Amicus Curiarum

VOLUME 29
ISSUE 2 FEBRUARY 2012

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

Motor Vehicle Administration v. Dana Eric Carpenter, No. 44, September Term 2011, filed January 25, 2012. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2012/44a11.pdf

ADMINISTRATIVE LAW – JUDICIAL REVIEW – MOTOR VEHICLE ADMINISTRATION – ADMINISTRATIVE LICENSE SUSPENSION HEARING

Facts:

In 2010, Dana Eric Carpenter had been detained on suspicion of driving under the influence of alcohol by an officer of the Elkton Police Department and subsequently had his license suspended for refusing to submit to a chemical breath test, pursuant to Maryland's implied consent statute, Section 16-205.1 of the Transportation Article. Carpenter requested an administrative hearing, at which the detaining officer was the only person to testify. The officer testified that she was dispatched to investigate a two-car collision in Elkton and, through her investigation and interview of witnesses at the scene, determined that one of the cars involved in the collision, a maroon Ford Truck, was owned by Carpenter, who was also at the scene. Carpenter told the officer that he had consumed two beers and was coming from Delaware to Elkton. Thereafter, the officer testified that she conducted several field sobriety tests, all of which Carpenter failed, and arrested him for driving under the influence of alcohol. Carpenter refused to submit to a breath test.

After the officer's testimony at the administrative law hearing, Carpenter's counsel made a motion that no action be taken by the administrative law judge, contending that the officer lacked reasonable grounds to detain Carpenter. Carpenter's counsel argued that no witness saw Carpenter driving, and thus the detaining officer did not have reasonable grounds to believe that Carpenter was driving. The administrative law judge denied the motion, concluding that the officer, based on the facts she collected at the scene of the accident, could reasonably infer that Carpenter had been driving his truck. Carpenter's license was suspended, for 120 days, but the administrative law judge stayed the suspension, provided Carpenter participate in the Ignition Interlock Program for 12 months, and disqualified Carpenter from driving a commercial vehicle for one year pursuant to Section 16-812 of the Transportation Article.

Carpenter sought judicial review of the administrative law judge's decision in the Circuit Court for Cecil County, who reversed, observing that although there was a "97 percent chance" that Carpenter had driven his truck at the time of the accident, the officer, nonetheless, lacked reasonable grounds to believe that Carpenter was the driver. The Circuit Court reversed the suspension and the Motor Vehicle Administration filed a Petition for Writ of Certiorari, which was granted by the Court of Appeals.

Held:

The Court of Appeals reversed the decision of the Circuit Court of Cecil County and remanded with instructions to affirm the decision of the administrative law judge. The Court initially observed that an officer's reasonable grounds to detain an individual, in order to request a chemical breath test under Section 16-205.1 of the Transportation Article, is based on the totality of the circumstances, including an officer's observations, statements from other witnesses and reasonable inferences developed therefrom. The Court concluded that the officer's inference that Carpenter had driven his truck, based on the officer's testimony that the truck had been involved in a collision, that Carpenter was present at the scene of the accident and that he admitted to traveling from Delaware to Elkton, Maryland after drinking two beers, supported the reasonable inference that Carpenter had been driving the truck.

***

Stop Slots Md 2008, et al. v. State Board of Elections, et al., No. 87, September Term, 2008, filed January 6, 2012. Opinion by Bell, C. J.

http://mdcourts.gov/opinions/coa/2012/87a08.pdf

GOVERNMENTS - STATE AND TERRITORIAL GOVERNMENTS - LEGISLATURES

GOVERNMENTS - STATE AND TERRITORIAL GOVERNMENTS - ELECTIONS

Facts:

In October, 2007, the Maryland legislature enacted a duo of bills, House Bill 4 and Senate Bill 3, during a special session of the General Assembly. House Bill 4 proposed an amendment to the Maryland Constitution that, if ratified by voters, would legalize video lottery in the state. Upon passage of the bill, the proposed amendment was placed on the November 2008 General Election ballot for voter approval, stating that the "primary purpose" of the amendment was to raise revenue for public education. Senate Bill 3, its companion legislation, sought to regulate the implementation and allocation of revenues originating from video lottery terminals. The efficacy of Senate Bill 3 was made contingent on voter ratification of the amendment placed on the ballot pursuant to House Bill 4.

The petitioners filed a complaint in the Circuit Court for Anne Arundel County, claiming, first, that the contingency of Senate Bill 3 on the ratification of the amendment proposed by House Bill 4 constituted an impermissible delegation of legislative authority to voters, and second, that the ballot language submitted to voters for ratification of the amendment did not fully inform them about the underlying and contingent appropriations enacted by Senate Bill 3. The Circuit Court concluded that the contingent legislation was constitutional, and that the ballot language summarizing the proposed amendment was sufficient. Following oral arguments, the Court of Appeals issued a per curiam order with an opinion to follow, affirming the ruling of the Circuit Court.

Held:

(1) The General Assembly's enactment of Senate Bill 3, contingent on voter ratification of the amendment proposed by House Bill 4, was constitutional; (2) the ballot question sufficiently summarized the amendment proposed by House Bill 4, and, therefore, is constitutional, and in compliance with the Election Law Article of the Maryland Code. The Court established, as a threshold matter, that the legislature possesses wide discretion in proposing amendments to the Constitution, pursuant to Article XIV, § 1 and concluded that the actions it took were squarely within this discretion. The petitioners' argument that the legislature exceeded its authority when it referred the proposed amendment to voters for approval is without merit because the legislation was not referred pursuant to Article XVI, but rather, submitted under Article XIV, § 1. Furthermore, since passage of Senate Bill 3 was not made contingent upon voter approval, the fact that its provisions would not take effect in the absence of the amendment's ratification did not amount to a delegation of legislative authority. The Court also concluded that the ballot language summarizing the amendment proposed by House Bill 4 was constitutional because it fairly and unambiguously apprised voters of the amendment's true nature in accordance with § 7-103 of the Election Law

Article. The Court reasoned that the ballot language was not misleading because, although proceeds from video lottery terminals would be used to fund other projects, public education would receive the largest percentage of those proceeds, making it the "primary" purpose of the amendment. Finally, voters were also provided with reasonable notice of, and access to, the full language of the legislation, far beyond what was required under § 7-105, thus allowing them to make an informed choice to vote for or against the proposed amendment.

***

Michael T. Polek, et ux. v. J.P. Morgan Chase Bank, N.A., et al., No. 24, September Term, 2011; *Richard S. Dinnis, et ux. v. J.P. Morgan Chase Bank, N.A., et al.*, No. 25, September Term, 2011; *John W. Kinsey, Jr., et ux. v. J.P. Morgan Chase Bank, N.A., et al.*, No. 26, September Term, 2011; *Frank J. Schultz, Jr. v. Citimortgage, Inc.*, No. 38, September Term, 2011; *Elizabeth A. Moore, et vir. v. Residential Funding Company LLC, et al.*, No. 80, September Term, 2011, filed January 24, 2012. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2012/24a11.pdf

STATUTORY INTERPRETATION - SECONDARY MORTGAGE LOAN LAW - LOAN ORIGINATION FEES

STATUTORY INTERPRETATION - SECONDARY MORTGAGE LOAN LAW - MANDATORY DISCLOSURE FOR COMMERCIAL BORROWERS

CONTRACTS - BREACH OF CONTRACT - IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING - SECONDARY MORTGAGE LOANS-LENDER AND ASSIGNEE RECORD-KEEPING

Facts:

Appellants, Michael T. and Linda Polek, Richard S. and Concetta Dinnis, John W. and Denise Kinsey, Jr., Frank J. Shultz, Jr., and Elizabeth and Alric Moore, filed complaints in the Circuit Courts for Baltimore City (the Polek, Dinnis, Kinsey, and Moore cases) and Anne Arundel County (the Shultz case), for alleged violations of the Maryland Secondary Mortgage Loan Law ("SMLL"), the Maryland Consumer Protection Act ("CPA"), and common law breach of contract. Two sets of Appellants, the Poleks and the Kinseys, claimed that Maryland Code (1957, 2005 Repl. Vol.) Com. Law Art., § 12-405, allows only a single loan origination fee to be collected at closing, rather than the multiple itemized fees the lenders charged (as shown by the HUD-1 form). All Appellants maintained that they were not provided at closing a mandatory disclosure form required assertedly by Com. Law Art., § 12-407.1. Three sets of Appellants (the Dinnises, Shultz, and the Moores), who did not retain copies of their loan or closing documents, alleged breach of contract, violation of the CPA, and a claim in accounting when their respective Appellee mortgage companies (assignees of the original lenders) refused to provide them, well after their loans had been paid in full and entered among the land records as satisfied, with copies of the documents. Appellees filed a motion to dismiss in their respective cases.

Judge Evelyn Omega Cannon in the Circuit Court for Baltimore City dismissed the Poleks' claim, concluding that the original lenders had not violated the SMLL by charging more than one loan origination and not providing a disclosure form only required for commercial borrowers. The Dinnis and Kinsey cases were consolidated and, based on the reasoning in the Polek case, dismissed also by Judge Cannon. Judge Cannon granted also the motion to dismiss the Moores' case. Judge Philip Caroom of the Circuit Court for Anne Arundel County dismissed the Shultz

case for failure to state a claim upon which relief may be granted. Appellants appealed timely to the Court of Special Appeals, but the Court of Appeals issued a writ of certiorari, on its motion, in each case before the intermediate appellate decided the appeals.

Held: Affirmed.

The Court of Appeals concluded that: (1) Com. Law Art., § 12-405 allows secondary mortgage lenders to charge itemized fees related to the loan origination, so long as the aggregate total of the fees related to the loan origination do not exceed the 10% statutory; and, (2) that the mandatory disclosure form in Com. Law Art., § 12-407.1 is required only for borrowers who disclose that they are using the loan proceeds for commercial purposes, which none of the Appellants disclose was their purpose. The Court concluded also that assignees of secondary mortgage loans owe no implied duty to retain any loan closing documentation received, after the debt has been satisfied and the contractual requirements of the contract are discharged. Finding no violations of the SMLL, CPA, or Maryland common law, the Court did not need to address the issues of assignee liability raised by Appellants.

***

Olusegun Ogundipe v. State of Maryland, No. 54, September Term 2010, filed December 21 2011. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2011/54a10.pdf

CRIMINAL PROCEDURE - VERDICT SHEET

Facts:

On July 23, 2006, Petitioner was involved in an incident that resulted in one victim being killed, one victim being seriously injured, and one victim being assaulted. Petitioner was charged, *inter alia*, with various first and second degree offenses for the injuries sustained by the victims. After a two-day jury trial, the judge instructed the jury to "consider" the second degree charges if the jury's answers to the corresponding first degree charges were not guilty. Similarly, the language on the verdict sheet instructed the jury: "If your answer to Question 1 is not guilty, please consider Question 2. If your answer to Question 1 is guilty, please answer Question 3," where Question 1 asked the jury to determine whether Petitioner was guilty of first degree murder of one of the victims, Question 2 asked the jury to determine whether Petitioner was guilty of second degree murder of that victim, and Question 3 asked about a separate charge. The verdict sheet contained identical instructions for several of the other crimes for which Petitioner was charged with the first and second degree offenses. The instruction implied that if the jury found Petitioner guilty of the charge in the first degree, the jury should skip the next question, containing the lesser included offense, and should leave that question blank. The jury did not, however, follow verbatim the judge's instructions, and it marked "not guilty" for the second degree offense when it found Petitioner guilty of the first degree offense. Because the jury found Petitioner guilty of the first degree offenses, the clerk of the court did not ask the jury for its verdict on the corresponding lesser included offenses, pursuant to the trial judge's instructions. The jury was then polled and the verdict hearkened.

Petitioner appealed to the Court of Special Appeals, claiming that the trial judge erred in not reading the verdicts for the lesser included offenses and that the verdict sheet constituted an inconsistent verdict. The Court of Special Appeals affirmed Petitioner's convictions.

Held: Affirmed.

The verdict for Petitioner's convictions was not inconsistent, as the verdict sheet itself does not constitute the verdict. Rather, the verdict sheet is a tool for the jury to utilize in deciding its verdict. A verdict is only valid if it is orally announced, including polling, if requested, and hearkening. In addition, a verdict sheet is not a communication within the purview of Maryland Rule 4-326(d), which requires that any communication from the jury pertaining to the action must be disclosed to counsel.

***

State of Maryland v. Leon Thomas Coleman, Jr., No. 14, September Term, 2011, filed December 15, 2011. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/14a11.pdf

CRIMINAL LAW—THEFT BY DECEPTION
A conviction for theft by deception will not stand in the case of a breach of contract when there is no evidence that the defendant lacked either a right to the money he received or an honest belief in that right.

REAL PROPERTY LAW—DEPOSITS ON NEW HOMES SUBTITLE
By its clear and unambiguous terms, the 1998 version of the Deposits on New Homes Subtitle, Maryland Code (1998, 2010 Repl. Vol.), § 10-301(a) of the Real Property Article, does not apply to transactions in which a builder or vendor deeds land without a home on it.

Facts:

A builder entered into eight contracts for detached homes in Prince George's County. The contracts provided that the buyers would purchase the unimproved lots before their homes were constructed. The buyers paid for the unimproved lots by obtaining loans with an initial advance for the purchase of the land. The remaining balance on the buyers' loans was held in escrow by the lenders pursuant to a draw schedule under which the builder would make draws to cover his ongoing construction costs. The builder never applied for any construction draws, however, because he ran out of money and construction never went forward. Ultimately, the buyers either filed for bankruptcy, had their lots foreclosed, or refinanced or modified their loans. In the Circuit Court for Prince George's County, the builder was convicted of eight counts of theft by deception and eight counts of failure to escrow under the Deposits on New Homes Subtitle. The Court of Special Appeals reversed the convictions.

Held:

The Court of Appeals affirmed the Court of Special Appeals. The builder's breach of contract did not rise to the level of theft because he gave value for the money he received, as provided under the contracts, and received no further payments or draws. There was no evidence that he lacked either a right to the money he received or "an honest belief" in that right, and therefore no evidence that he intended to deprive the buyers of their money or property. The Deposits on New Homes Subtitle did not apply to the builder because the 1998 version of the law, by its clear and unambiguous terms, does not apply to transactions in which a builder or vendor deeds land without a home on it.

***

Catherine A. Moreland Johnson v. James Micheal Johnson, No. 63, September Term, 2009, filed December 14, 2011. Opinion by Eldridge, John C. (Retired, Specially Assigned).

http://mdcourts.gov/opinions/coa/2011/63a09.pdf

TRUSTS & ESTATES - APPEALABILITY OF INTERLOCUTORY ORDERS

Facts:

The petitioner was sued by her stepson, the respondent, for an accounting of an inter vivos trust. Two trusts had been established several years earlier by the petitioner and her husband to support them during their lifetimes. The petitioner's husband died, leaving the petitioner with all the income of the trusts and giving her a limited power of appointment by which she could leave the remains of the trust to one or more of the descendants of the Trustors. If the petitioner did not exercise this limited power of appointment, the trust expressly named the respondent as a beneficiary.

After the petitioner's husband's death, the respondent twice requested an accounting of the trust, but when he received no response from the petitioner, he filed a petition in the circuit court asking for the court to assume jurisdiction of the trust and require an accounting. After a hearing, the circuit court ordered the accounting and the petitioner appealed from that order. The Court of Special Appeals affirmed.

Held:

Judgment of the Court of Special Appeals vacated and case remanded with directions to dismiss the appeal.

Although neither party challenged the appealability of the circuit court's order, the Court of Appeals, noting its authority to address jurisdictional issues *sua sponte*, held that an order for an accounting is not appealable as a final judgment. The only statute authorizing interlocutory appeals from orders directing an accounting is § 12-303(3)(vi) of the Courts and Judicial Proceedings Article. That statute authorizes appeals from interlocutory orders when "[d]etermining a question of right between the parties...." Because the circuit court's order in this case did not determine a question of right between the parties, it was not appealable.

***

Linda Freilich, et al. v. Upper Chesapeake Health Systems, Inc., et al., No. 4, September Term, 2011, filed December 19, 2011. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/4a11.pdf

FEDERAL HEALTH CARE LAW—RETALIATORY ANIMUS AND HCQIA IMMUNITY
Evidence of retaliatory animus may prevent summary judgment on immunity under the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101–11152, provided that it permits a rational trier of fact to conclude that (1) the defendant failed to comply with the standards for immunity set forth in 42 U.S.C. § 11112(a) or (2) the action was not a "professional review action" under 42 U.S.C. § 11151(9).

Facts:

A hospital in Harford County, after receiving numerous complaints about the behavior and professionalism of one of its doctors, terminated her privileges to practice medicine at the hospital. She sued the hospital for damages, claiming that she had been terminated in retaliation for her legitimate reporting of substandard care. The hospital moved for summary judgment, claiming immunity under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. §§ 11101–11152 (1994). The Circuit Court for Harford County granted the hospital's motion, and the Court of Special Appeals Affirmed.

Held:

The Court of Appeals affirmed the rulings below. Summary judgment was appropriate in this case because the plaintiff failed to present evidence that could lead a rational trier of fact to conclude that (1) the defendant failed to comply with the standards for immunity set forth in 42 U.S.C. § 11112(a) or (2) the action was not a "professional review action" under 42 U.S.C. § 11151(9). Although the plaintiff presented some evidence of retaliatory complaints by hospital staff and broadly alleged that all of the hospital's conduct was retaliatory, she presented no evidence that retaliation had anything to do with the decision to terminate her privileges.

***

Gregory Robinson v. Baltimore Police Department, No. 17, September Term, 2011, filed December 20, 2011. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/17a11.pdf

LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS- STATUTE OF LIMITATIONS- ADMINISTRATIVE CHARGES FOR FALSE STATEMENTS

Facts:

On February 22, 2007, the Internal Investigation Division ("IID") of the Baltimore Police Department ("BPD") learned of an allegation that Sergeant Gregory Robinson ("Petitioner") had, three days earlier, initiated improper contact with a prostitute in his personal sport utility vehicle. IID investigated the allegation, interviewing Petitioner on July 11, 2007, and again on August 1, 2007. During those two interviews, Petitioner denied knowing or meeting the prostitute, claimed to have been driving his personal sedan on the date of the alleged encounter, provided EZ Pass documentation in support of his claim, and explained that he had driven his sedan on that date because his supervisor had taught him to use personal vehicles while conducting prostitution sting operations. Through its investigation, IID learned that all of the statements were false and that Petitioner's EZ Pass documentation was fraudulent. Subsequently, on June 26, 2008, BPD brought administrative charges against Petitioner, including a charge for making a false statement during the course of an investigation ("false statement charge").

Petitioner challenged all of the charges in the Circuit Court for Baltimore City, and subsequently challenged the false statement charge on appeal to the Court of Special Appeals. In both courts, Petitioner relied on the one-year statute of limitations set out in the Law Enforcement Officer's Bill of Rights ("LEOBR," codified at Maryland Code (2003), § 3-106 of the Public Safety Article), to argue that the false statement charge was untimely. The limitations statute provides that charges must be filed "within 1 year after the act that gives rise to the charges comes to the attention of the appropriate law enforcement agency official"; and Petitioner argued that his making of false statements during his interviews did not constitute a separate "act" that gave rise to the charge. The false statements were part-and-parcel of the February 2007 misconduct, so the limitations window to bring the false statement charge opened in February 2007 and closed in February 2008.

Both the Circuit Court and Court of Special Appeals were unpersuaded by this argument. The Court of Special Appeals affirmed the Circuit Court's judgment that the interviews gave rise to the false statement charge, which made the charge timely under the LEOBR.

Held:

Judgement of the Court of Special Appeals affirmed. The Court of Appeals held that, according to the plain language of the limitations statute, lying during an investigation constitutes a separate "act" that gives rise to a charge. Section 3-113 of the LEOBR, specifically prohibiting

the making of a false statement during an investigation, confirms this interpretation of the plain language of § 3-106. Moreover, holding that the misconduct, about which the statement was made, gave rise to the false statement charge would lead to absurd results. Therefore, the statute of limitations for the false statement charge did not begin to run until the Petitioner made false statements in July and August of 2007. The June 2008 charge was timely.

***

Communications Workers of America, AFL-CIO v. Public Service Commission, et. al., No. 39, September Term, 2011, filed January 25, 2011. Opinion by Rodowsky, J.

http://mdcourts.gov/opinions/coa/2012/38a11.pdf

PUBLIC UTILITY CODE § 4-301 - ALTERNATE FORM OF REGULATION - ENSURE - PUBLIC INTEREST - PUBLIC UTILITIES REGULATION - QUALITY, AVAILABILITY, AND RELIABILITY OF SERVICE - SUBSTANTIAL EVIDENCE

Facts:

The Appellees, Verizon, and the staff of the Public Service Commission (PSC) obtained PSC approval, via a Baltimore City Order (Order), of a global settlement of six pending cases. It employed an alternative form of regulation (AFOR) under PUC § 4-301 that included up to six million dollars in bill credits to customers with out-of-service complaints that were not resolved in compliance with specified standards. This new AFOR replaced the previous AFOR which had been in force since the late 1990s. The Order approved Verizon's second settlement offer, after PSC had previously rejected the first settlement offer proposed by Verizon. PSC drafted the 66-page Offer after extensive review. The Appellant, the Communications Workers of America (CWA), the technicians union objected, contending that the proposed service quality plan (Plan) of the AFOR did not ensure the quality, availability, and reliability of service, as required by PUC § 4-301.

The Circuit Court for Baltimore City affirmed the Baltimore City Order. CWA then appealed to the Court of Special Appeals.

The Court granted certiorari on its own motion prior to consideration of the case by the intermediate appeals court to determine:

1. If PSC's Order was supported by substantial evidence in the record?;
2. If PSC's Order ensured the quality, availability, and reliability of service?;
3. If PSC's Order was affected by an error of law because PSC did not make a specific finding that the new AFOR protected consumers by producing affordable and reasonably priced basic local exchange service?;
4. If PSC's Order approving the new AFOR was in the public interest?; and
5. If PSC's Order was affected by an error of law in that it established a new balancing test instead of the required public interest test?

Held: Affirmed.

The Court first noted that CWA did not brief either the issue of whether the Order was affected by an error of law because PSC did not make a specific finding that the new AFOR protected consumers by producing affordable and reasonably priced basic local exchange service or the

issue of the new AFOR was in the public interest and that therefore, the Court would not consider them.

The Court next addressed whether the Plan was supported by substantial evidence on the record. The Court stated that just because PSC chose to require Verizon to achieve certain goals and did not dictate the specific means for such achievement, it did not mean that PSC's decision was arbitrary and unsupported by the record. The Court noted that the caselaw supported the notion that, where there is a report by an agency's technical staff, the existence of such a report in itself, is sufficient evidence to make the agency's actions fairly debatable. Further, PSC's Order was supported by substantial evidence in that Verizon's expert witness explained how the second settlement proposal met or addressed each concern raised by PSC concerning the first settlement proposal. The Court thus concluded that PSC's Order was supported by substantial evidence in the record.

The Court next discussed whether PSC met its statutory requirement, pursuant to Public Utilities Code (PUC) § 4-301(b)(1)(ii) of "ensuring the quality, availability, and reliability of telecommunications services throughout the State." CWA argued that the word "ensure" should be interpreted narrowly, and that because PSC expressed a reservation as to the Plan's potential success, PSC did not meet its statutory requirement. The Court stated that "ensure" could be interpreted in several ways. The Court mentioned several other real-world instances where "ensure" was employed where it did not mean certainty of result. The Court stated that because of the many possible meanings of "ensure," statutory ambiguity existed. Where ambiguity in statutes exists, the Court seeks to discern legislative intent from surrounding circumstances. The Court noted that the previously implemented AFOR was reviewed, and upheld, by the Court as ensuring the quality, availability and reliability of telecommunications services and that the Court determined that the General Assembly intended that an AFOR could be forward looking and goal oriented. The Court concluded that PSC did not commit an error of law when it observed that it could not guarantee the future.

The Court finally addressed whether PSC implemented a new balancing standard instead of the required public interest standard when it approved the Order. The Court stated that the nature of any proceeding before PSC requires considering, or balancing, of the interests of the public service company with that of consumer protection. Thus, the Court determined, PSC did not use an improper balancing test when it approved the Order.

***

John Burson, et al. v. David Simard, No. 35, September Term, 2012, filed January 23, 2012. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2012/35a11.pdf

FORECLOSURE LAW—LIABILITY FOR RESALES
Absent special circumstances, a defaulting purchaser at a foreclosure sale of property is liable, under Maryland Rule 14-305(g), for only the one resale resulting from his or her default.

REMEDIES—CONSEQUENTIAL DAMAGES IN FORECLOSURE
After a default by a purchaser at a foreclosure sale of property, the default of a second purchaser at a second resale is not a consequence arising "naturally, i.e., according to the usual course of things" from the first default.

Facts:

David Simard was the successful bidder at an auction of real property. After the auction sale was ratified, he defaulted on his contract to purchase the property. He admitted liability for the risk and expense of the initial resale, but when the purchaser at the resale defaulted as well, he balked at paying the expense and loss incurred at a second resale. Applying Maryland Rule 14-305(g), the Circuit Court for Baltimore County held that Simard was liable for the risk and expense of both resales. On Simard's appeal from this order, the Court of Special Appeals reversed in a reported opinion, interpreting Rule 14-305(g) to require that a defaulting purchaser be responsible for only one resale.

Held:

The Court of Appeals affirmed the Court of Special Appeals. Absent special circumstances, a defaulting purchaser at a foreclosure sale of property is liable, under Rule 14-305(g), for only the one resale resulting from his or her default. The default of a second purchaser at a second resale is not a consequence arising "naturally, i.e., according to the usual course of things" from the first default.

***

Paul DeWolfe, Jr. v. Quinton Richmond, No. 34, September Term 2011, filed January 4, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/34a11.pdf

PUBLIC DEFENDER ACT – INITIAL APPEARANCE – RIGHT TO COUNSEL

Facts:

After arrest, a defendant is presented to a District Court Commissioner for an initial appearance. At the initial appearance, the Commissioner: informs the defendant of the charge and allowable penalties; advises the defendant of the right to counsel and, when appropriate, a preliminary hearing; determines whether there was probable cause if the defendant was arrested without a warrant, and, if so, whether the defendant should be released on his or her own recognizance or whether bail is required.

The Plaintiffs filed a class action complaint seeking declaratory judgment and injunctive relief from, *inter alia*, the Chief Judge of the District Court of Maryland and the Baltimore City District Court Commissioners. The Plaintiffs later joined the Public Defender as a defendant. The Plaintiffs represent the class of "[a]ll indigent persons arrested, detained at Central Booking, brought before a Commissioner for initial bail hearings, and denied representation by counsel at the initial bail hearings, presently and in the future." The Plaintiffs alleged that they have a right to counsel at the bail-hearing portion of the initial appearance. They alleged that the right to counsel is rooted in: (1) the Maryland Public Defender Act, codified at Maryland Code (2001, 2008 Repl. Vol.), §§ 16-101 through 16-403 of the Criminal Procedure Article, because the initial bail hearing is a stage of the criminal proceeding; (2) the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights because the initial bail hearing is an adversary proceeding and/or a "critical stage" of a criminal prosecution; and (3) the Due Process Clause of the Fourteenth Amendment and Article 24 because the initial bail hearing implicates a defendant's right to liberty.

The Circuit Court for Baltimore City granted the Plaintiffs summary judgment, finding that they had a right to counsel at the bail-hearing portion of the initial appearance under all three alleged bases. The Circuit Court then issued a separate declaratory judgment followed by an order denying the Plaintiffs' request for injunctive relief, without reserving their right to seek injunctive relief in the future should there be subsequent violations of the right declared.

The Defendants and the Public Defender appealed to the Court of Special Appeals, and the Plaintiffs cross-appealed. The Plaintiffs then filed a petition for writ of certiorari and the Public Defender filed a conditional cross-petition. The Court of Appeals granted certiorari to review whether: (1)indigent defendants have a right to counsel at the bail-hearing portion of the initial appearance; (2) the Circuit Court erred in granting the Plaintiffs declaratory relief without addressing the implementation of that right; and (3) the Circuit Court's denial of the Plaintiffs' request for injunctive relief erected a *res judicata* bar precluding requests for relief for future violations.

Held: Affirmed.

The Court of Appeals held that the Plaintiffs have a statutory right to counsel at the bail-hearing portion of the initial appearance under the Public Defender Act and, therefore, did not address the constitutional arguments. The Public Defender Act provides for representation in "a criminal . . . proceeding in which a defendant or party is alleged to have committed a serious offense" as well as in "any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result." The representation extends to "all stages" of those proceedings, and the bail-hearing portion of the initial appearance is a "stage" under the Public Defender Act.

The Court further held that the Circuit Court did not err or abuse its discretion in declaring the Plaintiffs' right to counsel without also crafting a remedy for implementation. The Court of Appeals has never delayed declaration and implementation of a substantive right for reasons of fiscal concern or budgetary impracticability.

Finally, the Court held that the Circuit Court's denial of the Plaintiffs' request for injunctive relief did not erect a *res judicata* bar because future violations could not have been raised in the Circuit Court before they occurred and the denial of injunctive relief was not made on the merits of the Plaintiffs' claim.

***

Nicholas A. Piscatelli v. Van Smith, No. 18, September Term, 2011, filed January 23, 2012. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2012/18a11.pdf

TORTS – DEFAMATION – CONDITIONAL PRIVILEGES – FAIR REPORTING & FAIR COMMENT:

Facts:

Respondents (The *City Paper* and its reporter, Van Smith) published in 2006–07 two articles in the *City Paper* that reported on the 2003 murders of Jason Convertino and Sean Wisniewski. Respondents discussed Petitioner, Nicholas Piscatelli, in those articles as possibly connected to procuring the murder, despite that Petitioner was not charged criminally in that regard. Respondents reported on Petitioner's testimony at the murder trial, which revealed Petitioner's relationship with the victims. They reported also on a trial discovery memorandum, which discussed how an unknown man told Convertino's mother that Petitioner was involved in her son's murder. Based on the testimony and memoranda, Respondents opined that Petitioner may have been involved in the double murder. In response to these articles, Petitioner sued Respondents in the Circuit Court for Baltimore City for damages based on defamation and false light claims. The Circuit Court granted Respondents' motion for summary judgment, which judgment the Court of Special Appeals affirmed subsequently upon Petitioner's direct appeal.

Held: Affirmed.

Respondents' reporting of Petitioner's trial testimony and the discovery memorandum was non-defamatory because of the fair reporting privilege. Petitioner did not produce evidence of abuse of the fair reporting privilege, so the Circuit Court granted properly summary judgment in favor of Respondents. Respondents' opinion that Petitioner may have been involved in the murder was non-defamatory because of the fair comment privilege. Respondents based the allegedly defamatory opinions on facts disclosed in the article, Petitioner's trial testimony, and the discovery memorandum. Those facts were defensible under the fair reporting privilege. The fair comment privilege protects opinions based on disclosed, privileged facts. Thus, Respondents' opinions were privileged as fair comment and non-defamatory. Finally, Petitioner's false light claim could not prevail where there was no cause of action for defamation.

***

COURT OF SPECIAL APPEALS

Wallace H. Campbell & Co., Inc. v. Maryland Commission on Human Relations, Nos. 291, 1310, September Term, 2010, filed December 22, 2011. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2011/0291s10.pdf

GOVERNMENTS > LEGISLATION > INTERPRETATION

CIVIL RIGHTS LAW > CONTRACTUAL RELATIONS & HOUSING > FAIR HOUSING RIGHTS

Facts:

Austin Scarlett, who used a wheelchair and resided in one of Wallace H. Campbell & Company, Inc.'s ("the Campbell Company") buildings, became frustrated with the Campbell Company's lack of responsiveness to his concerns regarding his neighbors and sought to mediate those issues with the Campbell Company. Scarlett contacted the Baltimore City Community Relations Commission ("BCCRC"), which contacted the Campbell Company. Scarlett sought to mediate with R. Bruce Campbell, the president of the Campbell Company. Through the BCCRC, Scarlett agreed to attend a mediation at the Campbell Company's office building, which was not wheelchair accessible. Campbell and others helped Scarlett in, around, and out of the building. The mediation was unsuccessful. Thereafter, Scarlett filed a complaint with the Maryland Commission on Human Relations ("the Commission"), alleging that the Campbell Company had discriminated against Scarlett by holding the mediation at a wheelchair inaccessible location in violation of Md. Code (1957, 2003 Repl. Vol.), Article 49B § 22(a)(9)[1] by refusing to make a reasonable accommodation to afford an individual with a disability equal opportunity to use and enjoy a dwelling.

After an eventful history before an Administrative Law Judge and the Commission's appeal board, this matter was heard by the Circuit Court for Baltimore City on the Campbell Company's petition for judicial review. On April 6, 2010, the circuit court affirmed the Commission's final decision, which ordered the Campbell Company to pay $7,500 in damages and $5,000 as a civil penalty. On July 27, 2010, the circuit court granted the Commission's petition for judicial enforcement and entered judgment against the Campbell Company for $7,500 in damages and $5,000 as a civil penalty. The Campbell Company timely appealed both circuit court decisions, and we ordered that the appeals be consolidated. On appeal, the Campbell Company argued that

[1] Md. Code (1957, 2003 Repl. Vol.), Article 49B § 22(a)(9) has been recodified in substantially the same form in Md. Code (2009), § 20-706(b)(4) of the State Government Article ("S.G."), and the Legislature intended no substantive change. Section 2 of Chapter 120 of the 2009 Acts.

it could not have violated Article 49B § 22(a)(9) because no reasonable accommodation was ever requested.

Held:

Judgment reversed and remanded with instructions to reverse order of the Commission and remand to the Commission to dismiss the charges.

The Court noted that the record in this case reflects that neither Scarlett nor anyone on his behalf ever requested a special accommodation. Scarlett arrived at the Campbell Company's office building and never asked if there was a wheelchair accessible entrance. When a Campbell Company employee led him to a wheelchair inaccessible restroom, Scarlett did not ask whether there was a wheelchair accessible restroom. The issue, which was one of first impression for Maryland courts, was whether there must be a prior request for an accommodation before there can be a refusal in violation of Article 49B § 22(a)(9).

In its statutory interpretation, the Court examined the plain meaning of the statute, including that the common dictionary definition of "refuse" is "[t]he denial or rejection of something offered or demanded." Black's Law Dictionary 1394 (9th ed. 2009). The Court also looked to federal resources because the General Assembly enacted Article 49B § 22(a)(9) with the "purpose of altering the laws prohibiting discriminatory housing practices to include the provisions of the federal Fair Housing Amendments Act of 1988" and "to prohibit[] discriminatory housing practices in a manner substantially equivalent or similar to the federal Fair Housing Amendments Act of 1988." Chapter 571 of the 1991 Acts. Federal appellate decisions, in addition to other states' courts' interpretations of their own versions of the Fair Housing Amendments Act, required that a claimant or his or her representative must make a request for an accommodation before a party can refuse to provide the accommodation. Moreover, the Department of Housing and Urban Development and the Department of Justice have issued a "Joint Statement on Reasonable Accommodations Under the Fair Housing Act," which indicates that there must be a request for a reasonable accommodation before there can be a refusal to provide the accommodation.

The Court found the federal and out-of-state case law to be persuasive and in agreement with its plain meaning interpretation of Article 49B § 22(a)(9), requiring an underlying request. Therefore, because neither Scarlett nor his representative requested a reasonable accommodation, the Campbell Company could not have refused to provide the accommodation in violation of Article 49B § 22(a)(9). While the Court did not condone the Campbell Company's actions, it was limited to the statutory language of Article 49B § 22(a)(9), under which the Commission brought a violation against the Campbell Company.

***

Warren Jerome Yates v. State of Maryland, No. 2399, September Term, 2009, filed December 22, 2011. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/2399s09.pdf

FELONY MURDER; HEARSAY; INCONSISTENT STATEMENTS; CUMULATIVE EVIDENCE; HARMLESS ERROR; WAIVER; FORFEITURE; PRESERVATION; PARTICULARITY; JUDGMENT OF ACQUITTAL

Facts:

On January 7, 2009, appellant sold four pounds of marijuana to Donald Kohler. After the exchange, appellant realized that Mr. Kohler had purchased the drugs using fake money. Appellant chased Mr. Kohler down an alley. Sherry Worcester, who was taking out her trash at the time, was shot and killed.

A jury convicted appellant of second degree felony murder, use of a handgun in the commission of a crime of violence, use of a handgun in the commission of a felony, drug trafficking with a firearm, distribution of marijuana, and other offenses.

Held: Judgments affirmed.

A killing committed after the definitional elements of the predicate felony have been completed can qualify as felony murder. That appellant had distributed the drugs to the purchaser does not automatically preclude a finding of felony murder. A killing that follows a felony constitutes felony murder if the homicide and the felony were parts of one continuous transaction, and they were closely related in time, place, and causal relation.

The failure to object to a jury instruction is not an affirmative waiver of the right to challenge the jury instruction, but rather, it constitutes a forfeiture of the right to raise the issue on appeal. Forfeited rights, as opposed to waived rights, are reviewable for plain error if the Court chooses to exercise its discretion to undertake such review. The circuit court's use of a pattern jury instruction, without objection, weighs heavily against plain error review of the instructions given.

***

Melvin Alford v. State of Maryland, Case No. 2459, September Term 2010, filed December 22, 2011. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2011/2459s10.pdf

CRIMINAL LAW AND PROCEDURE; JURORS & JURIES; VOIR DIRE; QUESTIONS TO VENIRE PANEL AND INDIVIDUAL JURORS; JURY QUESTIONS TO THE COURT; CONSTITUTIONAL LAW; BILL OF RIGHTS; FUNDAMENTAL RIGHTS; CRIMINAL PROCESS; ASSISTANCE OF COUNSEL; WAIVER OF COUNSEL; REVIEWABILITY; PRESERVATION FOR REVIEW; VERDICTS; POLLING OF JURY; UNANIMITY; PLAIN ERROR

Facts:

A jury in the Circuit Court for Baltimore City convicted Melvin Alford of robbery with a dangerous weapon, two counts of first-degree assault, two counts of second-degree assault, two counts of using a handgun in the commission of a crime of violence or a felony, two counts of false imprisonment, theft over $500, and possession of a regulated firearm. On November 29, 2010, the circuit court sentenced appellant to twenty years' imprisonment for robbery with a dangerous weapon; ten years concurrent, with the first five years without the possibility of parole, for use of a handgun in the commission of a crime of violence; fifteen years consecutive for first-degree assault; and five years consecutive without the possibility of parole for possession of a regulated firearm for a total of forty years.

At trial, the State put forth evidence that Alford entered a Rite Aid store, with a gun, demanded that two employees of Rite Aid lock the front door and retrieve money from the safe. After several unsuccessful attempts to stuff the money into his pockets, Alford ordered one of the Rite Aid employees to place the money into a plastic Rite Aid bag. After appellant exited the Rite Aid, the employees called the police and described the robber. A police officer in the area noticed a man running out of an alley who matched the description given on the call. The officer ordered the person to "stop where he was," but the individual "took off running." After a chase, Officer Stackewicz arrested the person. At trial, Officer Stackewicz identified appellant as the person he chased and arrested. Officer Stackewicz testified that he recovered a gun and a large amount of money from appellant, including a substantial sum of money in a Rite Aid bag that appellant was carrying.

Prior to the jury selection process, the court instructed both the State and Alford's counsel that they could ask individual follow-up questions after the court's *voir dire*. Juror 753, later empaneled without objection as Juror Number Four, responded affirmatively to two general *voir dire* questions, but was asked no individual follow-up questions.

After the jury was selected, Alford asked to discharge his counsel. The circuit court denied Alford's request and followed the procedure set forth in Maryland Rule 4-215(a)(1)-(4) and (e).

During jury deliberations, the jury submitted a note to the court requesting an "arrest report." The trial judge shared the note with counsel after the jury advised it had reached a verdict but before the verdict was announced. The trial judge informed counsel that he did not advise them of the note earlier because he was handling another matter. At that time, the trial judge informed counsel of the note and of the court's intended response. Without objection, the trial judge instructed the jury: "All right, my apologies for not getting back to you sooner. I was in another Court, as I told you, I was handling other matters, and I did receive a note from you may we request a copy of the following, and then you have colons and then arrest report, thank you. I gather you concluded that I had already given you instructions on that, that if you didn't have it, you couldn't have it, right, and I am informed that you now have a verdict; is that correct?"

The verdict was announced in open court. Alford requested that the jury be polled. A review of the transcript revealed that Juror Number Five's response to the poll was "inaudible." The verdict was subsequently hearkened and the hearkening was unanimous.

Alford contended, on appeal, that the trial court erred in failing to ask individual follow-up questions to Juror 753 and appellant's counsel failed to render effective assistance of counsel by failing to ask individual follow-up questions to Juror 753. Alford argued that the trial court erred in failing to permit Alford to discharge his counsel and by mishandling the jury note submitted to the court. Alford contends that the verdict was not unanimous, as Juror Number Five failed to respond audibly to the poll.

Held: The Court of Special Appeals affirmed Alford's convictions.

A defendant waives his right to challenge on appeal the court's failure to ask individual follow-up questions to jurors when the defendant fails to object to a juror not being called for individual questioning and accepting the juror without objection upon request from the courtroom clerk to empanel the juror.

In Maryland, a defendant's attack of a criminal judgment on the basis of ineffective counsel generally takes place at post-conviction review, where the opportunity for further fact-finding exists.

A defendant in a criminal prosecution has a constitutional right to the effective assistance of counsel and the corresponding right to reject that assistance and represent himself. A trial judge must consider the reasons for the request and decide whether the reasons are meritorious or unmeritorious. A trial judge must follow the requirements of Md. Rule 4-215(a)(1)-(4) and (e) in evaluating appellant's request to discharge his attorney.

A defendant's failure to object to the handling of a jury note at trial resulted in forfeiture of appellate review of the issue.

Unanimity is required to finalize a verdict. Unanimity is determined by polling the jury, if the defendant requests, or unanimity is determined by hearkening. A defendant's right to a unanimous jury verdict may be waived, but only when a defendant receives consent from the

State and court, and the defendant "competently and intelligently" waives the right. Though polling may be waived, both polling and hearkening may not be waived in the same case. Although no "competent and intelligent" waiver was made, based on appellant's failure to object to the response or the inaudibility of the response from a juror during polling and the subsequent unanimous hearkening of the jury, we conclude that the verdict was unanimous and appellant has waived the issue on appeal.

***

Daniel Joseph Pair v. State of Maryland, No. 1396, September Term, 2010, filed December 22, 2011. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2011/1396s10.pdf

MERGER - - RULE 4-345 - DOUBLE JEOPARDY - RULE OF LENITY - FUNDAMENTAL FAIRNESS - FIRST-DEGREE ASSAULT - ROBBERY - FALSE IMPRISONMENT - ILLEGAL SENTENCE - COMMON LAW CRIME - REQUIRED EVIDENCE TEST - SAME OFFENSE TEST

Facts:

Pair was originally convicted by a Baltimore County jury of 1) first-degree assault, 2) robbery, 3) false imprisonment, and 4) the unlawful taking of a motor vehicle. The victim of all of the crimes was the appellant's former fiancé. Pair was sentenced to a term of 25 years imprisonment for the first-degree assault, a consecutive term of 10 years for the robbery, a consecutive term of 5 years for the false imprisonment, and a concurrent term of 5 years for the unlawful taking of a motor vehicle.

Pair first appealed his convictions to the Court of Special Appeals, raising four separate contentions including the sufficiency of the evidence to support the convictions. One of the appellant's other contentions was that the conviction for the unlawful taking of a motor vehicle should have merged into the conviction for robbery, because the motor vehicle was one of several items of property taken in the course of the robbery. In the case of *Pair v. State*, No. 2119, September Term, 2006, filed on July 28, 2009, this Court agreed with the appellant as to the merger of the conviction for the unauthorized taking of a motor vehicle. In all other respects, the 41-page unpublished opinion affirmed the judgments of conviction.

Pair then filed a Motion to Correct an Illegal Sentence pursuant to Maryland Rule of Procedure 4-345(a) which was denied by the Circuit Court for Baltimore County. On this second appeal to the Court of Special Appeals, Pair alleged the following:

1. The circuit court erred when it denied Pair's motion to correct an illegal sentence pursuant to Maryland Rule of Procedure 4-345(a) because Pair's sentences should have been merged in the following manner(s):
   a. The first-degree assault conviction merged into the robbery conviction;
   b. Alternatively, the first-degree assault conviction merged into the false imprisonment conviction; and
   c. False imprisonment and robbery merged under the Rule of Lenity and the principle of fundamental fairness.

Held: Affirmed.

The Court first noted that under Rule 4-345(a), it is unconstitutional as a matter of law for a judge to impose an illegal sentence on a person, where the sentences should have merged. This case contained three distinct merger issues: (1) merger pursuant to double jeopardy; (2) merger pursuant to the rule of lenity; and (3) merger pursuant to fundamental fairness.

The Court next addressed the crime of assault. Assault can take many forms: it can be in the first-degree or it can be nothing more than a constituent element in another crime, such as robbery. The inquiry as to whether assault is a centerpiece of a prosecution or a mere constituent element is an intensely fact-specific, case-by-case inquiry. The Court then discussed, at length and in detail, the relationship between Pair and his fiancé victim and the multi-hour assault perpetrated by Pair and his accomplice on the victim. After conducting the fact-driven inquiry, the Court concluded that assault was the centerpiece of the crime in this instance: it was the dominant criminal offense of a vicious and sadistic nature. The robbery was merely an afterthought to the drawn-out assault of the victim.

The Court then discussed the relationship between double jeopardy and merger. The Court restated the test for double jeopardy: the required evidence test, focusing on the elements of each crime. If each offense contains an element which the other does not, then the offenses are not the same for double jeopardy purposes under the 5th Amendment to the Constitution. The Court noted that in the case sub judice, the crimes for which Pair was sentenced (first-degree assault, robbery, and false imprisonment) are not the same offense under double jeopardy because each crime contains an element the other two do not. Thus, the Court concluded that merger was not required under double jeopardy.

The rule of lenity was next broached by the Court. The rule of lenity requires merger of sentences when a court finds, as a matter of statutory interpretation, that the Legislature did not intend for a person to be convicted of two particular offenses stemming from the same act or transaction. The Court stated that because the rule of lenity deals only with legislative intent, at least one of the two crimes subject to merger analysis must be a statutory offense. The Court found that the rule of lenity did not apply in this case because robbery, false imprisonment, and assault are all common law crimes in Maryland.

The Court finally addressed the relationship between fundamental fairness and merger. After remarking that fundamental fairness is an elusive concept with no real definition, the Court noted that there were only two previous merger cases citing fundamental fairness as the rationale for the merger (*Monoker v. State*, 321 Md. 214, 582 A.2d 525 (1990) and *Marquardt v. State*, 164 Md. App. 95, 882 A.2d 900 (2005)). The Court noted that both of these cases were intensely-fact driven, and that, in general, whereas both merger pursuant to the "required evidence" test and merger pursuant to the rule of lenity could be settled as a matter of law, merger pursuant to fundamental fairness could not. The Court noted that while the determinations under the two merger fundamental fairness cases might have been uncontroversial under those facts, future merger cases could pose more problems. The Court stated that it might be a bridge too far to have an appellate court make such evaluations of evidence in the first instance. Finally, the Court noted that even if fundamental fairness truly is a

merger test in Maryland, the long, first-degree assault of the victim in this case was no mere incident of either robbery or false imprisonment, and thus merger remained improper.

***

State of Maryland v. Konnyack A. Thomas, No. 1242, September Term, 2011, filed December 21, 2011. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/1242s11.pdf

MIRANDA; CUSTODY; CUSTODIAL INTERROGATION; VOLUNTARINESS; APPELLATE REVIEW; RECORD; LAW OF CONFESSIONS

Facts:

Appellee was charged by indictment with one count of sexually abusing a minor, two counts of second degree rape, and six counts of second degree sexual offense. After a hearing on appellee's motion to suppress his statements to the police, the Circuit Court for Montgomery County found that appellee was in custody at the time he gave his statement to police, and therefore, *Miranda* warnings were required. Because appellee was not advised of his *Miranda* rights, the court suppressed his statements. The court did not consider appellee's argument that his statement was involuntary.

Held:

Judgments reversed. In determining whether a person is in custody, triggering the requirement for warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), a court must consider the totality of the circumstances. A person's admission to a serious crime during police questioning does not automatically render the interrogation custodial. Rather, it is one factor to consider in assessing whether, under the totality of the circumstances, a reasonable person would believe there was a formal arrest or a restraint on freedom of movement to the degree associated with formal arrest. A significant consideration in this analysis is whether the incriminating statement changed the atmosphere of the interrogation.

Appellee was not in custody where: (1) appellee drove himself to the station; (2) once he arrived at the station, he was not restrained and was told that the door to the interview room was unlocked; (3) the officers were in plain clothes, without weapons, and they were polite, courteous, and respectful; (4) the police repeatedly told appellee that he was not under arrest; and (5) appellee was not extensively controlled during the interview; he was left alone to write a letter and use the restroom if he desired.

Where the circuit court did not rule on the question whether the confession was voluntary, and therefore, there were no factual findings on the issue, including whether the court found credible appellee's testimony that he confessed in reliance on statements by the police regarding obtaining help for his daughter, the record is not adequate for review of the issue by this Court.

***

Brenda Rupli v. South Mountain Heritage Society, Inc., Case No. 2555, September Term 2009, filed December 22, 2011. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2011/2555s09.pdf

REAL PROPERTY – EASEMENT BY PRESCRIPTION – LICENSE – PRESUMPTION OF ADVERSE OR PERMISSIVE USE.

Facts:

In 1965, Moran Enterprises, Inc. ("Moran") purchased the Rupli Property. The property adjacent to the Rupli Property, the Church Property, was at that time owned by Resurrection Reformed Church of Burkittsville ("RRCB"). Some time prior to 1973, RRCB granted Moran permission to use a well on the Church Property. Rupli and her former husband purchased the Rupli Property from Moran in 1973. At that time, Moran advised the former husband that the well was used with permission from RRCB.

In 1979, Southern Maryland Heritage Society ("SMHS") purchased the Church Property. At this time, SMHS knew of Rupli's use of the well, which continued after SMHS purchased the Church Property. In 1998, Rupli approached SMHS with a deed of easement to the well on the Church Property, which SMHS did not sign. On November 16, 2005, SMHS directed Rupli to disconnect from the well, and Rupli refused.

SMHS filed a complaint in the Circuit Court for Frederick County seeking declaratory relief with respect to use of the well, and to quiet title to the well. Pursuant to the parties' cross-motions for summary judgment, the court granted summary judgment in favor of SMHS. Harmonizing *Banks v. Pusey*, 393 Md. 688 (2006), with *Rau v. Collins*, 167 Md. App. 176 (2006), the court reasoned that while "the grant of permission between RRCB and Moran terminated upon the disposition of the property, it does not demand that that transfer raised a presumption of adversity as a matter of law." Because the use of the well was "initiated with permission" to her predecessor in title, Rupli had the burden of proving adverse use with "affirmative evidence," which she did not satisfy.

Held:

When a license is revoked by implication by the sale of the dominant or servient estate, or both, the continued use of the property as it was used before is presumed to be permissive. For its use to become adverse, there must be affirmative evidence of change to the character of the use offered by the party seeking the prescriptive easement.

***

Steven J. Ochse, et ux. v. William O. Henry, et ux., No. 2098, September Term, 2009, filed December 21, 2011. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2011/2098s09.pdf

REAL PROPERTY LAW > TITLE QUALITY > SPECIAL COVENANT AGAINST ENCUMBRANCES

REAL PROPERTY LAW > TITLE QUALITY > SPECIAL WARRANTY OF TITLE

REAL PROPERTY LAW > DEEDS > DEFENSE TO MERGER

Facts:

On March 2, 1919, Dorchester County acquired a fee simple determinable interest in a 30-foot wide strip of land over a large estate to be used as a county road. After a series of transfers, appellees, William O. Henry and Jessie Henry ("the Henrys"), purchased thirty-five acres of the large estate on March 19, 1987. The Henrys subdivided a smaller parcel and listed the subdivided parcel for sale.

The Henrys provided disclaimers to prospective purchasers, verifying that there were no recorded or unrecorded easements other than for utilities. After touring the subdivided parcel with Mr. Henry, appellees, Steven J. Ochse and Shari Ochse ("the Ochses") entered into a contract with the Henrys to purchase the subdivided parcel. The Henrys conveyed a fee simple interest in the subdivided parcel to the Ochses as tenants by the entireties on December 14, 2001.

On December 11, 2007, the Ochses filed a complaint against the Henrys, seeking reformation of the deed, a declaratory judgment, injunctive relief, and damages for breach of contract, breach of special warranties, and fraud in the inducement. An amended complaint naming Dorchester County was subsequently filed on April 11, 2008. The Henrys filed a counterclaim for attorney's fees based on the underlying contractual provision between the Henrys and the Ochses, which specifically survived any merger with the deed, to which the Ochses responded.

On August 4, 2008, the circuit court, in its rulings on cross-motions for summary judgment filed by the Ochses and Dorchester County, declared that Dorchester County owned the 30-foot wide strip of land across the subdivided parcel in fee simple. After a bench trial, the circuit court concluded that the contract merged into the deed and that the Henrys did not breach the covenant of special warranty of title, not specifically addressing the special covenant against encumbrances. The circuit court refused to reform the deed or issue a declaratory judgment with injunctive relief. The court then entered judgment in favor of the Henrys against the Ochses for attorney's fees in the amount of $100,020.00 based on the "fee-shifting provision" in the parties' contract, which specifically stated that the "fee-shifting provision" did not merge with the deed.

The Ochses filed a timely appeal, and we ordered mediation. As a result of the mediation, Dorchester County executed a quitclaim deed, giving the Ochses the county's interest in the 30-foot wide strip of land over the subdivided parcel. Dorchester County was later dismissed as a party. On appeal, the Ochses argued that the Henrys breached the special covenant against encumbrances and the covenant of special warranty of title. Additionally, the Ochses asserted that the contract did not merge into the deed based on either mutual mistake or fraudulent misrepresentation, resulting in an erroneous attorney's fees award.

Held: Judgment reversed and award of attorney's fees vacated.

The Henrys presented both a special covenant against encumbrances and a covenant of special warranty of title in the deed to the Ochses. "The *special* covenant against encumbrances . . . warrants that the land conveyed is free of encumbrances created by the grantor." *Magraw v. Dillow*, 341 Md. at 492, 503-04 (1996) (emphasis in original). When "a *special* covenant against encumbrances is given, a grantor will *not* be held liable for the acts of a predecessor in title who encumbered the property." *Id.* at 504 (emphasis in original). The Court held that the Henrys' recording of the subdivision plat created the subdivided parcel and did not encumber the parcel because the Henrys did not own the 30-foot wide strip of land previously deeded to Dorchester County. The 1919 deed to the county from the Henrys' predecessor in title gave the county actual title to the 30-foot wide strip of land, which is substantially more than a mere encumbrance. *See id.* at 502. The Court concluded that the Henrys did not breach the special covenant against encumbrances because the county's interest was not an encumbrance.

Unlike a general warranty of title, a special warranty of title does not protect the grantee from all claims of superior or paramount title. *Dillow v. Magraw*, 102 Md. App. 343, 365 (1994). Rather, a covenant of special warranty protects the grantee from all claims by, through, or under the grantor, but does not warrant title against a claim superior to the grantor's title. *Id.* The Court recognized that the Henry's subdivision created the subdivided parcel, but Dorchester County owned the 30-foot wide strip since 1919. The Court concluded that the defect in title arose in 1919, well before the Henrys' ownership. Therefore, the Henrys did not breach the covenant of special warranty of title.

The Ochses sought to sue on the underlying contract, which guaranteed that the Henrys would convey marketable title. While there is a *prima facie* presumption that acceptance of a deed triggers the merging of the provisions of the contract into the deed, a party can avoid merger by properly invoking the defenses of fraudulent misrepresentation or mutual mistake. *Dorsey v. Beads*, 288 Md. 161, 170-71 (1980). Here, the Henrys claimed to have not been aware of the existing title defect, and a search of the land records failed to reveal such defect. The Court noted that there could be two possible, alternate scenarios in this case: (1) the Henrys were being truthful as to their lack of knowledge, and there was mutual mistake as to the county's interest; or (2) the Henrys were being untruthful, and there was fraudulent misrepresentation. The Court concluded that in either situation, the Ochses could avoid merger of the contract into the deed. Therefore, even though the Ochses now own the entire subdivided parcel in fee simple after the county's quitclaim deed, at the time of the suit, they should have been able to sue on the contractual guarantee of marketable title.

The Court noted that while the circuit court was acting within the terms of the contract by awarding attorney's fees in accordance with the "fee-shifting provision" that specifically survived merger, an award to the Henrys was in error as they failed to convey marketable title.

***

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated January 4, 2012, the following attorney has been reprimanded by consent:

AVRUM M. KOWALSKY

*

By an Order of the Court of Appeals dated January 27, 2012, the following attorney has been disbarred by consent:

JACK BRUCE JOHNSON

*

JUDICIAL APPOINTMENTS

On December 22, 2011, the Governor announced the appointment of **ROBERT N. McDONALD** to the Court of Appeals for the Second Appellate Circuit (Baltimore County). Judge McDonald was sworn in on January 24, 2012 and fills the vacancy created by the retirement of the Hon. Joseph F. Murphy, Jr.

*

On December 22, 2011 the Governor announced the appointment of the **HON. STUART R. BERGER** to the Court of Special Appeals (At Large). Judge Berger was sworn in on January 25, 2012 and fills the vacancy created by the elevation of the Hon. Ellen L. Hollander.

*

On December 22, 2011 the Governor announced the appointment of the **HON. NANCY M. PURPURA** to the Circuit Court for Baltimore County. Judge Purpura was sworn in on January 4, 2012 and fills the vacancy created by the retirement of the Hon. Thomas J. Bollinger, Sr.

*

On December 22, 2011, the Governor announced the appointment of **JUSTIN J. KING** to the Circuit Court for Baltimore County. Judge King was sworn in on January 30, 2012 and fills the vacancy created by the retirement of the Hon. Robert N. Dugan.

*

On December 22, 2011, the Governor announced the appointment of the **WILLIAM R. NIKLAS, JR.** to the Circuit Court for Frederick County. Judge Niklas was sworn in on January 27, 2012 and fills the vacancy created by the retirement of the Hon. John. H. Tisdale.

*

On December 22, 2011, the Governor announced the appointment of **MELBA ELIZABETH BOWEN** to the Circuit Court for Harford County. Judge Bowen was sworn in on January 27, 2012 and fills the vacancy created by the retirement of the Hon. Thomas E. Marshall.

*

On December 22, 2011, the Governor announced the appointment of **MASTER WILLIAM V. TUCKER** to the Circuit Court for Howard County. Judge Tucker was sworn in on December 29, 2011 and fills the vacancy created by the resignation of the Hon. Diane O. Leasure.

*

On December 22, 2011, the Governor announced the appointment of **ANNE K. ALBRIGHT** to the Circuit Court for Montgomery County. Judge Albright was sworn in on January 19, 2012 and fills the vacancy created by the retirement of the Hon. Durke G. Thompson.

*

On December 22, 2011, the Governor announced the appointment of **GARY E. BAIR** to the Circuit Court for Montgomery County. Judge Bair was sworn in on January 19, 2012 and fills the vacancy created by the retirement of the Hon. Thomas L. Craven.

*

On December 28, 2011, the Governor announced the appointment of **FRANK MICHAEL KRATOVIL, JR.** to the Queen Anne's County District Court. Judge Kratovil was sworn in on January 30, 2012 and fills the vacancy created by the retirement of the Hon. John T. Clark III.

*