stated that a high percentage of mesothelioma cases were caused by asbestos exposure.

On March 20, 2003, in the Circuit Court for Baltimore City, Mrs. Benjamin filed a survival action against various defendants, including Georgia Pacific Corporation ("GP") and Union Carbide Corporation ("UC"). In the same complaint, Mrs. Benjamin and Mr. Benjamin's two surviving children filed a wrongful death action against the same defendants. Both UC and GP moved for summary judgment on the ground that both actions were barred by limitations. As to both motions, the trial court granted summary judgment, holding that respondents were on inquiry notice in 1997 when Mr. Benjamin was diagnosed with mesothelioma and was aware of his exposure to asbestos.

On June 21, 2004, only Mrs. Benjamin, in her individual capacity and as personal representative for Mr. Benjamin, appealed to the Court of Special Appeals. On May 3, 2005, the Court of Special Appeals filed its opinion, in which it affirmed in part and reversed in part the trial court's judgment. In affirming the trial court's judgment, the intermediate appellate court held that Mrs. Benjamin's survival action was barred by limitations. The court reversed as to the wrongful death action. It held that, as to that action, the evidence was insufficient, as a matter of law, to constitute inquiry notice. We granted the petitions for *certiorari* filed by GP, UC, and Mrs. Benjamin.

Held: In a wrongful death action, if the decedent does not have knowledge sufficient to satisfy the discovery rule, the beneficiaries are the determinative parties. The cause of action does not accrue until the beneficiaries are on inquiry notice. Specifically, in cases involving workplace exposure to toxic substances, (asbestos) a claimant, including a wrongful death claimant, is on inquiry notice of the causation element of a cause of action to recover injuries resulting from an "occupational disease," (mesothelioma) when the claimant has knowledge that (1) the person whose injury forms the basis for the claim has been diagnosed with mesothelioma, and (2) the injured person was exposed to asbestos in the workplace. Further, we hold that in a survival action, if the decedent's knowledge is sufficient to satisfy the discovery rule, the decedent's knowledge is enough to trigger the running of the limitations period for the survival action.

Before determining whether the commencement date for the cause of action for a wrongful death under § 3-904(g) is the time of decedent's death or the time when the beneficiaries became aware of the causal link between the decedent's illness and his exposure to a toxic substance, we must determine whether § 3-904(g)(2), stating

that when an occupational disease was the cause of death, an action "shall be filed within 10 years of the time of death; or within 3 years of the date when the cause of death was discovered, whichever is shorter" is a condition precedent to maintaining a cause of action or a statute of limitations *per se*.

Historically, § 3-904(g)(2) has been construed as a condition precedent. Had the Legislature intended to change that language so that the time constraints were statutes of limitations rather than conditions precedent, it would have done so in an unmistakable way. Thus, the limitations are a condition precedent.

The next matter is the meaning of the phrase "when the cause of death was discovered." The traditional Maryland discovery rule was incorporated in 3-904(g)(2) by the plain language of the phrase "when the cause of death was discovered," even though 3-904(g)(2) is a condition precedent. This means that the person maintaining a claim for wrongful death has a duty to discover the wrongful act (asbestos exposure) and the antecedent disease leading to the decedent's death (mesothelioma). For purposes of the discovery rule, the knowledge necessary to trigger the running of the limitations period is actual knowledge or "inquiry notice." Constructive knowledge is insufficient to trigger the running of the limitations period.

Applying the discovery rule, a person bringing a wrongful death action under § 3-904(g)(2) has ten years from the time of the decedent's death to bring an action, or three years from the time the claimant(s) discover or should have discovered that an "occupational disease" contributed to or caused the decedent's death.

Sufficient evidence existed to generate a genuine dispute as to the material facts. The evidence submitted was that Mrs. Benjamin, Carol Jeffers, and Robert Benjamin, III, were on inquiry notice for the first time in 2001 when Carol Jeffers discovered the connection between asbestos exposure and mesothelioma. Mrs. Benjamin's knowledge of her husband's cancer diagnosis and the asbestos exposure are matters in dispute and are not subject to resolution by summary judgment. Thus, the Court affirmed the Court of Special Appeals' holding that the trial court erred when it granted the petitioner's motion for summary judgment on the wrongful death action.

As to the survival statute, Maryland has applied both the discovery rule and the statute of limitations to survival claims for close to a century. Mr. Benjamin's express knowledge of his exposure to asbestos products, coupled with his express knowledge

of his diagnosis of mesothelioma, was sufficient to put him on inquiry notice during his lifetime. The decedent's cause of action for personal injuries accrued in 1997, during his lifetime, when he was placed on inquiry notice. The survival action was not filed until 2003. The personal representative's cause of action, filed on behalf of Mr. Benjamin, under the survival statute, is barred by limitations because the claim was brought more than three years after the date of accrual. Accordingly, the trial court did not err in granting petitioners' motion for summary judgment concerning the survival action.

Georgia-Pacific Corporation, et al. v. Elsie L. Benjamin, No. 42, September Term 2005, filed August 2, 2006, Opinion by Greene, J.

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COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - RETROACTIVE VERSUS PROSPECTIVE APPLICATION OF LAW - BECAUSE THE ANIMAL CONTROL LAW CONFERS A NEW SUBSTANTIVE RIGHT TO POSSESS WILD AND EXOTIC ANIMALS TO BE HOUSED AT FACILITIES THAT ARE DESIGNATED AS ANIMAL SANCTUARIES, THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE LAW SHOULD BE APPLIED PROSPECTIVELY AND THAT THE CASE SHOULD NOT BE REMANDED TO THE BOARD OF APPEALS FOR CONSIDERATION UNDER THE CURRENT ANIMAL CONTROL LAW.

Facts: Appellants, Colleen Layton and Scott Robbins, operated a wildlife refuge and sanctuary (Frisky's Wildlife and Primate Sanctuary, Inc.). It functions as an animal rehabilitation center and primate sanctuary, whose activities include care and rehabilitation of wildlife that have been injured or orphaned; and, primates that come from laboratories, sanctuaries. Appellants were issued a notice for violating a zoning regulation by operating a charitable and philanthropic institution without a special exception by the Howard County Department of Planning and Zoning. Appellants petitioned for a Special Exception for a Charitable and Philanthropic Institution for an existing wildlife rehabilitation center and primate sanctuary and were granted permission to operate as an animal rehabilitation center on the property, but the request for an exception to operate a primate or other wildlife sanctuary was denied. This action allowed appellants to qualify and obtain an exhibitor's permit. The matter proceeded to the Board of Appeals, which was concerned whether the acquisition of the exhibitor's permit would, in effect, change the nature of appellants' requests from that of a sanctuary. Appellant obtained a license to comply with the provision of the Howard County Code, allowing them to exhibit animals at the Center. During the course of the hearings, the board determined that appellant's primary function was a sanctuary and rehabilitation center for animals, rather than a facility for displaying animals as an exhibitor. Appellants failed to provide sufficient evidence, thus the exemption for exhibits in the Howard County Code does not apply. Appellants did not request approval as a wildlife or exotic animal exhibitor. Appellants appealed, contending that this Court must remand the case to the Howard County Board of Appeals with instructions to apply the animal control law passed four months after the Board of Appeals rendered its decision in this case.

Held: Affirmed. Although the current animal control law became effective four months after the decision, there was no reason to digress from the general rule that statutes are presumed to operate prospectively. The animal control law is not remedial

or a zoning law, but a new substantive right to possess wild and exotic animals for facilities that are designated as animal sanctuaries. Whether it should be applied retrospectively is not properly based upon the rationale relied upon in *Mandel* and *Holland*. Thus, the circuit court did not err by refusing to remand the case to the Board for consideration under the current animal control law. The Board's decision relied upon the evidence. Appellants failed to present sufficient evidence to convince the Board that they qualified as an animal exhibitor. The Court will not to substitute its judgment for that of the Board.

Colleen L. Layton et al. v. Howard County Board of Appeals, No. 1715, September Term, 2005, decided October 2, 2006. Opinion by Davis, J.

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CRIMINAL LAW - RAPE - JURY INSTRUCTIONS - COURT'S RESPONSE TO JURY QUESTION REGARDING WHETHER PRIOR CONSENT VITIATES CRIMINAL CHARACTER OF POST PENETRATION WITHDRAWAL OF CONSENT; *BATTLE V. STATE*, 287 MD. 675 (1980) - QUESTION POSED BY JURY, "IF A FEMALE CONSENTS TO SEX INITIALLY AND, DURING THE COURSE OF THE SEX ACT TO WHICH SHE CONSENTED, FOR WHATEVER REASON, SHE CHANGES HER MIND AND THE . . . MAN CONTINUES UNTIL CLIMAX, DOES THE RESULT CONSTITUTE RAPE?" WAS NOT AMBIGUOUS AND THUS REQUIRED A SPECIFIC ANSWER AND, NOTWITHSTANDING WEIGHT OF AUTHORITY TO THE CONTRARY, SHOULD HAVE BEEN ANSWERED IN THE NEGATIVE UNDER THE COMMON LAW, ADOPTED BY MARYLAND, AND CONTINUES TO BE THE LAW OF THE STATE, UNTIL AND UNLESS MODIFIED BY THE GENERAL ASSEMBLY OR THE MARYLAND COURT OF APPEALS.

Facts: Complainant, an 18-year-old college student, agreed to drive 16-year-old appellant and his friend to a party. After discovering there was no party, complainant drove appellant, her girlfriend and a male friend of appellant to a secluded area, where appellant asked the women to get a hotel room, exhibited three condoms and the two boys smoked marijuana and discussed sex. Apparently displeased with the tenor of the conversation, the

complainant's girlfriend asked to be dropped off at the McDonald's restaurant. The two boys then asked the complainant to drive to a secluded area where she agreed to park her car on the street. After the complainant agreed to join the two boys in the backseat of complainant's car, appellant asked her, "Can I hit it?" (Meaning, can we have sex?) The complainant consented, stating, "Yes, as long as you stop when I tell you to." When appellant had difficulty inserting his penis, he ceased trying five to ten seconds after she told him to stop, according to her testimony. During deliberations, the jury sent a note to the trial judge which read, "If a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the . . . man continues until climax, does the result constitute rape?" The court concluded that the question was ambiguous and told the jury to re-read the instructions as to each element and apply the law to the facts as you find them to be. Appellant was subsequently convicted of first-degree rape.

Held: Reversed. Holding: The jury's question was not ambiguous as the jury simply wanted to know if it should return a verdict of guilty of rape if the complainant changed her mind, "during the sex act" after initially, giving her consent. The ambiguity of the question asked in *Battle* was not present in this case; there was, therefore, an obligation on the part of the court to answer the question. Under the common law, adopted by Maryland, the crime of rape was defined by the act of penetration. Thus, once there was penetration, coupled with consent, any continued coitus against the will of the woman after withdrawal of consent constituted a battery, *i.e.*, common-law assault, but consent prior to penetration vitiated the criminal character of the sex act where there was post-penetration withdrawal of consent. The trial court therefore erred in not instructing the jury that the answer to the question was no rape occurred, assuming the jury's factual premise, in this case if it found that the complainant changed her mind and withdrew her consent after consenting prior to penetration.

Maouloud Baby v. State of Maryland, No. 225, September Term, 2005, filed October 30, 2006. Opinion by Davis, J.

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TAX SALES - FORECLOSURE OF RIGHT OF REDEMPTION - SUBJECT MATTER JURISDICTION - MOTION TO ALTER OR AMEND ENROLLED JUDGMENT.

Facts: The City of Baltimore, the appellee, acquired title to several properties through condemnation proceedings in September of 2003. Six months later, the City held its annual Tax Sale and listed one of the properties for sale. Taxi, LLC, the appellant, purchased the property at the Tax Sale. The purchase price was equal to the amount of taxes due and owing on the property at the time of the condemnation proceedings according to the tax certificate. Taxi subsequently filed a complaint to foreclose the City's right of redemption in the property. The City did not respond to the complaint. The City's right of redemption was foreclosed by judgment of the Circuit Court for Baltimore City in March of 2005.

In July of 2005, the City filed a motion to vacate judgment pursuant to Md. Code, section 14-845 of the Tax Property Article, alleging that the tax sale was void *ab initio* since the taxes already had been disposed of prior to the sale, thus rendering the tax certificate invalid and depriving the circuit court of subject matter jurisdiction to issue the judgment. The City attached an affidavit by an attorney in the City Solicitor's office attesting that all taxes on the property had been paid prior to the tax sale. The circuit court granted the City's motion and ordered the City to repay Taxi the sum paid at the tax sale, without interest, costs, or attorneys' fees.

Held: Reversed. The Court committed legal error by vacating the judgment of foreclosure of right of redemption because lack of subject matter jurisdiction was not proved. Absent clear and convincing evidence to the contrary, the certificate of tax sale was presumptive evidence of the statement in the certificate that unpaid taxes remained. An enrolled judgment of foreclosure of right of redemption may be vacated for fraud or lack of subject matter jurisdiction. No fraud was alleged in this case. Furthermore, the City did not prove by clear and convincing evidence that the property taxes had been paid prior to the tax sale. The only evidence submitted by the City was an affidavit by a lawyer involved in the condemnation proceeding attesting that the taxes had been "disposed of". No proof was offered of any critical first-level facts: when the taxes were assessed, when they were paid, how and by whom they were paid. The City's vague and conclusory evidence was legally insufficient to prove by clear and convincing evidence that the taxes had been paid prior to the tax sale.

Taxi, LLC v. Mayor and City Council of Baltimore, No. 2023, Sept. Term 2005, filed October 31, 2006. Opinion by Eyler, Deborah S., J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated October 31, 2006, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

CHRISTOPHER K. VARES

*

By an Order of the Court of Appeals of Maryland dated November 6, 2006, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

PARIS A. ARTIS

*

By an Opinion and Order of the Court of Appeals of Maryland dated November 6, 2006, the following attorney has been disbarred from the further practice of law in this State:

ANDREW M. STEINBERG

*

By a Per Curiam Order of the Court of Appeals of Maryland dated November 13, 2006, the following attorney has been indefinitely suspended, effective immediately, from the further practice of law in this State:

MARIE ELENA KLARMAN

*

By an Opinion and Order of the Court of Appeals of Maryland dated November 20, 2006, the following attorney has been indefinitely suspended from the further practice of law in this State:

BARRY E. SWEITZER

*