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Facts: Early in the morning of May 16, 2004, Steven W. Weller, respondent, was stopped by a police officer upon being observed driving over a set of double yellow lines. The officer detected a strong odor of alcohol on respondent's breath, bloodshot and watery eyes, and respondent admitted that he had consumed six beers. Respondent failed the field sobriety tests that were administered and the results of a preliminary breath test (PBT) suggested that he had a blood alcohol concentration of 0.16.

As a result of this information, the officer arrested respondent for driving under the influence of alcohol pursuant to Md. Code. (1977, 2002 Repl. Vol.), § 21-902 of the Transportation Article. The officer then requested that respondent submit to the chemical breath test authorized under § 16-205.1 of the Transportation Article to determine his blood alcohol concentration. Prior to respondent's decision, the officer advised him of the administrative sanctions he would face if he refused to take the breath test for a first or subsequent time. Respondent refused to take the test and acknowledged his refusal in writing by signing a DR-15 ("Advice of Rights") form. Pursuant to § 16-205.1 of the Transportation Article, Officer Schuster then issued respondent an Order of Suspension.

Pursuant to his rights under § 16-205.1(b)(3)(v)(1), respondent requested an administrative "hearing to show cause why [respondent's] driver's license should not be suspended concerning the refusal to take the [chemical breath] test." On June 28, 2004, a hearing was conducted in front of an ALJ at the Office of Administrative Hearings representing the Motor Vehicle

Administration ("Administration"). Respondent eight years earlier had refused such a test and was therefore facing a possible one-year suspension pursuant to § 16-205.1(b)(1)(i)(2)(B). The Administration presented several documents at the hearing which were admitted into evidence by the ALJ, including a DR-15A "Officer Certification and Order of Suspension" and the respondent-signed DR-15 "Advice of Rights" form acknowledging respondent's refusal to take the chemical breath test. Respondent did not object to the introduction into evidence of any of the Administration's documents, including the DR-15 officer certification that contained the respondent's PBT result.

At the conclusion of the hearing, respondent asked the ALJ to exercise her discretion and not suspend his driver's license for the full one-year period mandated by § 16-205.1(b)(1)(i)(2)(B) for repeat offenders. Respondent asked that the ALJ grant him the opportunity to use his company vehicle without restriction, because the ignition interlock could not be installed on that vehicle, and that he be allowed to use his personal vehicle with an ignition interlock. The ALJ declined to recommend respondent's proposed disposition. The Administration then suspended his privilege to drive in Maryland for one-year as provided for in § 16-205.1(b)(1)(i)(2)(B).

Respondent sought judicial review of the Administration's decision in the Circuit Court for Carroll County and that court held a hearing on January 14, 2005. On February 16, 2005, the Circuit Court issued an Order reversing the decision of the Administration and vacating the one-year suspension of respondent's Maryland driving privileges.

The Administration then filed a Petition for Writ of Certiorari to this Court and on June 9, 2005, this Court granted certiorari. *Motor Vehicle Administration v. Weller*, 387 Md. 462, 875 A.2d 767 (2005).

Held: Reversed. The Circuit Court for Carroll County was incorrect in its interpretation of § 16-205.2(c) of the Transportation Article; preliminary breath test results are admissible in administrative hearings as such hearings are not "court actions" or "civil actions." The Circuit Court also improperly substituted its judgement for that of the ALJ when it reversed and vacated the agency's decision.

Motor Vehicle Administration v. Steven W. Weller, September Term, 2005, filed December 12, 2005. Opinion by Cathell, J.

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CONSTITUTIONAL LAW - DECLARATION OF RIGHTS - ARTICLE 14 - ARTICLE 8 - POWER OF STATE TO SET RATE OF TAX OR CHARGE - CONSUMER PROTECTION ACT - MARYLAND TORT CLAIMS ACT – REGARDING A MONETARY COMMISSION REMITTED TO THE STATE BY STATE-SELECTED VENDORS OF COLLECT TELEPHONE CALL SERVICE UTILIZED BY INMATES IN STATE CORRECTIONAL FACILITIES, WHERE THE COMMISSION IS AUTHORIZED BY STATUTE, BUT THE AMOUNT IS NEGOTIATED BY AN EXECUTIVE BRANCH AGENCY, ARTICLES 14 AND 8 OF THE DECLARATION OF RIGHTS AND THE CONSUMER PROTECTION ACT ARE NOT VIOLATED

Facts: Sandra Benson and Mary Ann Dean received and accepted non-emergency telephone calls, on a collect call basis, from inmate relatives and paid the resulting bills calculated according to the rate structure contracted for between the State and the vendors. The State Department of Budget and Management ("DBM"), with the approval of the Board of Public Works, contracted with two private companies to install, maintain, and service telephones and monitoring equipment in the State's correctional facilities. The customer rates for these calls are set under the contract. The telephone companies collected the charges from the parties receiving and accepting the calls, and then remitted a commission to the State (a fixed percentage of the total telephone fees charged per call) as provided by § 10-503 of the Correctional Services Article. The State used the commissions to finance a Welfare Inmate Fund ("Fund") in each Maryland correctional facility as sanctioned by §§ 10-502, 503, and 504.

On 25 October 2001, Benson, purporting to act on behalf of herself and others similarly situated, sent a letter by certified mail to the State Treasurer, pursuant to the Maryland Tort Claims Act ("MTCA"), complaining about the contract and fee mandated as a telephone commission. She sought compensatory damages, punitive damages, and attorneys' fees. Dean sent a similar letter to the Treasurer regarding her similar claims.

When the relief Benson sought was not forthcoming immediately, she filed a Class Action Complaint in the Circuit Court for Baltimore City a month later. She alleged that the telephone commission remitted to the State was illegal under several causes of action, as both direct causes of action and actions filed under the MTCA. The various theories of recovery that were preserved for appellate review were based on asserted violations of: the Maryland Declaration of Rights, Articles 8 (separation of powers) and 14 ("That no aid, charge, tax, burthen or fees ought to be rated or levied, under any pretense, without the consent of the Legislature."); Maryland Consumer Protection Act; unjust enrichment; and common law action for money had and received. For each count, Benson sought both prospective injunctive relief to enjoin the State from charging and collecting the telephone

commission, as well as damages for herself and each class member. Dean also filed her virtually identical Class Action Complaint in the Circuit Court for Baltimore City.

The Circuit Court dismissed Benson's and Dean's claims in a single order entered on 25 June 2004. The court dismissed Benson's tort-based claims for non-compliance with the requirements of the MTCA and dismissed Benson's Consumer Protection Act ("CPA") claim. The court dismissed all of Dean's claims as well for non-compliance with the MTCA's notice provisions and because she failed to allege in her complaint any facts supporting her claimed monetary injury. Benson and Dean filed a joint motion to Alter or Amend Judgment seeking to add several allegations to their complaints. The Circuit Court denied the post-judgment motions. The Court of Appeals issued a writ of certiorari before the Court of Special Appeals could decide the resultant appeals, 384 Md. 448, 863 A.2d 997 (2004).

Held: Affirmed. The Court held that the imposition of the telephone commission did not violate Articles 14 or 8 of the Declaration of Rights because the Legislature consented to the charge and delegated properly authority to the DBM to set the amount of the charge. The Court also held that the CPA does not regulate the State's conduct in this matter, thus, the telephone commission did not violate the CPA.

First, the Court concluded that a private right of action for violation of Article 14 may lie because it is a self-executing provision because if an action is taken in contravention of Article 14, then the action is voidable by the court; no further legislative action is required to effectuate Article 14; and its provisions are not merely a statement of principles, but are a directive capable of execution. Next, the Court held that an action for damages under Article 14 may not lie for its violation after applying common law tort analysis and declined to create judicially a monetary damages remedy for its alleged violation, noting that an asserted violation of Article 14 is best corrected by declaratory or injunctive relief because Article 14 does not secure or proclaim an individual right. Disagreeing with the Circuit Court, the Court accordingly held that a claim for violation of Article 14 is not subject to the requirements of the MTCA because such a claim is not compensable in monetary damages.

Thereafter, the Court construed the meaning of Article 14 and determined its scope, holding that Appellants did not sufficiently plead a violation of the Article. The Court determined that the telephone commission provided for in § 10-503 of the Correctional Services Article fit under the general terms "charge" and "fee." The Court determined also that Article 14 does not require the

Legislature to set the amount of charges imposed by it. Article 14 requires by its plain terms that the Legislature *consent* to the imposition of a governmental charge before the charge may be rated or levied by a body to which the power of setting the amount of the charge or fee has been delegated by the Legislature. In the present case, the Court determined that the Legislature consented to the imposition of the telephone commission because it enacted §§ 10-502 and 10-503, which set up the Fund and financed it by the "profits derived" from "telephone and vending machine commissions." § 10-503(a)(2)(i)(1).

Moreover, the Court held, § 10-503 does not violate Article 8 of the Declaration of Rights because the power to set fees and charges may be delegated to Executive Branch bodies and administrative agencies. After interpreting the meaning of the language of Article 8 and reviewing prior case law, the Court concluded that the Legislature delegated properly the power to set the amount of the telephone commission to the DBM because § 10-503 created a "commission," but did not set an amount and § 3-702 of the State Finance and Procurement Article granted broad authority to personnel of the DBM to procure telephone services for State government. Also, the Court decided that the absence in § 10-503 of direction for fixing the amount of the telephone commission did not violate separation of powers principles because the Legislature may change the agency-established fee schedule at anytime, thus providing the necessary legislative check on the Executive.

The Court held that the telephone commission did not violate the CPA because the CPA does not regulate the State's conduct. After reviewing the Legislature's chosen language and applying established principles of statutory construction, the Court determined that the Legislature did not contemplate the State as a "person" within the coverage of the proscribed activities described in the CPA.

The Court also affirmed the Circuit Court's dismissal of the common law counts of unjust enrichment and money had and received because the Court found no wrongful conduct upon which Appellants could rely to support their claims. Finally, the Court concluded that the Circuit Court did not abuse its discretion by denying Appellants' post-judgment motions seeking to amend their complaints for a fifth time.

Benson v. State, No. 7, September Term, 2005, filed December 7, 2005. Opinion by Harrell, J.

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CRIMINAL LAW - CONSTITUTIONAL LAW - DUE PROCESS - INDIGENT DEFENDANT - *AKE v. OKLAHOMA*, 470 U.S. 68 (1985) - EXPERT WITNESS - OFFICE OF THE PUBLIC DEFENDER

Facts: Petitioner Frederick James Moore was convicted by a jury in the Circuit Court for Howard County of first degree murder. The State conducted DNA analysis on the evidence found at the crime scene, and the test implicated Moore. Moore filed a motion in the Circuit Court requesting that the State provide a DNA expert, at State expense. The Circuit Court denied Moore's motion, holding that the Office of the Public Defender was not required to pay for a defense expert when a defendant is represented by private counsel. Moore noted a timely appeal to the Court of Special Appeals, which affirmed. The Court of Appeals granted certiorari primarily to determine whether the U.S. and Maryland Constitutions and State statutory law require the State to provide public funding for expert assistance for a defendant who has retained private counsel.

Held: Affirmed. Md. Code (1957, 2003 Repl. Vol., 2004 Cum. Supp.), Article 27A, which governs the duties of the Public Defender and establishes the Office of the Public Defender, makes available to indigent defendants legal representation and ancillary services, which are not severable. Because the funding for expert assistance was available to Moore had he been represented by O.P.D., the State satisfied the requirements of *Ake v. Oklahoma*, 470 U.S. 68 (1985.

Ake was a capital case, and the expert assistance at issue was that of a psychiatrist. The Court made clear that the due process requirements set out in *Ake* apply beyond the context of capital cases and that the right to expert assistance extends beyond the insanity context and to non-psychiatric experts. The Court further pointed out that due process and equal protection require the State to provide non-psychiatric experts to indigent defendants when the defendant makes a particularized showing of the need for assistance of such experts. The Court adopted the test that seems to have been adopted by the majority of courts considering the issue: that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. In addition, upon request of the defendant, the trial court must permit the defendant to make the requisite showing in an ex parte proceeding, reasoning that the defendant seeking state funded experts should not be required to

disclose to the State the theory of the defense when non-indigent defendants are not required to do so.

Frederick James Moore v. Maryland, No. 38, September Term, 2004, filed December 14, 2005. Opinion by Raker, J.

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CRIMINAL LAW - SENTENCING - PENALTIES

Facts: Appellee Stanley was convicted of possession of a firearm after having been convicted of a crime of violence under Maryland Code § 449 (e). The crime of violence he had been convicted of was second degree assault under § 441 (e), which was not a felony. He was sentenced to five years imprisonment without parole. Appellee contended his sentence was illegal, arguing that the language of § 449 (e) not only required a crime of violence but also proof of a felony as two separate prerequisites. The Court of Special Appeals rejected this argument, despite recognizing that as an enhanced penalty statute, § 449 (e) must be construed strictly.

Held: It is a well settled canon of statutory construction when interpreting a statute, effect should be given to all of the language and a construction that renders any portion superfluous should be avoided. Section 449 (e) of Maryland Code Art. 27A is clear and unambiguous. By its clear and explicit terms, to be subject to the enhanced penalty it prescribes, a person must be "in illegal possession of a firearm as defined in § 445 (d) (i) and (ii)," and been convicted previously of a crime of violence as defined in § 441 (e) or been convicted of certain enumerated drug-related offenses.

The definition of the illegal possession targeted for purposes of this statute consists of two elements, both of which must be met; it is not sufficient if only one is present. Since the definition includes a crime of violence and any violation classified as a felony in Maryland, a conviction of both, not just one, must be established. It is not enough that the person be convicted of a crime of violence under § 441 (e). On the contrary,

unless the illegal possession of the firearm is established by proof of a violation classified as a felony, the establishment of the crime of violence under § 441 (e) could not trigger the enhanced punishment.

Stanley v. State, No. 80, September Term, 2004, filed December 13, 2005. Opinion by Bell, C.J.

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EVIDENCE - HEARSAY - DEFINITION OF "STATEMENT" FOR HEARSAY RULE

Facts: Michael Joseph Bernadyn was tried by a jury in the Circuit Court for Harford County on charges of possession of marijuana, possession with intent to distribute, and maintaining a common nuisance. According to police, surveillance of 2024 Morgan Street, Edgewood, MD, in August 2001 revealed that many people were coming and going from 2024 Morgan Street and conducting in-person drug transactions outside it. A police officer testified at trial that Bernadyn was one of the persons coming and going from 2024 Morgan Street while it was under surveillance. The police obtained and executed a search warrant for 2024 Morgan Street. Police discovered Bernadyn in the residence, along with a marijuana pipe, marijuana stems and seeds, and a medical bill that read "Responsible party: Michael Bernadyn, Jr., 2024 Morgan Street, Edgewood, Maryland 21040."

The State offered the medical bill into evidence at Bernadyn's trial over defense objection. The trial court overruled the defense objection without explanation, and without asking the State to articulate the purpose for which the medical bill was offered. In its closing and rebuttal arguments, the State argued that the bill showed that Bernadyn lived at 2024 Morgan Street.

The jury convicted Bernadyn on all counts. Bernadyn noted a timely appeal to the Court of Special Appeals, which upheld his convictions. The Court of Appeals then granted Bernadyn's petition for a writ of certiorari.

Held: Reversed. In reliance on its holding in the contemporaneously filed case of Stoddard v. State, the Court held that the bill was hearsay when offered to show that Bernadyn lived at 2024 Morgan Street. In Stoddard, the Court held that assertions implied from the spoken or written words of a declarant are "statements" under Md. Rule 5-801(a), regardless of whether the declarant intended the implied assertion. The bill asserted implicitly that Bernadyn lived at 2024 Morgan Street. Thus, following Stoddard, the billing address was hearsay, as the State offered it to establish the truth of its implicit assertion that Bernadyn lived at 2024 Morgan Street.

Because the billing address was hearsay, not established at trial as an exception to the hearsay rule, the trial court erred in admitting it into evidence. Particularly, it was not subject to the business records exception, as the State presented no evidence at trial to establish the foundational requirements for application of the business record exception.

Michael Joseph Bernadyn v. State of Maryland, No. 91, September Term, 2003, filed December 8, 2005. Opinion by Raker, J.

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EVIDENCE - HEARSAY - DEFINITION OF "STATEMENT" FOR HEARSAY RULE

Facts: Erik Stoddard was convicted by a jury in the Circuit Court for Baltimore City of second degree murder and child abuse resulting in the death of three-year-old Calen DiRubbo. The court sentenced Stoddard to thirty years for each offense, to be served consecutively.

Stoddard, along with five other adults, had access to Calen during the time when the fatal blow could have been delivered. Jasmine Pritchett, Calen's cousin, was staying in the same house as Calen during this period. At trial, Jasmine's mother, Jennifer Pritchett, testified over defense objection that Jasmine had later

asked her "is Erik was going to get her."

Stoddard noted a timely appeal to the Court of Special Appeals. Before that court, Stoddard argued that his convictions should be reversed because Jasmine's question was erroneously admitted. He argued that her question was offered for the truth of a matter it asserted by implication, namely that Jasmine was afraid of Stoddard because she had seen him attack Calen, and hence should have been excluded as inadmissable hearsay. The court rejected this argument, and affirmed Stoddard's convictions. The Court of Appeals then granted Stoddard's petition for a writ of certiorari.

Held: Reversed. The implication of Jasmine's question was a "statement" for purposes of the hearsay rule, regardless of whether she intended it as such, and was not subject to any exception to the rule excluding hearsay from evidence. The Court reaffirmed the vitality under the Maryland Rules of Evidence of the common law approach to assertions implied from words. Md. Rule 5-801(a) provides the definition of "statement" for purposes of the hearsay rule, defining it as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." "Assertion" is not defined in either the Maryland Rules or the Committee note to the Rule 5-801.

Finding no definitive guidance in the text of the Maryland Rules or the Committee Note, the Court examined the policy rationale underlying the hearsay rule in general and its application to the issues raised by implied assertions. The Court first noted that the traditional rationale for excluding hearsay from evidence is that a hearsay declarant's out-of-court statement is untested as to sincerity, narration, perception, and memory. The Court then reasoned that all four of these dangers presented by hearsay statements are still present for assertions unintentionally implied by words spoken or written out-of-court by the declarant, and thus concluded that the implied assertion doctrine as it relates to assertions implied from words should be retained under the Maryland Rules.

The Court rejected the approach of the advisory committee note to the Federal Rules of Evidence and the courts that have followed it. This approach treats implied assertions as "statements" for purposes of the hearsay rule only if the declarant intends to assert the implied statement by uttering the underlying statement. The advocates of this approach claim that unintended implications of words are more reliable than intended implications, because the lack of intent to assert the implied statement lessens the sincerity concerns associated with the statement. The Court

rejected this rationale, noting that sincerity concerns are still present because the words from which an assertion is implied may have been insincerely asserted, regardless of whether the declarant intended to assert the statement implied from them.

Having determined that Jasmine's question should have been excluded from evidence, the Court held that the trial court's failure to do so was reversible error. In light of the fact that the State's only other evidence against Stoddard was evidence that he, along with five others, had access to victim at the time of fatal blow, and evidence that he may have previously abused Calen, the Court concluded that the admission of the question was not harmless beyond a reasonable doubt.

Erik Stoddard v. State of Maryland, No. 70, September Term, 2004, filed December 8, 2005. Opinion by Raker, J.

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JUDGMENTS - RES JUDICATA

Facts: The Anne Arundel County Board of Education discharged David Norville from his position as a Media Production Specialist. Norville filed an age discrimination complaint, grounded in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 - 634, with the Equal Employment Opportunity Employment Commission (EEOC) against the Board. After the EEOC advised Norville of his right to sue, Norville sued the Board in the United States District Court for the District of Maryland, alleging six counts: violation of ADEA, violation of Md. Code (1957, 2003 Repl. Vol., 2005 Cum. Supp.) Art. 49B (the Fair Employment Practices Act), unjust enrichment, quantum meruit, wrongful discharge, and intentional infliction of emotional distress. Based on the U.S. Supreme Court's intervening decision in *Kimel v. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000), the District Court dismissed Norville's federal claims with prejudice and his state law claims without prejudice. Then, Norville filed the same six-count action in the Circuit Court for Anne Arundel County. The Circuit Court dismissed the entire action, holding that the Eleventh Amendment, as interpreted by the Supreme Court in *Alden v.*

Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), barred the ADEA action against the Board, a state agency, in state court. The Court of Special Appeals affirmed the Circuit Court's holding that the Board was a state agency entitled to Eleventh Amendment protection, but also held that Md. Code (1973, 2002 Repl. Vol., 2004 Cum. Supp.)Courts and Judicial Proceedings Article, § 5-518(c) waived the Board's sovereign immunity defense to "any claim" of $100,000 or less, including claims brought by individuals under ADEA. *Norville v. Anne Arundel County Bd. of Educ.*, 160 Md. App. 12, 862 A.2d 477 (2003).

The Court of Appeals granted the Board's petition for writ of certiorari to determine whether § 5-518(c) was an effective waiver of the Board's Eleventh Amendment immunity and whether the Court of Special Appeals erred in failing to apply a rule of "strict construction" to the issue of whether § 5-518(c) waived any of the Board's sovereign immunity to suit. The Court also granted Norville's cross petition to determine whether the Board was a state agency for the purposes of sovereign immunity.

Held: Norville's ADEA claim is barred by the res judicata effect of the judgment as to the same claim entered by the United States District Court for the District of Maryland. Norville brought the same claim against the same party in the instant action as was litigated previously in the federal District Court. Norville's ADEA claim based on the theory that § 5-518(c) waives the Board's immunity up to $100,000 is barred also by res judicata principles, because Norville could have raised this alternative theory of liability in the prior federal action, and failed to do so.

The Court of Appeals raised res judicata *sua sponte*, which is in accord with the Supreme Court and other appellate courts that have considered the issue. Barring re-litigation prevents a waste of judicial resources; Norville's ADEA claim was fully adjudicated by a federal court of competent jurisdiction and he is not entitled to a second bite at the apple.

Finally, the Court of Appeals noted that the federal District Court's dismissal of Norville's ADEA claim on Eleventh Amendment immunity grounds was an adjudication on the merits pursuant to Fed. R. Civ. P. 12(b)(6), entitling the judgment to res judicata effect.

Anne Arundel County Board of Education v. David Norville, No. 6, September Term, 2005, filed December 12, 2005. Opinion by Raker, J.

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LIS PENDENS - OPERATION AND EFFECT IN GENERAL - EXTENT OF NOTICE - PERSON FILING A LIS PENDENS BEARS THE BURDEN OF ENSURING THAT THE NOTICE IS FILED PROPERLY

Facts: In 1996, the Circuit Court for Washington County appointed appellee, Roger Schlossberg, and others as receivers in the pending divorce case of Moses Karkenny v. Nahil Karkenny. Pursuant to their appointment, the receivers filed what purported to be notices of *lis pendens* with the clerks of the circuit courts for Montgomery and Prince George's counties. The notices listed property owned by Mr. Karkenny, which was subject to the divorce proceedings. The notices were mis-indexed in the clerk's offices for both counties.

In 1999, Mr. Karkenny executed a deed of trust in favor of World Savings Bank and a promissory note in favor of Greenpoint Mortgage securing both instruments with properties covered by the purported notices of *lis pendens.* In 2002, appellee filed a complaint in the Circuit Court for Washington County, asking for injunctive relief against World Savings Bank and Greenpoint Mortgage, appellants. In its complaint, appellee argued that his filing of the notices was sufficient to provide constructive or actual notice of the *lis pendens*. Appellee, however, later acknowledged that an examination of the respective indexes would not have revealed the existence of the notice of *lis pendens* under the name Moses Karkenny.

The Circuit Court found that the notice was not indexed in the name of Moses Karkenny. It determined, however, that the plain language of Maryland Rule 12-102(b) only required the notices to be filed and that the lending institutions should bear the risk of improperly indexed or non-indexed notices.

On August 2, 2004, the lending institutions noted appeals to the Court of Special Appeals, which consolidated their appeals. The Court of Appeals granted certiorari; *Greenpoint v. Schlossberg*, 385 Md. 511, 869 A.2d 864 (2005).

Held: Reversed. A notice of *lis pendens* is intended to, and does, affect the title to property. Its purpose is to notify any future purchaser of the title to the property that they will take the property subject to the result of pending litigation. Because it affects title to property, the notice of *lis pendens* must be recorded in the "Land Records." As instruments affecting title and recorded in the "Land Records," notices of *lis pendens* are required to be recorded *and indexed.* The party who bears the burden of proper indexing, is the one with the ability to ensure that the

document was indexed correctly, i.e., the person filing it with the clerk's office. As a result, the party who records a judgment or a notice of *lis pendens* in a judgment index or *lis pendens* index has the duty of ensuring that the name entered into the index is spelled correctly and indexed correctly in order to protect the priority of that party's lien or potential lien.

Greenpoint Mortgage Funding, Inc. et al. v. Roger Schlossberg, Receiver World Savings Bank, et al. v. Roger Schlossberg, Receiver, No 144, September Term, 2004, filed December 15, 2005. Opinion by Cathell, J.

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CONSTITUTIONAL LAW - EQUAL PROTECTION CLAUSE - BASES FOR DISCRIMINATION IN GENERAL

Facts: Realty Development Group, Inc. ("RDG") owns three rental properties in College Park. James L. Kane, Jr. manages the properties for RDG. Both RDG and Kane (collectively referred to as petitioners) were cited for violations of the Prince George's County Code as a result of conditions created by the tenants living in those properties. Petitioners appealed the citations to the Prince George's County Board of Appeals, sitting as the Board of Administrative Appeals, arguing that the tenants–not the landlords–should be cited for the violations of the County Code

because the tenants created the conditions and the landlords lack control over the tenants' premises.

The Board of Appeals found that the landlords were properly cited. Petitioners appealed the Board's decision to the Circuit Court for Prince George's County. Petitioners claimed that the plain meaning of the County Code provided that only the person responsible for the violation, meaning the person who caused the violation, could be cited. Furthermore, petitioners argued that, as applied, the County Code violated their due process and equal protection rights. The Circuit Court found that the plain meaning of the statute allowed the County to cite either landlords or tenants. The court also found that the government had a legitimate interest in the health and welfare of its citizens, and the enforcement of the County Code was reasonably related to that interest. The Court of Special Appeals, in an unreported opinion, affirmed the Circuit Court's judgment.

Held: Affirmed. The Prince George's County Code provides that the Fire Department may cite the "owner, operator, occupant, agent or other person responsible for the condition or violation." A plain reading of this ordinance requires that the qualifying clause "responsible for the condition or violation" be applied only to the term "other person." As a result, it is appropriate for the Fire Department to cite the owner/manager, while not citing the tenant. This practice does not violate the petitioners' due process or equal protection rights.

James Kane, Jr. and Realty Development Group, Inc. v. The Board of Appeals of Prince George's County, Sitting as the Board of Administrative Appeals, No 29, September Term, 2005, filed December 12, 2005. Opinion by Cathell, J.

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COURT OF SPECIAL APPEALS

CRIMINAL LAW - SEARCH AND SEIZURE - REASONABLE ARTICULABLE SUSPICION FOR STOP UNDER *TERRY v. OHIO*, 392 U.S. 1 (1968) - REASONABLE SCOPE OF *TERRY* FRISK.

Facts: The appellant, William Sykes, was walking with a friend, Theodore Dargon, on a trail behind an apartment complex when the two men were stopped by the police, pursuant to a broadcast description of two armed robbery suspects. The robbery occurred 16 minutes before the men were stopped. Dispatch gave a height and clothing description of the robbers. The suspects were reported to have fled on foot on a trail behind an apartment complex. An officer familiar with the area knew that the trail emptied onto another trail behind a different apartment complex. The police drove to that apartment complex, anticipating that the robbers would end up at that point. Sykes and Dargon appeared at that apartment complex at the time that it would have taken the robbery suspects to traverse the trails and end up at the same location. Sykes and Dargon were near in height to the suspects; their clothing was not all black as had been broadcast, but some of their clothing was black, and the rest was dark and could have been mistaken for black at night. The two men appeared from behind a dumpster area, and there were no other people in that area. They appeared startled to see the police. The officers stopped the men and performed a patdown search. During the patdown of Sykes, the officer felt what he recognized as "decks" of illegal drugs and recovered them from Sykes's jacket pocket. They were in fact decks of cocaine. The Circuit Court for Baltimore County denied Sykes's motion to suppress the cocaine, finding that the *Terry* stop and frisk were based upon reasonable suspicion that the two men were the armed robbery suspects and that they were armed and dangerous. Thereafter, Sykes was convicted.

Held: Affirmed. The officers were justified, based on these facts, in making the *Terry* stop. The two men closely matched the description of the armed robbery suspects. They also were stopped at a location where the armed robbers would have ended up based upon the broadcast information. The officers had reasonable, articulable suspicion to believe that the two men had committed the armed robbery and were justified in performing the *Terry* frisk. The officers reasonably believed the two men were armed and dangerous based upon their belief that the two men were the armed robbery suspects. The police were not required by federal constitutional law or Maryland statutory law to ask questions of

the men before frisking them for weapons. The officer did not exceed the reasonable scope of a *Terry* frisk. The officer testified that he grabbed and crumbled the outside of Sykes's winter coat pursuant to routine police procedure. When he reached the outside pocket of Sykes's coat, he felt an object that he immediately recognized as a "deck" of illegal drugs. He had not, at that time, finished the frisk or determined that the pocket did not contain a weapon. Under these circumstances, including that Sykes was wearing a winter coat, the method of the search did not exceed what was necessary for the officer to determine whether Sykes was armed, and the search was not a general exploration beyond that required to discover weapons.

Sykes v. State, No. 2818, September Term 2004, filed December 7, 2005. Opinion by Eyler, Deborah S., J.

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EMPLOYMENT - THREE YEAR STATUTE OF LIMITATIONS IN DISCRIMINATIONS SUIT - MONTGOMERY COUNTY CODE, § 27-19; MARYLAND CODE ANNOTATED, ARTICLE 49, § 42 (a); *CHARDON V. FERNANDEZ*, 454 U.S. 6 (1981); *DELAWARE STATE COLLEGE V. RICKS*, 449 U.S. 250 (1980); *TOWSON UNIVERSITY V. CONTE*, 384 MD. 68 (2004); BECAUSE ARTICLE 49 OF THE ANNOTATED CODE OF MARYLAND IS MODELED ON TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, MARYLAND COURTS MAY PROPERLY LOOK TO FEDERAL LAW INTERPRETING TITLE VII IN ANALYZING CLAIMS UNDER ARTICLE 49 B, *POPE-PAYTON V. REALTY MANAGEMENT SERVICES, INC.*, 149 MD. APP. 393 (2003); APPELLANT'S CONTENTION WAS THAT THE STATUTE OF LIMITATIONS BEGAN TO RUN ON HER CLAIM OF DISABILITY DISCRIMINATION PURSUANT TO §27-19 OF THE MONTGOMERY COUNTY CODE ON THE DAY THAT SHE WAS ACTUALLY DISCHARGED, OCTOBER 23, 2001, RATHER THAN ON THE DAY THAT SHE WAS NOTIFIED OF HER PROSPECTIVE DISCHARGE, OCTOBER 9, 2001; IN DETERMINING THE POINT IN TIME WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN, TRIAL COURT PROPERLY RULED THAT THE PROPER FOCUS IS ON THE TIME OF THE DISCRIMINATORY ACT, *I.E*, AT THE TIME OF NOTIFICATION THAT APPELLANT WOULD BE DISCHARGED, NOT THE POINT AT WHICH THE *CONSEQUENCES* OF THE UNLAWFUL ACT ARE ACTUALIZED, *I.E.*, AT THE TIME OF TERMINATION OF APPELLANT'S EMPLOYMENT.

Facts: Appellant began working for appellee in October of 1998. In April of 2000, appellee created a new business area and a new department within that business area. Around that time, appellant was transferred to the new business area and began working under a new supervisor. Prior to her transfer, appellant was diagnosed with Attention Deficit Hyperactivity Disorder. Also, prior to her transfer, appellant's current supervisor informed her new supervisor of appellant's disorder. Shortly after her transfer to the new department, appellant's supervisor began making negative comments to her about her work and, in June of 2001, appellant was placed on a performance improvement plan. In April of 2001, appellant was informed that her job was being transferred to yet another department. Appellant was given the opportunity to apply for the job, but was not hired in the position. In the later part of June of 2001, appellant received an assessment, which rated her as only a marginal contributor to the organization. On September 24, 2001, appellant was removed from the performance improvement plan and, by letter dated October 9, 2001, she was informed that her current position was being eliminated due to a "reduction in force," effective October 23, 2001. On October 23, 2001, appellant was terminated. Appellant filed suit claiming she was discharged in violation of Montgomery County Code § 27-19. After completing discovery in the case, appellee filed a motion for summary judgment claiming the statute of limitations period had expired and appellant's claims were time barred. Appellee's motion for summary judgment was granted and appellant appealed the judgment.

Held: Affirmed. The statute of limitations, in a claim for discriminatory discharge under the Montgomery County Code, begins from the moment notice of the termination is received. The proper focus is on the discriminatory act itself, not the moment when the consequences of the unlawful act are realized.

Suzanne N. Haas v. Lockheed Martin Corp., No. 2470, September Term, 2004, decided December 5, 2005. Opinion by Davis, J.

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ESTATES - NOMINAL BOND OF PERSONAL REPRESENTATIVE - ESTATES & TRUSTS, § 6-102 - MARYLAND RULE 6-312

Facts: By the terms of her will, decedent excused her personal representatives from the obligation of posting bond. A nominal bond was ordered by the orphans' court, which provided limited coverage, guaranteeing payment of "the debts due by the decedent, the Maryland inheritance tax, and court costs."

Following the removal of the original personal representatives, appellant, Lynn C. Williamson, was appointed as special administrator/successor personal representative by the Orphans' Court of Baltimore County.

Appellant's claim against the nominal bond for personal representative commissions was denied by the orphans' court on the basis that they were "not a debt due by the decedent or otherwise covered by the Nominal Bond." The Circuit Court for Baltimore County affirmed the orphan's court's decision and denied and disallowed appellant's claim upon the nominal bond.

Held: Affirmed. Commissions payable to a personal representative are not a "debt due by the decedent" because they were not incurred during decedent's lifetime. Estates & Trusts, §6-102, Md Rule 6-312, the plain language of the bond at issue, established secondary authority, and persuasive authority from other jurisdictions all demonstrate that a nominal bond cannot be called upon to pay a personal representative's commissions.

Williamson v. Nat'l Grange Mut. Ins. Co., No. 2287, September Term, 2004, filed December 5, 2005. Opinion by Sharer, J.

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MARYLAND PUBLIC INFORMATION ACT, - ATTORNEY'S FEES - MD. CODE (1999 REPL. VOL, 2004 SUPP.), STATE GOV'T ARTICLE, §§ 10-611 ET. SEQ.; FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552; IN A CASE IN WHICH APPELLANT, WHO WAS A SUBCONTRACTOR ON PROJECT TO RENOVATE THE STAMP STUDENT UNION AT THE UNIVERSITY OF MARYLAND, ASSERTED THAT IT WAS ENTITLED TO COUNSEL FEES, BECAUSE IT HAD SUBSTANTIALLY PREVAILED IN ITS ACTION TO OBTAIN RECORDS PURSUANT TO THE MARYLAND PUBLIC INFORMATION ACT, IT WAS NOT AN ABUSE OF DISCRETION FOR TRIAL COURT

TO DENY CLAIM FOR ATTORNEY'S FEES SOUGHT PURSUANT TO STATE GOV'T ARTICLE, § 10-623 (F); APPLYING THE FACTORS ENUNCIATED IN *KLINE V. FULLER*, 64 MD. APP. 375 (1985), *I. E.*, BENEFIT TO THE PUBLIC DERIVED FROM THE SUIT, NATURE OF COMPLAINANT'S INTEREST IN THE RELEASED INFORMATION AND WHETHER AGENCY'S WITHHOLDING OF THE INFORMATION HAD A REASONABLE BASIS IN LAW, CIRCUIT COURT PROPERLY CONCLUDED THAT, NOTWITHSTANDING DECISION OF THE COURT OF APPEALS IN *STROMBERG METAL WORKS, INC. V. UNIVERSITY OF MARYLAND*, 382 MD. 151 (2004), IN WHICH APPELLANT SUBSTANTIALLY PREVAILED, APPELLANT'S INTEREST WAS PRIVATE AND PECUNIARY AND PRINCIPALLY BENEFITTED APPELLANT AND THAT, ALTHOUGH APPELLANT WAS ELIGIBLE FOR AN AWARD OF ATTORNEY'S FEES, IT DID NOT NECESSARILY FOLLOW THAT IT WAS ENTITLED TO ATTORNEY'S FEES.

Facts: Appellant subcontractor corporation substantially prevailed in its Maryland Public Information Act cause of action against the University of Maryland. Appellant filed a motion in Circuit Court for Prince George's County seeking award of reasonable attorney's fees under § 10-623 (F) of the State Government Article, which allows parties who substantially prevail in a public information action and are deemed eligible for attorney's fees and legal costs, to prove entitlement to attorney's fees under the *Kline* factors of consideration – whether there is a benefit to the public derived from the suit; whether the nature of complainant's interest in the released information is public or private; and whether agency's withholding of the information had a reasonable basis in the law. *Kline v. Fuller*, 64 Md. App. 375 (1985). The Circuit Court denied appellant's motion and found it was eligible for attorney's fees, but was not entitled to the fees because appellant's suit only benefitted appellant, its interest in the information was private and pecuniary, and the University had a reasonable basis in the law for withholding information.

Held: Affirmed. Where evidence reveals a party, that substantially prevailed at trial, and, accordingly, would be eligible for attorney's fees under State Gov't Article § 10-623(F), but fails to sufficiently demonstrate that the public benefits from the suit, that the nature of party's interest in the released information is not solely private or pecuniary, and agency did not have reasonable basis in law to withhold the sought-after information, trial court, pursuant to *Kline v. Fuller*, 64 Md. App. 375 (1985) and within the purview of its discretion, should deny party's motion for attorney's fees. The Circuit Court did not err or abuse its discretion in denying appellant's motion for attorney's fees. Although appellant was eligible for attorney's fees after substantially prevailing against University under the state's Public Information Act, it was not entitled to such fees

under the *Kline* factors as a result of the court's finding appellant was the only beneficiary of the suit, nature of its interest in the information was private and pecuniary, and University had a reasonable basis in the law for not disclosing information.

Stromberg Metal Works, Inc. v. University of Maryland et al., No. 2673, September Term, 2004, decided December 6, 2005. Opinion by Davis, J.

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WORKERS' COMPENSATION - WRONGFUL RECOVERY OF BENEFITS - LABOR AND EMPLOYMENT ARTICLE SECTIONS 9-1106 AND 9-310.1; PRECLUSION FROM EVER RECEIVING WORKERS' COMPENSATION BENEFITS AS A PENALTY FOR WRONGFULLY OBTAINING BENEFITS.

Facts: The appellant, William W. Kelly, was injured in the course of his employment as a truck driver for Consolidated Delivery Co. The Workers' Compensation Commission awarded Kelly temporary total disability benefits. The Injured Workers' Insurance Fund discovered that Kelly had begun working for another employer while receiving disability benefits and without informing the Commission. Kelly was charged in the District Court of Maryland for Baltimore County with one count of theft over $500 and one count of making a false claim under LE section 9-1106(a). The LE section 9-1106(a) charge was *nol prossed* and Kelly was convicted of theft over $500. Following Kelly's hearing before the Commission on the nature and extent of his permanent partial disability, the Commission ordered that Kelly was precluded from receiving any workers' compensation benefits under LE section 9-1106(a), despite his attorney's argument that LE section 9-310.1 was the applicable statute. Kelly filed an action for judicial review in the Circuit Court for Baltimore County, which upheld the Commission's decision.

Held: Reversed and remanded to the circuit court with instructions to reverse the decision of the Commission and remand to the Commission for proceedings consistent with this opinion. LE

section 9-1106(a) is a criminal statute that prohibits a person from knowingly acquiring or attempting to acquire the payment of workers' compensation fees or expenses by means of a fraudulent representation. If a person is convicted for violating LE section 9-1106(a), the court may, under LE section 9-1106(b), impose the penalties as provided under the theft statute, and the Commission may preclude that person from receiving workers' compensation benefits. A person who is not convicted of violating LE section 9-1106(a) cannot be precluded by the Commission, under LE section 9-1106(b), from receiving workers' compensation benefits. Kelly was not convicted for violating 9-1106(a). Instead, that charge was *nol prossed*. Because Kelly was not convicted for violating LE section 9-1106(a), the Commission did not have the authority to preclude him from receiving benefits under LE section 9-1106(b). The Commission does have the authority under LE section 9-310.1 to order Kelly to reimburse the Commission for any benefits that he knowingly obtained and to which he was not entitled, as this section is independent of the penalty provision of LE section 9-1106(b).

Kelly v. Consolidated Delivery Co., et al., No. 2588, September Term 2004, filed December 6, 2005. Opinion by Eyler, Deborah S., J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated December 1, 2005, the following attorney has been disbarred by consent from the further practice of law in this State:

GEORGIA L. LEONHART

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By an Opinion and Order of the Court of Appeals of Maryland dated December 14, 2005, the following attorney has been disbarred from the further practice of law in this State:

PATRICK J. MUHAMMAD

*

By an Opinion and Order of the Court of Appeals of Maryland dated December 15, 2005, the following attorney has been disbarred from the further practice of law in this State:

MICHAEL J. THERIAULT

*

By an Order of the Court of Appeals of Maryland dated December 15, 2005, the following attorney has been suspended for ninety (90) days by consent, effective January 17, 2005, from the further practice of law in this State:

STEVEN RUSSELL HOOK

*

By an Opinion and Order of the Court of Appeals of Maryland dated December 22, 2005, the following attorney has been disbarred from the further practice of law in this State:

WILLIAM M. LOGAN

*

By an Opinion and Order of the Court of Appeals of Maryland dated December 22, 2005, the following attorney has been indefinitely suspended from the further practice of law in this State:

PETER RICHARD MAIGNAN

*

By an Order of the Court of Appeals of Maryland dated December 23, 2005, the following attorney has been indefinitely suspended by consent, effective immediately, from the further practice of law in this State:

CHRISTOPHER M. LEE

*

By an Order of the Court of Appeals of Maryland dated December 27, 2005, the following attorney has been disbarred by consent from the further practice of law in this State:

JOHN DAVID ASH

*

JUDICIAL APPOINTMENTS

On November 1, 2005, the Governor announced the appointment of STEPHANIE LYNN ROYSTER to the Circuit Court for Baltimore City. JUDGE ROYSTER was sworn in on December 5, 2005 and assumes a vacant seat authorized by legislation enacted in the 2005 General Assembly.

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On November 1, 2005, the Governor announced the appointment of BARRY GLENN WILLIAMS to the Circuit Court for Baltimore City. JUDGE WILLIAMS was sworn in on December 15, 2005 and assumes a vacant seat authorized by legislation enacted in the 2005 General Assembly.

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On November 21, 2005, the Governor announced the appointment of the Hon. Richard R. Bloxom to the Circuit Court for Worcester County. JUDGE BLOXOM was sworn in on December 2, 2005 and assumes a vacant seat authorized by legislation enacted in the 2005 General Assembly.

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On November 15, 2005, the Governor announced the appointment of ROBERT BENNETT RIDDLE to the District Court of Maryland for Calvert County. JUDGE RIDDLE was sworn in on December 12, 2005 and assumes a vacant seat authorized by legislation enacted in the 2005 General Assembly.

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On November 23, 2005, the Governor announced the appointment of DANIEL R. MUMFORD to the District Court of Maryland for Worcester County. JUDGE MUMFORD was sworn in on December 16, 2005 and assumes a vacant seat authorized by legislation enacted in the 2005 General Assembly.

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On November 29, 2005, the Governor announced the appointment of the HON. MICHAEL J. ALGEO to the Circuit Court for Montgomery County. JUDDGE ALGEO was sworn in on December 20, 2005 and fills the vacancy created by the elevation of the Hon. Patrick L. Woodward to the Court of Special Appeals.

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On November 29, 2005, the Governor announced the appointment of the HON. THOMAS L. CRAVEN to the Circuit Court for Montgomery County. JUDGE CRAVEN was sworn in on December 20, 2005 and fills the vacancy created by the retirement of the Hon. Dennis M. McHugh.

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On November 29, 2005, the Governor announced the appointment of KRYSTAL QUINN ALVES to the District Court of Maryland for Prince George's County. JUDGE ALVES was sworn in on December 22, 2005 and and assumes a vacant seat authorized by legislation enacted in the 2005 General Assembly.

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On November 29, 2005, the Governor announced the appointment of RONALD B. RUBIN to the Circuit Court for Montgomery County. JUDGE RUBIN was sworn in on December 28, 2005 and assumes a vacant seat authorized by legislation enacted in the 2005 General Assembly.

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