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http://mdcourts.gov/opinions/coa/2012/36a11.pdf

ADMINISTRATIVE LAW – FINAL DECISION

Facts:

The Silver Spring Historical Society applied in 2007 to Montgomery County's Historic Preservation Commission to nominate the Perpetual Building, in Silver Spring, for historical designation. Following county procedure, the Preservation Commission recommended it for designation to the Planning Board for the Maryland-National Capital Park and Planning Commission ("MNCPPC"). The Planning Board staff originally prepared an amendment to the county's master plan approving such designation, but after a hearing, voted not to recommend the Perpetual Building for historic designation. The Planning Board revised the amendment and sent it to the Montgomery County Council, which voted against holding a public hearing on the amendment. The Council did nothing further concerning Petitioner's application or the Planning Board's recommendation.

Petitioners filed a complaint for a writ of administrative mandamus in the Circuit Court for Montgomery County in late 2008, requesting judicial review of the Planning Board's decision not to recommend historic designation of the building. The Circuit Court dismissed the complaint after a hearing, ruling that the Planning Board's recommendation was not appealable as a final order of the agency. The Petitioners appealed to the Court of Special Appeals, which affirmed, holding that the Planning Board's recommendation was, again, not an appealable final administrative decision.

Held: Affirmed.

The Court reasoned that the Council has broad, definite authority to alter the county's master plan for historic designation, whereas the Planning Board's power is limited and subject to that of the Council. The Court held that the power to make decisions affecting the county's master plan for historic designation was vested in the Council, not the Planning Board. The Court thus rejected the Petitioners' argument that proceedings before the MNCPPC were appealable final decisions within the contours of administrative law.

As such, the Planning Board instead made a recommendation to the Council. The Planning Board took all necessary steps as required by law. The Council then had 180 days to act under Section 7-108 of Article 28 of the Maryland Code; because it did not act, its inaction was transformed into approval of the Planning Board's recommendation as submitted. Petitioners argued that the Council had relinquished its jurisdiction, because it decided as a matter of law that it had nothing before it to decide. The Court rejected this argument, because Section 7-108 had no *mens rea* element; the Council did not have to demonstrate a willingness not to act in order to be subject to the section.

Zi'Tashia Jackson, et al. v. The Dackman Company, et al., No. 131, September Term, 2008, filed October 24, 2011. Opinion by Eldridge, John C. (Retired, Specially Assigned).

http://mdcourts.gov/opinions/coa/2011/131a08.pdf

CONSTITUTIONAL LAW – ARTICLE 19 OF THE MARYLAND DECLARATION OF RIGHTS

Facts:

Petitioner ZiTashia Jackson and her mother filed a complaint against the Dackman Company and others sounding in negligence and deceptive practices. The complaint alleged that while residing at properties owned by the defendants, ZiTashia, who was then a child under the age of 6, had consumed flaking lead paint and become lead-poisoned.

The Reduction of Lead Risk in Housing Act is primarily codified in Maryland Code, §§ 6-801 *et seq.* of the Environment Article. The Act's stated purpose is to reduce the occurrence of childhood lead poisoning while maintaining affordable rental housing. The Act offered liability protection for owners of lead-affected properties if they complied with certain registration and risk reduction requirements. If the property owners were in full compliance with the Act's requirements, their liability to lead-affected individuals was capped at $17,000 and they were immunized from further suit.

In the circuit court, the defendants motioned for summary judgment, arguing that their compliance with the Act immunized them. The plaintiffs countered that the Act was unconstitutional. Although there was a dispute regarding whether the defendants had timely filed the required registration, the circuit court granted summary judgment to the defendants, holding that the immunity provisions of the Act were constitutional. Plaintiffs appealed to the Court of Special Appeals, which agreed with the circuit court that the Act was constitutional, but held that the defendants had not complied with the registration requirements and thus were not entitled to full immunity.

Held:

The Court of Appeals reversed the judgment of the Court of Special Appeals and remanded the case with instructions to reverse the judgment of the circuit court.

The Court of Appeals held that the immunity provisions of the Act were invalid under Article 19 of the Maryland Declaration of Rights. Article 19 protects two interrelated rights: a right to a remedy for an injury to one's person or property and a right of access to the courts. While

Article 19 ordinarily does not prohibit the Legislature from placing certain reasonable restrictions upon remedies and access to the courts, the issue generally under the Court's Article 19 jurisprudence is whether the abolition of a common law remedy and the substitution of a statutory remedy in its place is reasonable.

In this case, the plaintiffs' personal injury action was based on well-settled Maryland common law and was the type of remedy protected by Article 19. As such, any statutory restriction placed upon the plaintiffs' remedy must be reasonable. Because the Act's immunity provisions were not based on traditional or well-established immunities and the statutory remedy resulted in either no compensation or drastically inadequate compensation, the remedy was unreasonable. Therefore, the immunity provisions of the Act were unconstitutional under Article 19 of the Maryland Declaration of Rights.

Maryland law states that all statutes enacted after July 1, 1973, are severable unless the statute specifies that its provisions are not severable. The principal severability test considers whether the dominant purpose of the enactment may be carried out despite the law's partial invalidity. As the stated purpose of the Reduction of Lead Risk in Housing Act is to reduce the incidence of childhood lead poisoning while maintaining the stock of available affordable rental housing, and not granting immunity to landlords, the dominant purpose of the Act can be given effect without the invalid immunity provisions. Consequently, the Act remains in effect without the unconstitutional immunity provisions.

Michael D. Washington v. State of Maryland, No. 22, September Term 2011, filed February 21, 2012. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/22a11.pdf

CRIMINAL PROCEDURE – DNA EVIDENCE – POSTCONVICTION REVIEW ACT

Facts:

On January 24, 1990, Appellant was convicted by a jury of first degree rape, second degree rape, third degree sexual offense, fourth degree sexual offense, assault, and battery. He was later sentenced to life in prison. Appellant subsequently filed several unsuccessful appeals and post-conviction petitions. On May 29, 2009, Appellant filed a Petition for Search for DNA Material and Petition for DNA Testing, pursuant to the DNA Evidence – Postconviction Review Act, Md. Code (2001, 2008 Repl. Vol.), § 8-201 of the Criminal Procedure Article. The Circuit Court granted Appellant's Petition for Search for DNA Material, and the court's Order was served on law enforcement agencies that may have had possession of or access to biological evidence related to Appellant's case. In response to the court's Order, several affidavits and letters were filed by various law enforcement agencies, including the State's Attorney's Office, the Sheriff's Office, the Maryland State Police Crime Laboratory, and the hospital where the victim was examined. Those documents detailed the unsuccessful searches for scientific identification evidence related to Appellant's case.

On August 3, 2010, Appellant filed a Petition for Production and Testing of DNA Material and a Motion for a New Trial. After a hearing on the matter, the Circuit Court judge issued a written opinion denying the relief requested by Appellant. The judge determined that the State had performed a reasonable search for scientific identification evidence related to Appellant's case and that the evidence requested by Appellant no longer exists. The judge further concluded that, based upon the evidence presented by the State, the scientific identification evidence was lost or destroyed prior to the enactment of the DNA Evidence – Postconviction Review Act, which became law on October 1, 2001. The hearing judge determined that because the scientific identification evidence was destroyed prior to the time when the State had a statutory duty to preserve it, Appellant was not entitled to any relief under § 8-201(j) of the statute. Lastly, the judge denied Appellant's request for a new trial, filed pursuant to § 8-201(c), because Appellant had not established that the scientific identification evidence presented by the State at his trial was unreliable and that there was a substantial possibility that he would not have been convicted without the use of that evidence. Appellant filed a direct appeal to the Court of Appeals.

Held: Affirmed.

In response to a petition for DNA testing, if the State performs a reasonable search and demonstrates sufficiently a prima facie case, either directly or circumstantially, that the requested

scientific identification evidence no longer exists, the State will have satisfied its burden of persuasion. The hearing judge in this case was not clearly erroneous in determining that the State performed a reasonable search for the scientific identification evidence from Appellant's case and that the requested evidence no longer exists. Furthermore, the hearing judge was not clearly erroneous in concluding that the scientific identification evidence was lost or destroyed prior to the enactment date of the statute. Section 8-201(j) of the statute is silent as to whether the State's duty to preserve scientific identification evidence is to be applied retroactively. The legislative history of the statute, however, indicates that the General Assembly intended for this duty to be applied prospectively. Therefore, because the hearing judge was not clearly erroneous in determining that the scientific identification evidence from Appellant's case was lost or destroyed prior to the enactment date of the statute, Appellant is not entitled to any relief under § 8-201(j). The hearing judge did not abuse his discretion in denying Appellant's Motion for a New Trial, concluding that Appellant failed to establish that the scientific identification evidence presented by the State at trial was unreliable and that there was a substantial possibility that Appellant would not have been convicted without the use of that evidence.

Erick Leroy Spencer v. State of Maryland, No. 87, September Term 2009, filed October 25, 2011. Opinion by Eldridge, John C. (Retired, Specially Assigned).

Harrell, Adkins and Barbera, JJ., dissent

http://mdcourts.gov/opinions/coa/2011/87a09.pdf

CRIMINAL LAW – ELEMENTS OF ROBBERY

Facts:

Petitioner Erick Leroy Spencer was charged and convicted of robbery, theft over $500, and second degree assault. The uncontested facts in the case showed that Spencer entered an automobile service center and stated to the cashier: "Don't say nothing." There was no evidence that he possessed a weapon or otherwise threatened the cashier with the use of force.

On appeal, Spencer challenged the sufficiency of the evidence to sustain his robbery conviction. The Court of Special Appeals affirmed Spencer's robbery conviction, stating that there had been sufficient evidence to satisfy the constructive force element of robbery.

Held:

The Court of Appeals reversed the judgment of the Court of Special Appeals and remanded the case with instructions to reverse the judgments of the circuit court with regard to the robbery and assault convictions.

Robbery in Maryland is governed by a common law standard in which fear is a central component in distinguishing robbery from larceny or theft. The hallmark of robbery is the presence of force, threat of force, or intimidation. When considering the question of the degree of violence or putting in fear that is necessary to support a robbery conviction, the Court uses an objective standard to decide whether the perpetrator is engaged in conduct reasonably tending to create apprehension in a reasonable man that force is going to be applied. It need not be proven that the person assailed was actually put in fear, but it must be shown that the perpetrator's actions were calculated to instill fear in the mind of a reasonable man.

There was no evidence in this case that Spencer conducted himself in a manner that could cause apprehension in a reasonable person that force was going to be applied. No demand was made for money, there was no suspicion that Spencer possessed a weapon, and the cashier offered no resistance. The mere statement, "Don't say nothing," does not rise to the level of intimidation necessary to sustain a robbery conviction.

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Mario Rodriguez Gutierrez v. State of Maryland, No. 98, September Term, 2009, filed November 29, 2011. Opinion by Adkins, J.

Bell, C.J., dissents. Greene, J., concurs and dissents

http://mdcourts.gov/opinions/coa/2011/98a09.pdf

EVIDENCE – EXPERT TESTIMONY – GANGS

Facts:

Defendant Mario Rodriguez Gutierrez was convicted of first-degree murder and the use of a handgun in the commission of a crime of violence in the shooting death of a young man. At trial, witnesses testified that the incident was linked to Defendant's affiliation with the MS-13 street gang. The judge also permitted testimony, over Defendant's objections, of a "gang expert" who generally described the violent customs of MS-13, including its initiation practices and culture of retaliation for perceived insults. The Circuit Court for Prince George's County imposed a life sentence on the Defendant for murder and a consecutive 20-year sentence for the handgun conviction. Gutierrez appealed to the Court of Special Appeals, and the Court of Appeals granted *certiorari* on its own initiative.

Held: Affirmed.

Although evidence of gang membership may be impermissible "prior bad acts" evidence, the Court held that the trial court did not violate Maryland Rule 5-404(b), because the gang expert's testimony was admitted to prove Defendant's motive for the crime. Generally, a court should not admit the testimony of a gang expert unless other fact evidence provides a connection between the crime and the gang. Here, evidence supplied by lay witnesses established that the murder was gang-related, and thus the expert's testimony was relevant and highly probative.

Furthermore, except for one statement characterizing the gang as the most violent of gangs, the probative value of the expert's testimony was not substantially outweighed by any unfair prejudice. The admission of that one statement was error, but it was harmless, as the Court held that the statement would not have persuaded the jury to render a different verdict.

Benoit Tshiwala v. State of Maryland, No. 108, September Term, 2009, filed January 23, 2012. Opinion by Eldridge, John C. (Retired, Specially Assigned).

http://mdcourts.gov/opinions/coa/2012/108a09.pdf

CRIMINAL LAW – ILLEGAL SENTENCES

Facts:

Benoit Tshiwala was charged and convicted of a multitude of criminal offenses and sentenced to a total of 70 years in prison. After all of his direct appeals had been denied, Tshiwala filed an application for relief under the Maryland Uniform Postconviction Procedure Act, Maryland Code, § 7-101 *et seq.*, of the Criminal Procedure Article. Tshiwala was granted the right to file a belated "Application for Review of Sentence," and a three-judge panel was convened to review his sentences. The panel reduced the sentences for several of Tshiwala's convictions and his 70 year term was reduced to 39 years. The re-imposed sentences became the only sentences for his convictions.

Tshiwala then filed a "Motion for Reconsideration of Sentence," seeking modification of the sentences imposed by the review panel. The motion was denied by the three judges that had earlier reviewed his sentences. Tshiwala subsequently filed a "Motion to Correct Illegal Sentence," arguing that the sentence review panel lacked jurisdiction to rule on his "Motion for Reconsideration of Sentence." Tshiwala requested that the reconsideration motion be considered by the original sentencing judge rather than the three judge panel. Tshiwala's Motion to Correct Illegal Sentence was denied, and Tshiwala appealed.

Held: Affirmed.

Tshiwala's case clearly did not involve an illegal sentence within the meaning of Rule 4-345(a). The only remaining sentences in Tshiwala's case were the 39 years imposed by the review panel and Tshiwala did not contend that those sentences were illegal, but rather argued that there had been a procedural defect on his motion for reconsideration. Where the sentences imposed are not inherently illegal, and where the complaint simply argues a procedural error, Rule 4-345(a) does not create a cause of action. In order for a motion to correct an illegal sentence to be granted, the alleged illegality must inhere in the sentence itself.

Elroy Matthews, Jr. v. State of Maryland, No. 20, September Term 2011, filed January 26, 2012. Opinion by Barbera, J.

Harrell and Adkins, JJ., dissent.

http://mdcourts.gov/opinions/coa/2012/20a11.pdf

CRIMINAL LAW AND PROCEDURE – MOTION TO CORRECT ILLEGAL SENTENCE

Facts:

Elroy Matthews, Jr., Petitioner, entered a plea of guilty to charges of attempted first-degree murder, two counts of first-degree assault, and unlawful use of a handgun in the commission of a felony or crime of violence. In exchange for that guilty plea, the State agreed to argue "for incarceration within the - to the top of the guidelines range . . . [,] twenty-three to forty-three years." The State added that it would "be asking for incarceration of forty-three years . . . . That cap is a cap as to actual and immediate incarceration at the time of initial disposition." The sentencing court stated that it "agreed to cap any sentence," and advised the Petitioner that "theoretically I can give you anything from the mandatory minimum on the one count . . . up to the maximum of life imprisonment." At sentencing several months later, the State asked the court to impose a sentence of life imprisonment, suspend all but forty-three years. The court sentenced Petitioner on the lead count of attempted first-degree murder to life imprisonment, with all but thirty years suspended.

Petitioner then filed a petition for postconviction relief asserting ineffective assistance of counsel for, *inter alia*, failing to object to the State's breach of the plea agreement by asking for life imprisonment, suspend all but forty-three years instead of a total sentence of forty-three years. The postconviction court found that the State had breached the plea agreement, but that the sentencing court was not bound by the plea agreement. The postconviction court granted Petitioner the relief of re-sentencing. The re-sentencing court then re-imposed the original sentence. Petitioner filed a Rule 4-345(a) motion to correct illegal sentence, which the Circuit Court denied without a hearing. Petitioner appealed to the Court of Special Appeals.

The intermediate court held that Petitioner's claim of illegal sentence based on the alleged breach of his plea agreement was not cognizable under Rule 4-345(a); and, even if it were, Petitioner's sentence was not illegal. Petitioner filed a petition for writ of certiorari, which the Court of Appeals granted.

Held: Reversed and Remanded.

The Court of Appeals held that Rule 4-345(a) is an appropriate vehicle to challenge a sentence imposed allegedly in violation of a plea agreement to which the sentencing court had bound

itself. Pursuant to Rule 4-345(a), an alleged illegality must inhere in the sentence itself, rather than stem from trial error. Relying on precedent, the Court concluded that "a sentence imposed in violation of the maximum sentence identified in a binding plea agreement and thereby 'fixed' by that agreement as 'the maximum sentence allowable by law,' is an inherently illegal sentence." The Court reiterated that "[t]he test for determining what the defendant reasonably understood at the time of the plea is an objective one," dependent "on what a reasonable lay person in the defendant's position . . . would have understood the agreement to mean." Further, if the sentencing term of a binding plea agreement is ambiguous, based on that test, then "the ambiguities must be resolved in the defendants' favor."

The Court concluded that the sentencing term of Petitioner's plea agreement was ambiguous and, resolving the ambiguity in Petitioner's favor, held that the sentence was illegal. A lay defendant, hearing the State inform the court that it would be "asking for incarceration within the guidelines," might reasonably understand the State to be referring to the total years of incarceration to which the defendant would be exposed, including any suspended portion. The trial court's explanation that "theoretically I can give you anything from the mandatory minimum on the one count . . . up to the maximum of life imprisonment" did not clarify this ambiguity because the court did not explain that the cap to which it agreed to be bound concerned only a non-suspended portion of the sentence. Therefore, the statement more likely further confused what was already unclear.

Michelle D'Aoust v. Cindy R. Diamond, et al., No. 5, September Term 2011, filed January 31, 2012. Opinion by Greene, J.

Harrell, J., dissents.

http://mdcourts.gov/opinions/coa/2012/5a11.pdf

IMMUNITY – COURT-APPOINTED TRUSTEES

Facts:

Cindy Diamond and Bruce Brown were appointed trustees by the Circuit Court for Harford County to conduct a judicial sale of Michelle D'Aoust's condominium unit, for which she had defaulted on monthly assessment payments. The trustees conducted the sale, and D'Aoust subsequently filed exceptions. The presiding judge ratified the sale, and the trustees conveyed the property. In a separate action, D'Aoust filed a Complaint in the Circuit Court for Harford County against the trustees, based upon their conduct in connection with the sale, alleging breach of fiduciary duty resulting in actual fraud and breach of fiduciary duty resulting in constructive fraud. The Complaint also alleged vicarious liability of the law firm that employed the trustees at the time of the events alleged in the Complaint.

The trustees and the law firm filed a Motion to Dismiss, which the trial judge granted, concluding that the trustees and the law firm were entitled to receive qualified judicial immunity. D'Aoust noted an appeal to the Court of Special Appeals, which reversed in part and affirmed in part the determinations of the trial judge, holding that the trustees and the law firm were entitled to receive qualified judicial immunity for allegations of constructive fraud, but they were not entitled to receive qualified judicial immunity for allegations of actual fraud.

Held: Reversed in part and affirmed in part. Remanded for further proceedings.

The Court of Appeals has never adopted the doctrine of qualified judicial immunity. This concept is a conflation of the doctrines of qualified public official immunity and absolute judicial immunity. The appropriate test for qualified public official immunity is whether, at the time the acts were performed, the individual was: (1) a public official; and (2) acting in the performance of discretionary, as opposed to ministerial, functions conducted without malice. The appropriate test for determining whether an individual exercising judgment similar to that of a judge is entitled to receive absolute judicial immunity is whether: (1) the act performed was by a judicial officer; and (2) the act was a judicial act. The principal in an agency relationship is not entitled to receive immunity merely because its agent is entitled to receive immunity; the principal must establish an independent basis for receiving immunity. The Court held that the trustees and the law firm were not acting as public officials at the time of the sale and the surrounding events and, thus, they were not entitled to receive qualified public official immunity. The Court also

held that the trustees and the law firm were not acting as judicial officers at the time of the events alleged in the Complaint and, thus, they were not entitled to receive absolute judicial immunity. Accordingly, the Court held that, as a matter of law, the trustees were not entitled to any immunity from liability on the basis of their status as trustees conducting the judicial sale.

Deane J. Allen, et al. v. Sharon J. Ritter, Successor Personal Representative of the Estate of Roy Harry Allen, No. 16, September Term, 2011, filed December 15, 2011. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/16a11.pdf

TRUSTS & ESTATES LAW – PERSONAL REPRESENTATIVES

Facts:

Roy H. Allen died January 28, 2005, survived by three children, Virginia Leitch, Deane J. Allen, and Robert L. Allen. After ongoing estate disputes, the Orphans' Court for Dorchester County removed Leitch and Robert Allen, and named Sharon J. Ritter ("Appellee") as personal representative on February 26, 2008. Appellee filed a First and Final Administration Account of Roy Allen's estate that September, and Deane Allen and Robert Allen ("Appellants") excepted to portions of it. Despite these exceptions, the orphans' court approved the Account.

In 2009, Appellee requested that Appellants sign releases before Appellee would distribute any money to them. Appellants refused, so Appellee petitioned the orphans' court for Appellants to show cause for why they should not be ordered to sign the releases. The court entered a show cause order, and Appellants argued that Section 9-111 of the Estates & Trusts Article did not apply to cash distributions of a residuary estate. The orphans' court ordered the Appellants to sign the releases. Appellants appealed to the Court of Special Appeals, which affirmed the orphans' court. The Court of Special Appeals held that the orphans' court had the power to order Appellants to sign the release, incident to its broader powers in administrating estates.

Held: Affirmed.

Section 9-111 says that "a personal representative may, but is not required to, obtain a verified release from the heir or legatee." Appellants argued that the statutory language of "release" was more akin to a "receipt," not a full release from liability. The Court instead construed Section 9-111 as conferring upon a personal representative the right to obtain a release prior to distribution. The Court held that adopting Appellants' interpretation of Section 9-111 would strip the section of its meaning and render a personal representative unable to obtain a release if he or she desired one.

The Court also held that it is a proper exercise of the power of the orphans' court to mandate Appellants' signatures on the releases before distribution. The orphans' court properly had jurisdiction over interested persons and creditors who invoke the court's power to determine issues within its expressly granted powers.

Joanna Davis v. Michael A. Petito, Jr., No. 30, September Term 2011, filed February 27, 2012. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2012/30a11.pdf

FAMILY LAW – CHILD CUSTODY – AWARD OF ATTORNEYS' FEES UNDER SECTION 12-103 OF THE FAMILY LAW ARTICLE

Facts:

In the Circuit Court for Wicomico County, Joanna Davis, Petitioner, filed an Emergency Complaint for Immediate Custody, Injunctive Ex Parte and Pendente Lite Relief against Michael A. Petito, Jr., Respondent, in which she sought sole legal and physical custody of her daughter. Mr. Petito, through counsel, filed a Counter Complaint for Modification of Custody. When Ms. Davis could no longer afford to pay an attorney, she retained the services of the Sexual Assault Legal Institute (SALI) on a pro bono basis. After determining that Ms. Davis had not established by preponderance of the evidence grounds for modification in child custody, the Circuit Court considered an attorneys' fees award under Section 12-103 of the Family Law Article, Maryland Code (1984, 2006 Repl. Vol.).

The Circuit Court awarded Mr. Petito $30,773.54 in attorneys' fees, reasoning that Mr. Petito had substantial justification for defending himself in this proceeding, which justified his greater attorneys' fees than Ms. Davis, and that Ms. Davis's financial circumstances were better than that of Mr. Petito, in part because she had been represented on a pro bono basis whereas Mr. Petito had incurred significant debt as a result of retaining private counsel. In her subsequent Motion to Alter or Amend the Order, Ms. Davis argued that the judge's consideration of the pro bono status of her representation in awarding Mr. Petito attorneys' fees and costs under Section 12-103 was erroneous in light of *Henriquez v. Henriquez*, 413 Md. 287, 992 A.2d 446 (2010), which was denied by the Circuit Court judge. The Court of Special Appeals affirmed the award of attorneys' fees.

Held:

The Court of Appeals reversed and ordered that the case be remanded for reconsideration of the attorneys' fees award according to the statutory factors of Section 12-103(b) and (c) of the Family Law Article. The Court held that consideration that one party was represented on a pro bono basis, in order to award attorneys' fees under Section 12-103, to the other party, who retained private counsel, was erroneous.

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Lisa Meade v. Shangri-La Partnership and a Business T/A & D/B/A Children's Manor Montessori School, No. 128, September Term 2008, filed January 26, 2012. Opinion by Eldridge, John C. (Retired, Specially Assigned).

Battaglia, Adkins, and Raker, JJ., dissent.

http://mdcourts.gov/opinions/coa/2012/128a08.pdf

CIVIL RIGHTS – DISABILITY ACCOMMODATION DISCRIMINATION & RETALIATION

Facts:

The petitioner, Lisa Meade, sued the school attended by her two-year old son, alleging that the school had violated the Howard County Code by discriminating against her on the basis of her allergy to latex, which she claimed constituted a handicap. The petitioner twice requested the school to discontinue the use of latex gloves on school premises because the aerated latex particles created by the use of those gloves had the potential to cause her a serious allergic reaction. The school continued to use latex gloves and, after receiving the petitioner's second request for accommodation, the school asked the petitioner to withdraw her son. The Howard County Office of Human Rights investigated the charges and concluded that a prima facie case of disability accommodation discrimination and retaliation had been established. The petitioner filed a complaint in the circuit court for money damages pursuant to former Article 49B, § 42(a), of the Maryland Code and § 12.217 II of the Howard County Code.

The jury returned a special verdict in favor of the petitioner. In a motion for judgment notwithstanding the verdict, the school's counsel argued that the petitioner's latex allergy did not constitute a "handicap" under the Howard County Code, but the trial judge found that sufficient evidence had been presented to allow the jury to determine that the petitioner's latex allergy was a "handicap" because it had substantially impaired her major life activities of socialization and parenting.

The Court of Special Appeals reversed, holding that the Howard County Code should be interpreted in the same manner as the federal Americans with Disabilities Act. Federal courts had determined that the term "disability" as used in the ADA should be construed strictly to create a demanding standard. Applying this high standard, the Court of Special Appeals determined that no jury could have reasonably concluded that the petitioner was handicapped.

Held:

The Court of Appeals reversed the judgment of the Court of Special Appeals and remanded the case with instructions to affirm the judgment of the circuit court.

The Court of Appeals disagreed with the Court of Special Appeals' construction of the Howard County Code as creating a demanding standard for qualifying as disabled. Before relying on federal courts' interpretation of a federal statute, Maryland courts should first look to the language of the relevant code. The Howard County Code specifically provided that terms not defined by the Code have their "usual meanings." Maryland law also established that remedial statutes should be construed liberally in favor of individuals claiming to be the victim of discrimination. Additionally, federal cases interpreting the ADA, which were relied upon by the Court of Special Appeals, had been explicitly repudiated by the U.S. Congress.

The Court of Appeals identified several portions of the record which supported the jury's determination that Meade's allergy to latex constituted a substantial limitation on her major life activities of socialization and parenting, and thus was a "handicap" within the meaning of the Howard County Code.

People's Insurance Counsel Division v. Allstate Insurance Company, No. 60, September Term, 2011, filed January 25, 2012. Opinion by Wilner, Alan M. (Retired, Specially Assigned).

Harrell, J., dissents.

http://mdcourts.gov/opinions/coa/2012/60a11.pdf

INSURANCE LAW – STATISTICAL EVIDENCE

Facts:

Allstate Insurance Company filed a notice with the Insurance Commissioner of its intent not to accept new applications for homeowners and renters insurance in large areas of the State that fell within certain Hurricane Bands. The areas were identified by ZIP Codes.

After an evidentiary hearing conducted at the request of petitioner, a unit within the Attorney General's Office, the Insurance Commissioner concluded that (1) petitioner had standing to request the hearing, (2) Allstate had the burden of establishing that its geographic designations had an objective basis and were not arbitrary or unreasonable and therefore were in compliance with § 19-107(a) of the Insurance Article, (3) it had met that burden, (4) it also had the burden of establishing that its underwriting decision was based on standards that were reasonably related to its economic and business purpose and therefore was in compliance with § 27-501(a) of the Insurance Code, and (5) it had met that burden as well.

On judicial review, the Circuit Court and the Court of Special Appeals affirmed the Commissioner's ruling. The Court of Special Appeals concluded that § 27-501 was not applicable but that, even if it was, Allstate had complied with it.

Held: Affirmed.

The Court of Appeals held that § 27-501(a) was applicable and, finding no other error, affirmed the Court of Special Appeals judgment. The principle issue regarding § 27-501(a) was whether Allstate could demonstrate the likelihood of catastrophic hurricane damage in the excluded areas through simulation evidence produced through computer modeling, rather than by hard data from past experience. In light of expert evidence that catastrophic risk was unique, that there was too little historical evidence of its frequency to provide a reliable estimate of the actual risk, and that computer simulations were accepted within the industry and provided a more reliable estimate, the Court concluded that the validity of Allstate's underwriting decision could be based on such evidence.

David Clickner, et ux. v. Magothy River Association, Inc., et al., No. 13 September Term 2011, filed January 20, 2011 Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/13a11.pdf

REAL PROPERTY LAW – PRESCRIPTIVE EASEMENTS

Facts:

Six individuals and the Magothy River Association, Inc. ("Appellees") brought suit against the recent purchasers of Dobbins Island, David and Diana Clickner ("Clickners" or "Appellants"), seeking to establish a public right to use a beach located alongside the island's northern crescent area. Following a bench trial on the merits, the trial judge determined that Appellees had demonstrated the existence of a prescriptive easement on behalf of the public and ordered the removal of portions of a fence erected on the beach by Appellants. In making this determination the trial judge applied the general presumption of adverse use and accordingly placed the burden on Appellants to prove that the use was, in fact, permissive.

Held: Reversed.

Public prescriptive rights may be acquired over privately owned portions of beaches located along inland waterways. It was error, however, for the trial court, under the circumstances of the case, to apply the general presumption of adversity to the public use of a beach that was unimproved and in a general state of nature. Instead, the proper presumption was that public use of the land was by permission of the owners.

When an easement is claimed on land that is unimproved or in a general state of nature, there is a legal presumption that the use is by permission of the owner. A rationale for this so-called "woodlands exception," is that owners of unimproved lands ordinarily suffer no deprivation of their rights of use and enjoyment by allowing others access to their property.

Therefore, the burden was on the claimants to overcome the presumption of permission by proving that the use was, in fact, adverse. Appellees failed to overcome the presumption, as there was insufficient affirmative evidence to demonstrate that use of the beach was ever claimed adversely as a matter of right. Therefore, the public's historic use of the beach on Dobbins Island was under a license, properly subject to revocation by the Clickners.

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Bonnie L. Maddox v. Edward S. Cohn, et. al., No. 55 September Term 2011, filed January 24, 2012. Opinion by Cathell, Dale R. (Retired, Specially Assigned).

Harrell and Barbera, JJ., concur.

http://mdcourts.gov/opinions/coa/2012/55a11.pdf

STATUTORY LAW – FORECLOSURES

Facts:

Trustees, in advertising a foreclosure sale, attempted to require the successful bidder to pay additional attorneys' fees that would ordinarily be paid from the proceeds of sale or if the proceeds of sale were not sufficient, would ordinarily be paid by the mortgagee, i.e. trustees. One judge in the particular trial court permitted the imposition of the fees and ratified the sale. Another judge refused to ratify any sale in which the advertisement sought to impose additional fees on the successful bidders. Neither the instrument of indebtedness nor any statute or rule permitted the imposition of such additional fees. Such fees, if collected, were not intended to be included in the audit nor its ratification. The Court of Special Appeals affirmed the trial court.

Held: Reversed.

Court of Special Appeals reversed, case remanded to the trial court for further proceedings consistent with the Court of Appeals opinion

The public policy of the State, which formerly had been to expedite foreclosure proceedings has been changed by the Legislature in a series of statutes passed in 2008 -2011 (based upon the reports of study commissions), to create a substantial delay in such proceedings as to time requirements, mediation requirements and the like. The new statutes were intended to afford additional protection to mortgagors by slowing down the process and imposing the additional requirements. Accordingly, the Court will strictly scrutinize any attempt to impose additional requirements on prospective bidders.

Additionally, it was held that the requirement of the additional fees was not designed to maximize the sums bid at foreclosure sales. The trustees were again held to have a duty to maximize said sums and a requirement that a successful bidder be required to pay additional costs (legal fees in this case) is a violation of that duty.

Wanda T. King v. Comptroller of the Treasury, No. 32, September Term 2011, filed February 24, 2011. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2012/32a11.pdf

STATUTORY INTERPRETATION – SECTION 13-1104(c)(2)(i) OF THE TAX-GENERAL ARTICLE – TIME FOR FILING A MARYLAND REFUND CLAIM AFTER A FEDERAL ADJUSTMENT TO A PARTNERSHIP RETURN

Facts:

In 2005, the Internal Revenue Service (Service) conducted an audit of the Baltimore Orioles Limited Partnership returns for tax years 1993-1999, pursuant to the Tax Equity and Fiscal Responsibility Act of 1982. The Service adjusted various line items on the partnership returns, which had the practical effect of lessening Wanda King's personal tax liability, because she had been a limited partner. The Service notified her of this by issuing to her, on January 3, 2006, two Forms 4549A that described the changes to her personal tax liability for years 1999 and 2000. Because of these adjustments, she was eligible for a refund for those years, and filed a claim for such on February 2, 2007. The Comptroller denied her claim, pursuant to Section 13-1104(c)(2)(i) of the Tax-General Article of the Maryland Code (1988, 2004 Repl. Vol.), because it was filed more than a year after she received Forms 4549A from the Service. Ms. King filed an informal appeal with the Hearings and Appeals Section of the Office of the Comptroller, which was denied. She then appealed to the Maryland Tax Court, arguing that because she had six months within which to challenge the Service's calculations on Forms 4549A, the one year statute of limitations should have began to run six months from the date the Service issued its report. The Tax Court ruled in favor of the Comptroller, reasoning that because Form 4549A represents a final adjustment report of the Service and Ms. King did not actually file an appeal challenging the computations, she had one year from the date Form 4549A was issued to file her Maryland refund claim.

Ms. King sought judicial review of the Tax Court's decision in the Circuit Court for Calvert County, which reversed the Tax Court's determination, reasoning that the plain meaning of the statutory provision was that a report was only final after the period in which a taxpayer-partner could file an appeal expired. The Comptroller noted an appeal to the Court of Special Appeals, which, in an unreported opinion, overturned the decision of the Circuit Court. Ms. King then filed a Petition for Writ of Certiorari, which the Court of Appeals granted.

Held: Affirmed

The Court of Appeals affirmed the decision of the Court of Special Appeals. The Court explained that the statutory provision at issue was written to encompass two scenarios, one in which a taxpayer-partner does file an appeal of the Service's determination and one in which he

or she does not. Because the Petitioner never filed an appeal, she was required to submit her claim within one year of "the date of a final adjustment report." The Court analyzed this phrase in light of the Maryland tax refund scheme, as well as its federal counterpart, and held that the plain meaning of this phrase was the date that the report was issued, not the date that her right to appeal the report expired. The Court concluded that because Ms. King filed her refund claim more than year from the date the Service issued Forms 4549A, it was properly denied as untimely.

Donald Spangler, et al. v. Peggy McQuitty and Gary McQuitty, as Personal Representatives of the Estate of Dylan McQuitty, No. 23, September Term 2011, filed January 27, 2012. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2012/23a11.pdf

TORTS – POST TRIAL MOTIONS – MOTIONS FOR NEW TRIAL – GROUNDS

Facts:

Dylan McQuitty, by and through his parents, Peggy and Gary McQuitty, Appellees, brought an action against Dr. Donald Spangler, Appellant, arguing that he had breached his duty to obtain the informed consent of his patient, Ms. McQuitty, resulting in severe injuries to Dylan at birth. The McQuittys' original complaint also named the hospital where Dylan was born, Franklin Square Hospital Center, as a defendant. The Hospital moved for summary judgment, which was granted, and entered into a release and settlement agreement with the McQuittys, agreeing that the Hospital would be considered a joint tort-feasor only if it was "adjudicated to be a joint tortfeasor by a final judgment of a court of record after trial on the merits."

Dr. Spangler also moved for summary judgment, arguing that he had no duty to obtain the informed consent of Ms. McQuitty regarding a placental abruption because he did not conduct or propose an "affirmative invasion of her physical integrity." The motion was denied. Following the trial, the jury, finding in the McQuittys' favor, awarded Dylan $13,078,515.00 in damages, including $8,442,515.00 in future medical expenses.

After trial, Dr. Spangler filed a Motion for Remittitur and a Motion for Judgment Notwithstanding the Verdict, again asserting that the doctrine of informed consent required "an affirmative invasion of physical integrity." The trial court granted judgment notwithstanding the verdict in favor of Dr. Spangler, and the McQuittys appealed. The Court of Appeals ultimately reversed, *McQuitty v. Spangler*, 410 Md. 1, 976 A.2d 1020 (2009) (hereinafter *McQuitty I*), holding that a physical invasion, or a battery, was not a prerequisite to a physician's duty to obtain a patient's informed consent to treatment. The Court of Appeals remanded the case to the trial court to consider Dr. Spangler's motion for remittitur.

Prior to resolution of the motion for remittitur, Dylan died. In a series of post-trial motions following *McQuitty I*, Dr. Spangler moved to reduce the verdict, arguing that the opinion of the Court of Appeals in *McQuitty I* substantively changed Maryland common law and entitled him to a new trial, that Dylan's death absolved the portion of the judgment allocated for future medical expenses, that the jury's award should be reduced by the Franklin Square Hospital's settlement amount, as the Hospital had not been judicially determined to be a joint tort-feasor, and finally, that no post-judgment interest be calculated. The trial court denied Dr. Spangler's

requests, and he appealed. The Court of Appeals, prior to any proceedings in the intermediate appellate court, granted certiorari to consider the denial of Dr. Spangler's post-trial motions.

Held:

The Court of Appeals affirmed the decisions of Circuit Court for Baltimore County. The Court concluded that the decision in *McQuitty I* was consistent with Maryland common law and therefore did not serve as grounds for a new trial. The Court also observed that Dr. Spangler had "ample opportunity" to be heard and clearly knew before his presentation at trial that he needed to address informed consent, without the necessity of a battery, because he asserted the claim in his motion for summary judgment, which was denied, prior to trial.

The Court then observed that the impact of the death of a prevailing party on an award of future medical expenses after a judgment notwithstanding the verdict was entered but was reversed on appeal and the case was returned for consideration of a motion for remittitur was a matter of first impression. There is no Maryland statute that requires a reversion of the remainder of future medical expenses following the death of the recipient. Rather, Section 11-109 of the Courts & Judicial Proceedings Article, Maryland Code (1973, 2006 Repl. Vol.) provides the trial court with discretion to annuitize the future damages portion of the award. Under that statute, if the plaintiff dies prior to receiving the final periodic payment, then the rest of the award for future medical expenses reverts to the defendant. Although Dr. Spangler's motion to annuitize the payments was denied by the trial court, he did not appeal that denial. The Court upheld the finality of the judgment in favor of the McQuittys.

As to Dr. Spangler's contention that he was entitled to a reduction in the jury's award for the amount the Franklin Square Hospital paid the McQuittys, the Court disagreed, concluding that the trial court's grant of summary judgment in favor of the Hospital served as the judicial determination that it was not a joint tortfeasor, according to Maryland's Uniform Contribution Among Tort-Feasors Act, Section 3-1401(c) of the Courts & Judicial Proceedings Article; Dr. Spangler therefore was not entitled to a reduction.

Finally, the Court addressed Dr. Spangler's argument that the trial court erred in awarding the McQuittys post-judgment interest from the date of the original judgment, instead of the date when the trial court ruled on his motion for remittitur. The Court of Appeals observed that where judgments are entered following an appeal of a post-trial motion, it is within the sound discretion of the trial court to award post-judgment interest dating back to the entry of the original judgment, in pursuit of equitable principles, where the mandate of the appellate court does not expressly address the issue of post-judgment interest. The mandate in *McQuitty I* did not address post-judgment interest, but the language of the opinion clearly remanded the case only for consideration of Dr. Spangler's motion for remittitur, not to reconsider the jury's verdict. Post-judgment interest accrued from the date of the original judgment.

Nicole Pace, as Mother and Next Friend of Liana Pace v. State of Maryland, No. 132, September Term, 2010, filed February 22, 2012, Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/132a10.pdf

TORT LAW – STATUTORY DUTY

Facts:

The mother of a kindergarten student who suffered a serious allergic reaction after consuming peanut butter given to her under her school's free lunch program brought suit in the Circuit Court for Frederick County against the State of Maryland and its agents. The mother alleged in her complaint that the State's obligations under the National School Lunch Act, 42 U.S.C. §§ 1751-1769 (2006) ("NSLA") imposed upon the defendants a statutory duty of care to ensure that children with food allergies are not served lunches containing allergens.

The trial court granted the State defendants' motion to dismiss on the ground that the NSLA merely establishes a subsidized lunch program for the benefit all children at participating schools, and does not impose a specific statutory duty of care towards children with food allergies. The Court of Special Appeals affirmed the dismissal.

Held: Affirmed.

The NSLA created a federal program aimed at providing free or low-cost nutritious meals to the nation's school children. The State defendants had no statutory duty under the NSLA to ensure that a child with a food allergy was not served harmful foodstuffs by her local school. Any duties imposed on the State under the statute redound to the general public and are therefore not enforceable in tort. Because the sections of the Act and accompanying federal regulations cited by Petitioner were insufficient to impose a duty on the State defendants, the complaint was properly dismissed.

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University of Maryland Medical System Corporation v. Giuseppina Muti, Personal Representative of the Estate of Elliott Muti, et al., No. 42, September Term, 2011, filed February 21, 2012. Opinion by Rodowsky, Lawrence F. (Retired, Specially Assigned).

http://mdcourts.gov/opinions/coa/2012/42a11.pdf

WRONGFUL DEATH ACTION – CONDITION PRECEDENT – COURTS AND JUDICIAL PROCEEDINGS § § 3-901 THROUGH 3-904 – MARYLAND RULE 15-1001 – USE PLAINTIFF – SANCTION FOR RULE VIOLATION – FAILURE TO ASSERT CLAIM – ONE ACTION RULE – RELATION BACK THEORY

Facts:

Joined plaintiffs, the Appellees in the current action, the widow and the adult children of the deceased filed a wrongful death action pursuant to Maryland Code §§ 3-901 through 3-904 of the Courts and Judicial Proceedings Article (CJ) against the University of Maryland Medical System Corporation (UMMSC). The Appellees knew that the deceased had an adopted son, Ricky, from a prior marriage, but they did not know his whereabouts. They also did not name him as a use plaintiff as required by Maryland Rule of Procedure 15-1001. Ricky never asserted any claim against UMMSC.

The Circuit Court for Baltimore City dismissed the action for the non-joinder of the unnamed son as a use plaintiff more than three years after the death of the deceased. The Court of Special Appeals vacated the dismissal of the action, reversed summary judgment on the survival claim, and remanded the action to circuit court, stating that the circuit court had abused its discretion by denying the Appellees leave to amend without first considering whether the unnamed use plaintiff would be prejudiced by the denial.

This Court granted certiorari to determine whether:

1. To dismiss with prejudice the wrongful death claims of the Appellees, as the Appellant requests?;
2. To allow the Appellees' claims to proceed
    a. After permitting the Appellees to amend, under a relation back theory, by naming the previously unnamed use plaintiff as such; or
    b. Without naming the unnamed use plaintiff as such, as alternatively requested by the Appellees?

Held:

Vacated and remanded to the Court of Special Appeals with instructions to reverse the judgment of the circuit court for Baltimore City and remand this case to that court for further proceedings consistent with this opinion.

The Court first laid forth the legal history of wrongful death actions in Maryland, which were first established in Maryland in 1852. The original wrongful death action provided a cause of action, brought in the name of the State, for the use of the spouse, parent, or child of the person tortiously killed. These are today's primary beneficiaries under CJ § 3-904(a)(1). Damages were limited to pecuniary loss. It was not until 1969 that solatium damages were permitted. The Court then discussed the history of the procedural rules surrounding wrongful death actions. It noted that the present Rule 15-1001 requires notice to all use plaintiffs.

The Court next addressed the condition precedent issue. It noted that the Court construes the three-year time limit in the wrongful death statute to be a substantive provision: a condition precedent to asserting the statutorily created cause of action. The Court stated that what the Appellant sought here was to have the Court hold that a wrongful death action must be a unitary action by all actual or potential beneficiaries. The Court concluded that this is not how the wrongful death action operates. Citing *Deford v. State u/o Keyser*, 30 Md. 179 (1869), the Court held that the one-action clause is not a basis for dismissing an original plaintiff's claim for failure to identify a potential beneficiary as a use plaintiff.

The Court next discussed whether this proposition had been implicitly overruled by *Walker v. Essex*, 318 Md. 516, 569 A.2d 645 (1990) and *Ace Am. Ins. Co. v. Williams*, 418 Md. 400, 15 A.3d 761 (2011). The Court determined that it had not because those cases did not affect the long recognized condition precedent that requires a beneficiary to sue within three years of death.

The Court turned its attention to the Appellees' contention that the trial court erred by not applying the doctrine of relation back. The Court held that relation back could not be applied because the adopted son's claim had expired by operation of the three-year condition precedent.

The Court finally addressed the Appellees' violation of Rule 15-1001 by not identifying the adopted son as a use plaintiff. The Court stated that it viewed the addition, by rule, of a second automatic limitation on the nature to sue to be a substantive change and thus unfeasible. However, the Court noted that it could create reasonable requirements governing the exercise of a statutory right, which it did in Rule 15-1001(b). Because Rule 15-1001(b) did not enumerate consequences for failure to comply with it, the consequences would be determined in light of the totality of the circumstances and the purpose of the rule pursuant to Rule 1-201(a). The Court then discussed the purpose of Rule 15-1001, the potential prejudice to both the adopted son and to UMMSC, and the duty of the Appellees to have identified the son as a use plaintiff. The Court concluded that the circuit court abused its discretion as dismissing the wrongful death action as a sanction for the Rule violation and remanded it to that court to determine what, if any, sanction for the omission is appropriate.

COURT OF SPECIAL APPEALS

Edward C. McReady v. University System of Maryland, et. al, Nos. 1668, 1669, and 1670, September Term 2010, filed February 9, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/1668s10.pdf

ACTIONS FOR JUDICIAL REVIEW – AGENCY RECORD – RULE 7-206 – TRANSCRIPTS.

Facts:

Former employee brought complaint against his university employer under the Maryland Whistleblower Law, sections 5-301 *et seq.* of the State Personnel and Pensions Article. The complaint was rejected by the Department of Budget and Management, and, when appealed, was referred to the Office of Administrative Hearings ("OAH") for decision by an Administrative Law Judge ("ALJ"), with the ALJ's decision being the final agency action. The ALJ decided that the complaint was untimely filed, based solely on legal argument (the former employee is himself a lawyer), without any testimony of witnesses being taken. The former employee filed three related actions for judicial review in circuit court challenging the ALJ's decision.

The OAH directed the former employee to pay for the full cost of transcripts of the hearings before the ALJ that consisted only of oral argument of counsel. He refused, on the ground that Rule 7-206(a), governing the "record" in actions for judicial review, requires only that transcripts of "testimony" be included; and there was no testimony taken in this case.

The OAH transmitted what it designated a "partial record," which it said would be completed only upon receipt of payment for the transcripts. The schedule the court adopted assumed that the OAH would transmit the record in full at the correct times, and the court denied the former employee's request to amend the schedule. The former employee did not submit a memorandum as required by Rule 7-207 and did not appear for the scheduled Rule 7-208 hearing. The court dismissed the actions on the ground that the record had not been filed and the former employee had not submitted a memorandum or appeared for the hearing.

Held:

Dismissal reversed and remanded. The agency "record" is defined by Rule 7-206(a). It requires inclusion of "the transcript of testimony and all exhibits and papers filed in the agency proceeding." The rule does not require transcripts of hearings in which no testimony is taken, or

transcripts of "proceedings," which would include hearings with and without testimony. Thus, the record of the OAH, which was the agency "record" in these cases, was complete without the transcripts of the hearings that took place; and the former employee was not required to pay for the preparation of those transcripts. The schedule of the court was not properly amended to reflect that the "partial record" the OAH untimely filed was a complete record, and to reschedule the deadlines for filing the Rule 7-207 memoranda and holding the Rule 7-208 hearing accordingly.

Larry Bowie, et al., v. Board of County Commissioners of Charles County, Maryland, et al., Case No. 312, Sept. Term 2010, filed February 3, 2012. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2012/0312s10.pdf

APPEAL AND ERROR – PRESERVATION OF ISSUES
Due process and open meeting violations were properly preserved, even though appellants did not make a record or object to a partially closed site visit of county board of appeals in connection with consideration of an application for a special exception from zoning requirements. It is the duty of the board not the appellants to make a record of what happened at a site visit. Appellants' counsel by not objecting and impliedly agreeing to attendance at a site visit only by representatives and to a partially closed meeting could not have made such an agreement for the members of the public he did not represent and for those otherwise seeking admission to the site visit.

CONSTITUTIONAL LAW – DUE PROCESS
If a board of appeals intends to rely on a site visit in considering a special zoning exception, due process requires observations and communications to be placed on the record in order to preserve the right of rebuttal / cross-examination and to facilitate judicial review.

ADMINISTRATIVE LAW – OPEN MEETINGS
When a board of appeals conducts a site visit in connection with the consideration of a special exception it holds a meeting subject to applicable open meetings requirements. There is no legally recognized concept of a partially open, partially closed meeting. The board could not exclude the public from attending the site visit and the board cannot avoid open meeting requirements by meeting on private property to consider public business.

Facts:

WSG Holdings, LLC ("WSG") sought to build a facility in Nanjemoy, in Charles County, for research and training related to personal security. Because the activities they intended to conduct were not permissible uses under the Charles County Zoning Ordinance, Chapter 297, Code of Charles Co. (1994), WSG applied to the Board of Appeals for a special exception. Residents of Nanjemoy opposed WSG's application. The Board of Appeals held three public hearings on the matter, during which they took evidence from WSG and the opposing residents.

At the end of the second hearing, the Board decided to conduct a site visit. Both WSG and the opponents were permitted to send representatives to the visit, but the Board prohibited others from attending. The visit apparently occurred on March 17, 2009, but there exists no transcript, minutes or other official record accounting for the event and proceedings. As a result, opposing residents filed a Motion for Appropriate Relief, raising concerns about the partially closed site visit and lack of official record. At the hearing that followed, the Board appeared to deny the

motion and approved a motion to grant the special exception, provided that certain conditions were met.

The opponents sought judicial review in the Circuit Court for Charles County, asserting that the Board failed to follow its own procedural rules in conducting the hearing, that no reasonable person could conclude that the proposed development fit within the legal requirements for a special exception, and that the Board's site visit violated due process and open meeting requirements. After a hearing, the court remanded the case with instructions to the Board to articulate its findings on the issue of whether the proposed facility was consistent with the Charles County Comprehensive Plan, concluded that the opposing residents had not preserved the site visit issues for review, and otherwise affirmed the Board's decision. The Nanjemoy residents opposing the exception, WSG, and the Board all appealed.

Held:

The Court of Special Appeals reversed. The Court held that because the opponents of the project raised the site visit issue in its Motion for Appropriate relief, the issue was properly preserved for review.

The Court examined case law from Maryland and elsewhere to determine whether the Board violated § 4.07(c)(4) of Article 66 and Rule III of the Board's Rules by conducting a partially closed site visit and failing to maintain a record of what transpired. Under those provisions, Board meetings are required to be open to the public, and the Board is prohibited from receiving evidence, argument, or other matter except during a public hearing. In addition, the public hearing must be electronically recorded. Because the Board was transacting public business during the site visit, the Court held that § 4.07(c)(4) of Article 66 and Rule III of the Board's Rules were applicable. Accordingly, the Board's exclusion of others and failure to maintain a record was in violation of those rules. The Court also held that the Board's failure to disclose what happened during the site visit prevented appellants from challenging the evidence through cross-examination or otherwise, creating a denial of due process.

Employees' Retirement System of the City of Baltimore v. Sylvester Dorsey, No. 2818, September Term, 2010, filed February 10, 2012. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/2818s10.pdf

ADMINISTRATIVE LAW – BALTIMORE CITY CODE – PREEXISTING PHYSICAL OR MEDICAL CONDITIONS – RETIREMENT DISABILITY BENEFITS

Facts:

Sylvester Dorsey began working as a school police officer in August 2005. On August 31, 2007, while on-duty, Mr. Dorsey was involved in an altercation, during which he suffered back injuries, bruises, and a deep laceration to his arm. After the incident, Mr. Dorsey had weakness in his legs. At one point, while walking down steps, his legs "gave out" on him. He fell, separating his right shoulder. Mr. Dorsey was terminated by his employer, the City of Baltimore, because of his injuries. On January 15, 2010, Mr. Dorsey filed an Application for Line-of-Duty Disability Retirement.

On July 12, 2010, a hearing was held regarding Mr. Dorsey's claim. Counsel for ERS conceded that Mr. Dorsey was "incapacitated from the further performance of [h]is job and that the incapacity is permanent," but he challenged the "degree of impairment, degree of preexisting disability" and whether the assault was the "sole cause of [the] disability." Several doctors noted that Mr. Dorsey had preexisting asymptomatic degenerative disc disease.

The hearing examiner found that Mr. Dorsey sustained a "40% disability to the back, with 15% of the impairment caused by the pre-existing condition and 25% due to the assault of 8/31/07." She concluded that Mr. Dorsey suffered a "25% impairment to his back and 25% impairment to his right arm due to the assault which occurred in the line of duty on 8/31/07." She denied Mr. Dorsey's application, however, stating that his impairment was not "independent of . . . any preexisting physical or medical conditions."

Mr. Dorsey filed a Petition for Judicial Review of the hearing examiner's ruling in the Circuit Court for Baltimore City. The circuit court ruled that the hearing examiner's findings of "25 percent impairment to his back and 25 percent impairment to his shoulder complies with the [City Code's] requirements." The order stated that the hearing examiner's decision "is hereby reversed and appellant's application for line of duty disability retirement benefits is granted."

Held: Judgments affirmed, in part, and vacated, in part.

The Baltimore City Code provides that a claimant is eligible for a line-of-duty disability retirement if a hearing examiner determines that the claimant sustained an impairment "as the direct result of bodily injury through an accident independent of all other causes and independent

of any preexisting physical or medical conditions, job-related or otherwise, occurring while in the actual performance of duty with the City at a definite time and place, without willful negligence on the part of the member." Baltimore City Code, art. 22, § 9(j)(1). Additionally, "[f]or line-of-duty disability retirement benefits awarded on or after April 1, 2001," a claimant must meet a threshold showing of impairment: "50% anatomical loss of the use of any 1 or a 25% or more anatomical loss of each of 2 or more of the impairments" set forth in the statute.

The hearing examiner erred in finding that, because the claimant had asymptomatic degenerative disc disease, he did not quality for benefits because his disability was not "independent of any preexisting physical or medical condition." The hearing examiner properly apportioned the amount of the disability that was the "direct result" of the work accident. It found that the claimant sustained a "40% disability to the back, with 15% of the impairment caused by the pre-existing condition and 25% due to the assault of 8/31/07." The court went on to find that the claimant suffered a "25% impairment to his back and 25% impairment to his right arm due to the assault which occurred in the line of duty on 8/31/07." This portion of the claimant's disability that met the statutory requirements was independent of his preexisiting condition and satisfied the requirements of the statute. That there was some additional disability due to a preexisiting condition did not preclude the claimant from receiving line-of-duty disability benefits. The circuit court properly reversed the ruling of the administrative agency denying benefits. It exceeded its authority, however, when it granted Mr. Dorsey's application for disability benefits rather than remand the case with directions for the entry of an award.

University of Maryland Medical System Corp., et al v. Darryl Gholston, Jr., a Minor, et al., No. 2505, September Term 2010, filed February 10, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/2505s10.pdf

CIVIL LAW – NEGLIGENCE – MEDICAL MALPRACTICE – CAUSATION.

Facts:

In the Circuit Court for Baltimore City, Darryl Gholston, the appellee and a minor, brought suit through his mother, Nicole Player, for medical malpractice against the University of Maryland Medical System Corporation ("UMMS"), the appellant. The malpractice claim arose from events surrounding Gholston's premature delivery at UMMS. Player was admitted to UMMS when she was 23 weeks pregnant after a sonogram revealed a shortened and prematurely dilated cervix. Under care at UMMS, Player's pregnancy was extended another three weeks to 26 weeks gestation. On the morning of September 19, 2002, a sonogram showed that the umbilical cord had descended beneath the fetus's lowest presenting part, through the length of the cervix, creating, according to the physician who read the sonogram, "extreme risk" for premature rupture of the membranes, preterm birth, and complete cord prolapse, in which the source of oxygen to the fetus would be compromised. The physician recommended continuous monitoring with readiness for a "stat" Cesarean section. Gholston was born at 11:42 p.m. by emergency Cesarean section, weighing 1 pound, 12 ounces. He remained in the Neonatal Intensive Care Unit for several months.

The malpractice case was tried to a jury for six days. Evidence at trial presented by expert witnesses showed that Gholston, then 9 years old, suffered from physical and mental deficits and that the mental deficits were likely to worsen over time as he reaches the age where the ability to think in abstract terms becomes important. Experts for the plaintiff attributed his deficits to lack of oxygen caused by a delay in delivery at least from 11:05 p.m. until 11:42 p.m., during which time the umbilical cord had prolapsed completely and the mother's contractions were depriving the baby of oxygen. These experts opined that the cause-in-fact of Gholston's injuries was oxygen deprivation, not prematurity. Experts for UMMS opined that the health care providers saved Gholston from almost certain death by extending his mother's pregnancy and that the cause-in-fact of his deficits was prematurity and associated low birth weight. The parties also presented conflicting expert testimony on the standard of care, with UMMS maintaining that there was no delay in delivery.

Over the denial of a motion for judgment at the close of all the evidence, the case was sent to the jury, which returned a judgment for Gholston in the amount of $3.605 million. UMMS unsuccessfully moved for JNOV and a new trial. UMMS timely appealed from that judgment,

challenging the sufficiency of the evidence to establish causation and to establish Gholston's future lost wages.

Held: Affirmed.

On review of a denial of a motion for judgment at the close of all the evidence and a motion for JNOV, the evidence is viewed in the light most favorable to the prevailing party. There was no dispute that the expert witnesses presented by both sides were competent and properly accepted by the trial judge. In determining whether the evidence of causation was legally sufficient to raise a jury question, we focus exclusively on the evidence favorable to Gholston. On such evidence, reasonable jurors could conclude by a preponderance of the evidence that the cause-in-fact of the child's deficits was lack of oxygen during the birth process, which in turn was caused by the failure to deliver him at an earlier time, when the signs and symptoms of oxygen-depriving cord prolapse emerged; and that the deficits were not caused by prematurity and low birth weight.

UMSS presented the issue of proximate causation as a policy issue: whether health care providers whose heroic efforts prevent the near certain death of a fetus should be subject to a more lenient standard of care. Maryland law does not allow for that. A health care provider owes a duty of care to a patient regardless of the dire situation in which the patient presents and that duty persists after an initial dire situation may have been successfully treated.

As to the sufficiency of the evidence on the issue of future lost wages, if preserved, the evidence presented by Gholston's experts was legally sufficient to support the jury verdict on this item of damages.

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Russell Swatek v. Board of Elections of Howard County, No. 1557, September Term 2010, filed on February 9, 2012. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2012/1557s10.pdf

CIVIL PROCEDURE – APPEALS – BRIEFS

Facts:

On February 1, 2010, the Howard County Council passed a bill that amended the Howard County Zoning Ordinance. Appellant, in conjunction with Taxpayers Against Giveaways, prepared a Public Local Law Referendum Petition ("Petition") that sought to change portions of the ordinance that were amended. Appellant submitted 3,491 signatures in support of the Petition. Appellee concluded that the Petition was insufficient because 1,352 of the signatures were invalid. Appellant subsequently filed a petition for judicial review.

On May 27, 2010, appellee transmitted the record to the circuit court. A hearing was subsequently scheduled for August 27, 2010. On August 26, 2010, appellee filed a "Motion to Dismiss," arguing that the petition for judicial review should be dismissed because appellant failed to submit a memorandum in accordance with Md. Rule 7-207(a). The next day, the Circuit Court for Howard County dismissed the petition for judicial review.

Held: Affirmed.

Md. Rule 7-207(a) provides that "[w]ithin 30 days after the clerk sends notice of the filing of the record, a petitioner shall file a memorandum setting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to pages of the record and exhibits relied on." Appellee filed the record on May 27, 2010. On August 27, 2010, the day of the hearing, no memorandum had been filed.

"If a petitioner fails to file a memorandum within the time prescribed by [Md. Rule 7-207], the court may dismiss the action if it finds that the failure to file or the late filing caused prejudice to the moving party." Md. Rule 7-207(d). Appellee filed a motion to dismiss, arguing that it was prejudiced by the absence of a memorandum. Recognizing that the purpose of Md. Rule 7-207(a) was to inform the opposing parties of the issues involved, the Court held that appellee was prejudiced because it was unable to prepare for the petition without a memorandum.

Return to ToC

Bryson Murray, et al. v. TransCare Maryland, Inc. et al., Case No. 1791, September Term 2010, filed February 9, 2012, Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/1791s10.pdf

CIVIL PROCEDURE – VENUE – *FORUM NON CONVENIENS* – MOTIONS TO TRANSFER – CONVENIENCE OF PARTIES – INTERESTS OF JUSTICE – PUBLIC HEALTH & WELFARE LAW – GOOD SAMARITAN ACT – FIRE AND RESCUE ACT – LIABILITY – IMMUNITY – LEGISLATION – INTERPRETATION

Facts:

This appeal arises from the grant of a motion to transfer by the Circuit Court for Baltimore City and of summary judgment by the Circuit Court for Talbot County in favor of appellees, TransCare Maryland, Inc. and TransCare, Inc., against appellants, Karen Murray and Bryson Murray. Karen filed a negligence/medical malpractice action in the Circuit Court for Baltimore City on behalf of her minor child, Bryson, for injuries sustained by Bryson during a medical aircraft transfer, and on her own behalf, a claim for loss of parental relationship and extraordinary costs and expenses. The Circuit Court for Baltimore City granted appellees' motion to transfer to the Circuit Court for Talbot County on the ground of *forum non conveniens*, where summary judgment was granted in favor of appellees. On appeal, appellants argue that the Circuit Court for Baltimore City abused its discretion in transferring the action from Baltimore City to Talbot County under the doctrine of *forum non conveniens*, and the Circuit Court for Talbot County erred in granting summary judgment in favor of appellees finding appellees immune under the Good Samaritan Act, CJP § 5-603, and/or the Fire and Rescue Act, CJP § 5-604.

Held:

The Court of Special Appeals affirmed the Circuit Court for Baltimore City's grant of a motion to transfer to the Circuit Court for Talbot County. The Court of Special Appeals reversed the Circuit Court for Talbot County's grant of summary judgment.

Maryland Rule 2-327(c) states that "[o]n motion of any party, a trial court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice." A plaintiff's choice of forum must be given "proper regard," and the plaintiff's choice will not be altered solely because it is more convenient for the moving party to be in another forum. Nonetheless, the plaintiff's choice of forum is not dispositive and less deference should be accorded to a plaintiff's choice when the plaintiff is not a resident of the forum or when the controversy has no meaningful ties to the forum.

A motion to transfer may be granted only where the balance between two factors–convenience of the parties and witnesses and the interests of justice–weighs strongly in favor of the moving party. The convenience factor consists of the convenience of the parties and witnesses. The interests of justice factor requires a court to weigh both private and public interests. Private interests of justice concern the efficacy of the trial process itself. A private interest is concerned with a particular case. We have stated that private interests of justice include: (1) the relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) possibility of view of premises (the subject of the action or where the incident occurred), if view would be appropriate to the action; and (5) all other practical problems that make trial of a case easy, expeditious and inexpensive. Public interests of justice, on the other hand, embrace such broad citizen concerns as the county's road system, its educational system, its governmental integrity, its police protection, its crime problem, its fire protection, etc. Public interests of justice include: (1) considerations of court congestion; (2) the burden of jury duty; and (3) local interest in the matter at hand.

Through the plain meaning of its terms, the Good Samaritan Act, with the exceptions outlined in (b)(3) and (b)(4), is applicable solely to individual persons who render aid meeting the requirements set forth in subsection (a). As such, the Good Samaritan Act does not provide immunity to private commercial ambulance companies that are not "persons," "individuals," or "members" under the Act. The legislative history of the Act specifically demonstrates the General Assembly's intent to extend immunity to certain designated persons and corporations, which does not include private commercial ambulance companies.

Md. Code Ann., Cts. & Jud. Proc. § 5-604 provides immunity from civil liability to members of fire and rescue companies and to the companies themselves for any act or omission performed in the course of their duties, unless the act or omission is willful or grossly negligent. The plain language of Md. Code Ann., Cts. & Jud. Proc. § 5-604 leads to the conclusion that the term "rescue company" does not include private commercial ambulance companies. The legislative history of Md. Code Ann., Cts. & Jud. Proc. § 5-604 demonstrates that the statute is applicable to fire and rescue companies regardless of whether they are volunteer, municipal, or for profit. Nothing, however, in the legislative history demonstrates a legislative intent to extend immunity to private commercial ambulance companies. The clear language of Md. Code Ann., Cts. & Jud. Proc. § 5-604 provides that for immunity, fire or rescue companies must not commit a willful or grossly negligent act and must be performing "their duties," which could include a vast number of activities. The existence of an emergency is not a requirement of Md. Code Ann., Cts. & Jud. Proc. § 5-604.

Louis Brock A/K/A/ Lewis Brock v. State of Maryland, No. 1974, September Term, 2010, filed February 9, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/1974s10.pdf

CONSTITUTIONAL LAW – SIXTH AMENDMENT – CONFRONTATION CLAUSE – TESTIMONIAL VERSUS NON-TESTIMONIAL OUT-OF-COURT STATEMENT – STATEMENT MADE IN RESPONSE TO QUESTIONS DURING ONGOING EMERGENCY

Facts:

Around 1:30 a.m. in a crowded tavern in Baltimore City, the victim was stabbed in the neck on the dance floor. Police were called about a "cutting." They responded to find the victim lying on the floor bleeding profusely. Nearby, Michael Pryor was pacing, agitated and bleeding from his hands. The first responding police officer asked him what had happened. Pryor said that he saw a man stab the victim and run out of the tavern into the parking lot. Pryor chased after the man and the two men fought in the parking lot, with the man wielding a knife. The man then got into the passenger seat of a cream-colored car and was driven away from the scene, possibly tossing the knife out the window. Pryor described his assailant, but did not identify him. The victim died at the scene. The tavern and parking lot remained crowded throughout. While police were at the scene, they received a second call informing them that a man with blood on his hands was knocking on doors in a nearby neighborhood asking for help. That man, Louis Brock, the appellant, was arrested. In the Circuit Court for Baltimore City, he was charged with the victim's murder and with the attempted murder of Pryor.

In the months following the murder, Pryor gave several statements to the police identifying the appellant as the stabber, all of which were subsequently ruled inadmissible. Pryor subsequently recanted his identifications of the appellant as the stabber. The State immediately supplemented its discovery responses to inform the defense of the change in Pryor's most recent statement.

Before trial, Pryor was killed in what was characterized as an unrelated homicide. The defense moved to suppress Pryor's first statement to police made at the scene of the murder. The parties agreed that the statement was hearsay, but qualified as an excited utterance. The question of admissibility focused on whether the statement was testimonial and hence its admission would violate the appellants' confrontation rights. The court denied the suppression motion and the statement came into evidence. Brock sought to admit into evidence the State's supplemental discovery notice summarizing Pryor's recantation of his identification of Brock as the stabber. The court ruled that this statement was inadmissible hearsay. A jury acquitted Brock of the murder charges, but convicted him of second-degree assault of Pryor. He noted a timely appeal from the judgment of conviction.

Held: Affirmed.

Pryor's statement to the police officer at the scene was properly admissible. It was made in the midst of an ongoing emergency. The tavern and parking lot remained crowded, the scene was chaotic, with the perpetrator at large, possibly within the crowd (and possibly Pryor himself), and the knife had not been located. In these circumstances, the emergency was unresolved and Pryor's statement was not testimonial.

Any error in the court's exclusion of Pryor's subsequent statement recanting his identification of Brock as the stabber was harmless as this statement did not have any impeachment value with respect to the only charge upon which Brock was convicted, assault upon Pryor.

Michael Lee Adams v. State of Maryland & *John Wesley Ray v. State of Maryland*, Case Nos. 352 & 435, September Term, 2010, filed February 8, 2012. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2012/0352s10.pdf

RIGHTS OF INCOMPETENT PERSONS – DUE PROCESS/EQUAL PROTECTION – RE-INDICTMENT AFTER MANDATORY DISMISSAL DUE TO CONTINUING INCOMPETENCY – CRIMINAL/CIVIL COMMITMENT.

Facts:

John Wesley Ray was indicted for attempted first degree murder and lesser included offenses, but the circuit court found him not competent to stand trial and ordered him confined to a mental health facility under § 3-106(b) of the Criminal Procedure Article ("CP"). More than five years later, Ray successfully moved to dismiss the charges against him, *see Ray v. State*, 410 Md. 384 (2009), citing the mandatory dismissal provision in CP § 3-107(a)(2).Six weeks after his charges were dismissed, the State re-indicted Ray on the same charges and continued to confine him at the mental health facility. Ray moved to dismiss the second indictment and also responded to the indictment, pleading, *inter alia*, that he was still not competent to stand trial. The circuit court denied Ray's motion to dismiss.

Michael Lee Adams was indicted for attempted first degree rape and related offenses, but the circuit court found him not competent to stand trial and ordered him confined to a mental health facility. After the Court of Appeals' decision in *Ray*, Adams successfully moved to dismiss his indictment, citing CP § 3-107(a)(2). Two months earlier, however, the State had re-indicted Adams on the same charges. The circuit court denied Adams' motion to dismiss the second indictment.

Held:

After original felony indictments are dismissed in accordance with CP § 3-107(a)(2), which mandates that felony charges must be dismissed when the defendant remains incompetent after five years, CP § 3-107(a) expressly provides that such a dismissal is without prejudice, indicating the General Assembly contemplated that the State could decide to re-indict after such a dismissal. In this, as in the exercise of other prosecutorial powers to charge and try citizens, however, the State is obligated to act in good faith. In order to avoid undermining the statutory scheme designed to protect the constitutional rights of incompetent persons, the State may not re-indict after a § 3-107(a) dismissal until it can articulate a reasonable basis to believe that the defendant has become competent to stand trial. The re-indictment cannot be for the sole constitutionally impermissible purpose of continuing the defendant's confinement under a

criminal, rather than a civil, commitment. In cases of persistent incompetency, the State, in order to continue confinement, must initiate proceedings to convert the incompetent person's commitment from criminal to civil, in accordance with CP § 3-106.

Devin Jermaine Fields v. State of Maryland, No. 656, September Term, 2009, filed February 2, 2012. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2012/0656s09.pdf

FOURTH AMENDMENT – EXECUTION OF A SEARCH WARRANT – POLICE MAY DETAIN INDIVIDUAL WHO APPROACHES PREMISES DURING A SEARCH

Facts:

While police officers were executing a search and seizure warrant at a residence in Baltimore County, Devin Fields drove up in an automobile, parked on the street, opened a gate in a fence around the residence and approached the front door. Police officers came out of the house and intercepted Fields before he reached the front door. They asked for identification and then sought permission to frisk Fields. The officers found illegal drugs on his person.

Fields moved to suppress the drugs, arguing (1) that he was illegally detained by the officers as he approached the house and (2) that he did not consent to the search of his person. The motions court denied Fields's motion to suppress. Fields was convicted by a jury of possession with intent to distribute cocaine. He appealed, arguing that the circuit court erred by denying his motion to suppress.

Held: Affirmed.

The actions of the officers in detaining Fields and asking for identification fell within the scope of their authority to maintain control over the premises while the search warrant was executed. See *Michigan v. Summers*, 452 U.S. 692 (1981) and *Cotton v. State*, 386 Md. 249 (2005), *cert. denied*, 546 U.S. 885 (2005). Moreover, the motions court was not clearly erroneous in finding that Fields consented to a frisk by the police after he was stopped even though there was conflicting evidence as to consent.

Bryan L. Poole v. State of Maryland, No. 2098, September Term, 2008, filed February 1, 2012. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2012/2098s08.pdf

MARYLAND'S POSTCONVICTION RELIEF ACT – SCOPE OF AMENDMENTS TO POSTCONVICTION PETITIONS

Facts:

A jury in the Circuit Court for Montgomery County convicted Poole of first degree murder and the use of a handgun in a crime of violence. He was sentenced on March 25, 1996. Poole filed a *pro se* petition for postconviction relief on March 14, 2006, within the ten year statute of limitations governing the filing of postconviction petitions. On January 24, 2008, Poole's newly assigned public defender filed an amended petition for postconviction relief on his behalf. The State filed an answer to the amended petition, arguing that the amended petition should be dismissed because it was filed outside the ten year statute of limitations and Poole failed to establish "extraordinary cause" for allowing the untimely amended petition.

The postconviction court agreed with the State and determined that the amended petition should be dismissed because it is "governed by the purview of the 10-year rule." The court decided that amended petitions, even ones that amend timely filed original petitions, can only be accepted by the court if "extraordinary cause is shown." The court reasoned that "[i]f supplemental petitions were not also restrained by the 10-year filing rule . . . the 10-year rule would be moot, allowing petitioners unfettered time to file and present a petition for post-conviction relief." Poole appealed this decision.

Held:

The judgment was vacated and remanded to the circuit court for further proceedings. The ten year limitations period set out in MD. CODE ANN. CRIM. PROC. ("CP") § 7-103(b)(1) does not apply to amendments to postconviction petitions. Amendments to postconviction petitions are governed by Rule 4-402(c), which states that amendments "shall be freely allowed in order to do substantial justice." This is true even if the amended petition is filed after the ten year statute of limitations set out in CP § 7-103(b)(1). As long as the original petition is timely filed—that is, within ten years of the date of sentencing—amendments to postconviction petitions will be freely allowed.

The Court further held that an amended petition may contain new, non-frivolous arguments that were not included in the original *pro se* petition. This is because CP § 7-108 guarantees a petitioner the right to the assistance of counsel. In the context of postconviction proceedings, the right to effective assistance of counsel necessarily includes the right to add non-frivolous issues

developed by counsel, which were not included in the original petition. *See O'Connor v. Director*, 238 Md. 1, 2 (1965); *Hobbs v. Warden of Maryland Penitentiary*, 219 Md. 684, 686 (1959); *Niblett v. Warden of Md. House of Corr.*, 221 Md. 588, 591 (1959).

Latresha L. Weems v. State of Maryland, Case No. 2782, September Term, 2009, filed February 2, 2012. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2012/2782s09.pdf

CRIMINAL LAW – THEFT – PROPERTY LOST, MISLAID OR DELIVERED UNDER A MISTAKE

CRIMINAL LAW – THEFT – PROPERTY LOST, MISLAID OR DELIVERED UNDER A MISTAKE – REASONABLE MEASURES

Facts:

Latresha L. Weems was convicted of theft under § 7-104(d) of the Criminal Law Article, Maryland Code (2011). Weems had presented a check made out to Weems in the amount of $3,250.00 to a "licensed check casher." The licensed check casher, Anchor Check Cashing ("Anchor"), cashed Weems' check, giving Weems $3,250.00 in cash. Thereafter, Marie Coulter, the owner of Anchor, was notified the check was counterfeit. Weems was subsequently charged with uttering a forged document, theft, and possessing a counterfeit document.

The trial judge stated, "I'm not convinced beyond a reasonable doubt that [Weems] necessarily knew it was a counterfeit check at the time that she tendered it," but "it appears from the evidence presented which all came from the State that she remained in possession of money that she shouldn't have . . . ." Weems appealed her conviction, arguing that the evidence was insufficient to sustain her conviction because, first, under § 7-104(d), she was required to have known that the "property was lost, mislaid, or delivered under a mistake" at the time of acquiring possession and, second, the State did not prove beyond a reasonable doubt that Weems did not take reasonable measures to restore the property.

Held:

The Court of Special Appeals reversed Weems' conviction. Section 7-104(d) of the Criminal Law Article states "a person may not *obtain* control over property *knowing* that the property was . . . delivered under a mistake as to the . . . nature . . . of the property." (Emphasis added). The plain language of the statute and the legislative history does not resolve the ambiguity in the statute and, therefore, the rule of lenity dictates resolving the statute's language in the accused's favor. To be convicted under § 7-104(d), knowledge of the mistake must coincide with when the accused first "obtain[s] control" over the property. Furthermore, the statutory construction of §§ 7-104 & 7-110 indicates that the State must prove beyond a reasonable doubt that the accused did not take reasonable measures to restore the property.

Scott Garrity v. Injured Workers' Insurance Fund, No. 1185, September Term 2010, filed February 9, 2012. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2012/1185s10.pdf

WORKERS' COMPENSATION – COMPENSABILITY – COURSE OF EMPLOYMENT – GOING AND COMING RULE

Facts:

Appellant, a bailiff for the District Court for Baltimore City, Hargrove Courthouse, unknowingly wore a Christmas tie to work. Before he could call his son and request a new tie, appellant spilled coffee on his shirt and tie. Appellant subsequently decided to drive home and change because he was assigned to a courtroom that had two bailiffs. Appellant did not receive authorization to drive home because he believed it was acceptable to conduct minor errands without authorization.

As appellant drove back to work, he was struck by a truck head-on. Appellant suffered serious injuries and spent approximately one month in the hospital. Thereafter, appellant filed a workers' compensation claim. The Commission awarded appellant compensation after concluding his injury arose out of and was in the course of his employment. Appellees filed a petition for judicial review.

Before the Circuit Court for Baltimore County, appellant argued that his injuries were compensable, despite the fact that he was driving to work, because: (1) the special mission exception, (2) the dual purpose doctrine exception, and (3) the "comfort rule" exception. The circuit court disagreed, reversing the Commission's award. Appellant noted an appeal.

Held: Affirmed.

A compensable workers' compensation injury occurs when an injury arises out of and in the course of employment . An employee that suffers an injury going to or returning from their place of work is not considered to be acting in the course of their employment, absent a recognized exception. Appellant argued that his injury was compensable under these three exceptions: (1) the special mission exception, (2) the dual purpose doctrine exception, and (3) the "comfort rule" exception.

The special mission exception is applicable where an employer requests that an employee conduct an errand on its behalf. Appellant argued that the "Policy on Appropriate Attire and Appearance" ("Policy") provided express, and implied, authority to drive home and change his attire. The Court disagreed, holding that appellant was not instructed to go home and change, and that the Policy merely provided employees guidance on professional attire. Appellant also argued that there was an implied authority to drive home because of a liberal policy concerning

bailiffs running errands. The Court disagreed, recognizing that appellant's supervisors were not aware of such policy.

Appellant next posited that his injury was compensable under the dual purpose doctrine because he was advancing the judiciary's interests. The dual purpose doctrine exception is applicable where an employee is engaged in an activity that serves both a business and personal purpose. The Court concluded that leaving the courthouse to change attire was a personal errand that was not furthering the interests of the judiciary.

Appellant lastly argued that the "personal comfort" exception was applicable because bailiffs were compensated while conducting errands. The personal comfort exception is applicable where the terms of employment provide a paid break in which an employer can attend to his or her personal comforts, and where an employer encourages a break that benefits the employer and the employee. The Court held that the "personal comfort" exception was not applicable because appellant's supervisors were not aware that bailiffs were conducting errands without authorization, and the errand was not encouraged, nor was it beneficial to appellant and the employer.

Long Green Valley Association, et al. v. Bellevale Farms, Inc. et al., Case No. 228, September Term, 2009, filed February 14, 2012. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2012/0228s09.pdf

STANDING – USE RESTRICTIONS – BY TERMS OF AGREEMENT – BY THIRD-PARTY BENEFICIARIES – BY ASSOCIATIONS.

REAL PROPERTY – ESTATES & TRUSTS – AGRICULTURAL PRESERVATION EASEMENTS AS CHARITABLE TRUSTS.

STANDING – LAND USE – NEIGHBORING PROPERTY OWNERS – SPECIAL HARM.

Facts:

Bellevale owns a dairy farm in Baltimore County. The Yoders own an adjacent dairy farm. On January 12, 1997, the State, on behalf of the Maryland Agricultural Land Preservation Foundation (MALPF), purchased an "agricultural preservation easement" on Bellevale Farm for $796,500. The Easement Agreement stated that the grantee may enforce the easement, and that "[t]his easement does not grant the public any right to access or any right of use of the . . . land." Although the Easement Agreement stated that the land could "not be used for any commercial, industrial, or residential purpose," under the Easement Agreement and § 2-513 of the Agriculture article, there may be exceptions, as determined by MALPF, for "farm and forestry related uses and home occupations." Bellevale filed an application with MALPF to build a creamery, which MALPF approved.

The Yoders and the Long Green Valley Association (LGVA) ("complainants") filed a complaint seeking mandamus, declaratory judgment, and permanent injunctive relief based on MALPF's alleged failure to enforce the Easement Agreement and the law. After cross-motions for summary judgment, the case came before the motions court on the issue of whether the complainants had standing. Complainants asserted three independent, common law bases for standing in this case: (1) that "they are intended third party beneficiaries" of the Easement Agreement; (2) that "the Easement Agreement created a charitable trust, which is enforceable by interested third parties such as [complainants];" and (3) that "they will be 'specially harmed' by the proposed Creamery Operation in a manner different from the public at large." The court granted summary judgment in favor of Bellevale and MALPF, and issued a declaratory judgment that complainants did not have standing to challenge the creamery operation "through direct primary jurisdiction" of the court. Complainants filed a timely notice of appeal.

Held:

The court concluded that complainants were not intended beneficiaries of the Easement Agreement. Based on the case law and relevant statutory authority, the charitable trust doctrine is not *required* to be applied to the agricultural preservation easement in this case. However, complainants could have standing as neighboring landowners to challenge as an illegal or *ultra vires* action the approval of a proposed used of land subject to the agricultural preservation easement; neighboring land owners are deemed *prima facie* aggrieved and relieved of the burden of *alleging* specific harm.

Columbia Town Center Title Company, et al. v. 100 Investment Limited Partnership, et al., Case No. 915, September Term, 2009, filed February 2, 2012. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2012/0915s09.pdf

REAL PROPERTY – TITLE EXAMINERS – NEGLIGENT TITLE SEARCH – LIABILITY IN CONTRACT

REAL PROPERTY – TITLE INSURANCE – MARKETABLE TITLE – TITLE INSURANCE POLICY AS A CONTRACT OF INDEMNITY

TITLE INSURANCE PROVIDER – SCOPE OF AGENCY – VICARIOUS LIABILITY

Facts:

The 100 Investment Limited Partnership (the "Partnership") was conveyed a tract of land on October 14, 1986, which included a purported 1.145-acre parcel (the "Parcel") in Howard County, Maryland. The Parcel had been previously conveyed, however, to Dr. Khan on August 24, 1982. The Partnership, in conjunction with the sale, employed the services of Cambridge Title Company ("Cambridge"). Cambridge secured for the Partnership a title insurance policy, underwritten by Chicago Title Insurance Company ("Chicago Title"). Shortly thereafter, the Partnership engaged Columbia Town Center Title Company ("Columbia") in conjunction with a transfer of ownership interests in the Partnership. Columbia secured the Partnership a separate title insurance policy, underwritten by Safeco Title Insurance Corporation ("Safeco"). Neither Cambridge nor Columbia discovered in their respective title examinations that the Parcel had been previously conveyed to Dr. Khan. Safeco later merged with Chicago Title, and Chicago Title became responsible for the title insurance policy issued by Safeco.

The Partnership conveyed a part of the Parcel to NVR Homes, Inc. ("NVR") on July 7, 1995 and conveyed the remainder to Lynwood Association, Inc. ("Lynwood") on August 30, 1995. On July 26, 2001, the Partnership discovered the prior conveyance of the Parcel to Dr. Khan. To cure any title defect in its prior conveyances, the Partnership repurchased the Parcel for $175,348.56.

The claim against a title policy was rejected because at the time, the Partnership no longer owned the Parcel and had no legal responsibility for any title defect under its special warranty deeds. The Partnership filed a complaint alleging negligence against Columbia and Cambridge for their failure to discover and report the conveyance to Dr. Khan and against Chicago Title based on vicarious liability. After a bench trial, the circuit court awarded judgment for the Partnership in the amount of $191,510.88. The court concluded that the Partnership's "economic injury was proximately caused by [Cambridge and Columbia's] breach of the duty of care they

owed to the Partnership" and that "Chicago Title is vicariously liable" because Cambridge and Columbia were agents of Chicago Title. A timely notice of appeal was filed.

Held: Reversed.

The Court concluded that there is no tort duty, independent of contract, imposed on title companies to conduct a title examination with reasonable care. Based on the case law and relevant statutory and public policy factors, a contractual undertaking to examine title does not in itself impose a tort duty of care. Furthermore, a title insurance company is not vicariously liable for an agent title company's negligent title examination because a policy of title insurance is a contract of indemnity and not a guarantee of marketable title. *Stewart Title Guaranty Co. v. West*, 110 Md. App. 114 (1996). Under the title insurance policy, Chicago Title agreed to reimburse the Partnership for its losses or cure any non-excluded defects in title, consistent with the coverage and terms of the policy. Because the title insurance policy restricted claims regarding status of title to indemnity for losses from non-excluded defects, there is no obligation to conduct a title examination for the insured's benefit, absent a separate undertaking.

Benn Ray, et. al. v. Mayor and City Council of Baltimore, et. al., No. 215, September Term, 2011, filed February 1, 2012. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2012/0215s11.pdf

STANDING – PLANNED UNIT DEVELOPMENT – ZONING – PRIMA FACIE AGGRIEVEMENT – SPECIALLY AND ADVERSELY AFFECTED – NEARBY – PROXIMITY – VISIBILITY

Facts:

Baltimore City proposed the creation of a Planned Unit Development ("PUD") to be known as the 25th Street Station in the Remington/Charles Village areas of Baltimore City. The Appellants, Ray and his co-plaintiff Brendan Coyne, challenged the PUD and sought judicial review in the circuit court for Baltimore City. They contended that, as they lived nearby the proposed PUD, they had standing to petition for judicial review. After a hearing on the Mayor's and the City's, the Appellees', motion to dismiss, the circuit court for Baltimore City dismissed the Appellants' petition for judicial review, ruling that the Appellants lacked standing to so petition.

On appeal, Ray alleged the following:

1. That the circuit court erroneously ruled that the Appellants did not enjoy standing by virtue of being prima facie aggrieved;

2. That the circuit court erroneously ruled that the Appellants' personal or property rights were not specially and adversely affected; and

3. That the circuit court erroneously ruled that the Appellant Coyne's testimony about his property value was inadmissible.

Held: Affirmed.

The Court first discussed the unusual fact that Appellant Ray was not the owner of the property in which he resided and for which he contended entitled him to standing to challenge the PUD. The Court addressed the threshold requirements for standing when challenging zoning decisions. Noting that Bryniarski v. Montgomery County, 247 Md. 137, 230 A.2d 289 (1967) is the landmark opinion in this area, the Court put forth the two requirements for standing (1) being a party to the proceeding before the Board and (2) being aggrieved by the Board's decision. Being most concerned with the "aggreivement" requirement, the Court stated that an aggrieved person was one 1) who, if prima facie aggrieved, would presumptively be entitled to standing, or 2) a person whose personal or property rights are adversely affected in a special way different from that suffered by the public generally. To be prima facie aggrieved, one's property, which he

owns, must be adjoining, confronting, or nearby to the challenged zoning decision. Because Ray was merely a property renter and not an owner, he would most likely be unable to show prima facie aggrievement as an adjoining, confronting, or nearby property owner because most, if not all, Maryland caselaw dealt specifically with property owners. The Court, however, chose to analyze, arguendo, Ray's standing as if he was the property owner.

The Court next discussed the ambiguous definition of living "nearby" to the property in contention in order to establish prima facie aggreivement. The Court determined that here, Ray, at a distance of 0.4 miles from the proposed PUD, was not nearby enough to be prima facie aggrieved.

The Court turned its attention to visibility as a modifying factor of prima facie aggrievement. If the property owner seeking judicial review has a clear view of the project being developed, that visual factor would enhance nearness. The inverse is also true. The Court noted that, in a twist, Appellant Coyne was alleging visibility as a factor as measured from his place of employment. After comprehensively reviewing precedential caselaw on the subject, the Court concluded that the ability to view the site of the zoning project must be measured from one's property and not one's place of employment.

The Court then addressed visibility as a factor in terms of Ray's standing capability. It noted that merely being able to sometimes see the project site did not qualify as visibility to enhance a prima facie aggrievement argument.

The Court finally addressed whether the Appellants qualified for standing by rebutting their presumptive non-aggreivement with evidence that their personal or property rights were specially and adversely affected. The Court concluded that the Appellants' claims of special and adverse affectation were not persuasive: the potential for increased traffic flow, an unsupported assertion of a potential drop in property value, and the potential that the neighborhoods' character might change were all allegations of general, not special, aggrievement.

Exxon Mobil Corporation v. Paul D. Ford, et al., Case No. 1804, September Term, 2009, filed February 9, 2012. Per Curiam opinion.

Zarnoch, Meredith, Woodward, and Wright, JJ., concur and dissent.
Eyler, James R. and Hotten, JJ., concur and dissent.
Graeff, J., concurs.
Watts, J., concurs in part with Zarnoch, J. and concurs in part with Eyler, James R., J.
Eyler, Deborah S., J., concurs in part and dissents in part.

Editor's Note: This opinion consists of a Per Curiam opinion and five concurring or concurring and dissenting opinions. The judges in the panel agreed that the Per Curiam serve as the* Amicus Curiarum *abstract for the decision, in order to allow it to be included.

http://mdcourts.gov/opinions/cosa/2012/1804s09.pdf

TORTS – DAMAGES

In accordance with Md. Code (1973, 2006 Repl. Vol.), Courts and Judicial Proceedings Article, § 1-403(c), a majority of the incumbent judges of this Court ordered this appeal from the Circuit Court for Baltimore County by appellant Exxon Mobil Corporation to be reheard in banc.

The in banc panel unanimously concludes: that counsel for Exxon Mobil did not waive the appellant's right to challenge the compensatory damage award; and that the circuit court did not err in admitting the testimony of appellees' expert witness on diminution in property values in Jacksonville as a result of the spill.

A majority of the panel determines that, with the exception of the property damage award to one family (the Grecos), the damage award for diminution in value shall be affirmed.

A majority finds that, under certain circumstances, Maryland law permits recovery for emotional distress related to reasonable fear of cancer. However, a different majority concludes that there was insufficient evidence of emotional distress for 53 Jacksonville residents. Thus, their judgment for this component of damages shall be reversed.

Although a majority of the panel determines that there was sufficient evidence of emotional distress to support a damage award for the remaining appellees, a different majority / plurality concludes that a faulty instruction on damages for emotional distress requires a new trial for these appellees.

A majority of the in banc panel would recognize a damage award for medical monitoring under certain circumstances. However, a different majority / plurality concludes that the evidence was insufficient to support such a remedy.

Therefore, the judgment of the Circuit Court for Baltimore County is affirmed in part and reversed in part and the case is remanded for proceedings consistent with this Court's mandate.

CSX Transportation, Inc. v. Edward L. Pitts, Sr., Case No. 837, September Term 2010, filed February 8, 2012, Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/0837s10.pdf

TORTS – NEGLIGENCE – FEDERAL EMPLOYERS' LIABILITY ACT – PRECLUSION – FEDERAL RAILROAD SAFETY ACT – CIVIL PROCEDURE – STANDARDS OF REVIEW – ABUSE OF DISCRETION – PRESERVATION FOR REVIEW – EVIDENCE – RELEVANCE – UNFAIR PREJUDICE – CUMULATIVENESS – TESTIMONY – ADMISSIBILITY – CROSS-EXAMINATION – JURY INSTRUCTIONS – DAMAGES – REMITTITUR

Facts:

This case involves an action brought by Edward L. Pitts, Sr. ("Pitts") against his employer, CSX Transportation, Inc. ("CSX"), under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, for damages allegedly incurred during forty years of employment with CSX. Pitts sought damages for various injuries including osteoarthritis of the knees allegedly caused by "large ballast," or crushed rocks, used by CSX in its rail yards and on walkway surfaces. At trial, Pitts testified as to his various tasks and jobs with CSX, which required working and walking on large ballast. Two of Pitts's witnesses testified over CSX's objection as to complaints they forwarded to CSX from other railroad employees about the use of large ballast. At trial, the circuit court sustained several objections which CSX alleged prevented full cross-examination of Pitts's economics expert about statistics as to a railroad employee's average age of retirement. The circuit court instructed the jury as to the background and purpose of the Federal Employers' Liability Act and as to violation of a statute as evidence of negligence. CSX noted exceptions to both instructions. A jury sitting in the Circuit Court for Baltimore City returned a verdict in favor of Pitts for an apportioned total of $1,246,000 in economic and non-economic damages. On appeal, CSX argued that Pitts's Federal Employers' Liability Act claim was precluded by the Federal Railroad Safety Act and the regulations issued thereunder, specifically 49 C.F.R. § 213.103, a regulation titled "Ballast; general,"as the regulation allegedly covered the size and type of ballast used by railroads for track support regardless of the location of the ballast.

Held: Affirmed.

The Federal Railroad Safety Act, 49 U.S.C. § 20106(a)(2), provides that where the Secretary of Transportation or the Secretary of Homeland Security "prescribes a regulation or issues an order covering the subject matter of the State requirement," the State requirement must give way to the federal requirement, and any action brought based on the State requirement is preempted. Congress has clarified, however, that not all State law causes of action are preempted by 49 U.S.C. §20106(a)(2). 49 U.S.C. § 20106(b)(1) provides: "Nothing in [§ 20106] shall be construed to preempt an action under State law seeking damages for personal injury . . . alleging

that a party–(A) has failed to comply with the Federal standard of care . . .; (B) has failed to comply with its own plan, rule, or standard . . .; or (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2)."

The Federal Railroad Safety Act was created to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents. The Act mandated that the Secretary of Transportation create regulations for railroad safety.

49 C.F.R. § 213.103, the regulation titled "Ballast; general," provides that railroad track must be structurally supported by material which will: "(a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade; (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails; (c) Provide adequate drainage for the track; and (d) Maintain proper track crosslevel, surface, and alinement."

The Federal Employers' Liability Act, 45 U.S.C. § 51 *et. seq.*, creates a cause of action for railroad employees injured on the job due to the negligence of employers. A railroad employee has the choice of bringing a Federal Employers' Liability Act claim in either State or federal court. Actions brought in State court, although subject to State procedural rules, are governed by federal substantive law.

It is clear that whether reviewing the plain language of 49 C.F.R. § 213.103, the legislative history of the regulation, or relevant case law, Federal Employers' Liability Act claims involving the use of ballast in rail yards and walkways are not precluded by 49 C.F.R. § 213.103.

Federal Employers' Liability Act claims concerning ballast used for track support are precluded by 49 C.F.R. § 213.103, but Federal Employers' Liability Act claims involving injury caused by large ballast used in rail yards and walkways are not precluded by 49 C.F.R. § 213.103.

The plain language of 49 C.F.R. § 213.103 concerns ballast used for track support and the track itself rather than the conditions of rail yards and walkways or the workplace environment of railroad employees.

In the legislative history of 49 C.F.R. § 213.103, Congress is silent as to ballast used in rail yards and walkways. The overarching theme through creation and amendment of 49 C.F.R. § 213.103 has been one of track safety versus safety in employee working conditions.

A party fails to preserve an issue for appellate review where the party (1) fails to object to the admission of exhibits or testimony regarding those exhibits and (2) elicits the complained about testimony on cross-examination, and fails to object to the response from the witness.

The trial court properly admits testimony over a party's objection where the party makes only general allegations of prejudice and fails to provide a basis or argument that the danger of unfair prejudice substantially outweighs the probative value of the witness's testimony.

A witness's testimony was not cumulative of an expert witness's testimony where the expert testified as to the content of documents reviewed to assist in the formation of an opinion, including reading portions of the documents aloud, and the witness testified as to facts contained within the documents.

The trial court properly limited cross-examination of an expert witness where a party attempted to cross-examine the expert witness as to general statistics concerning a railroad employee's average age of retirement without introducing the statistics into evidence or establishing that the statistical evidence related to the opposite party.

The trial court did not abuse its discretion in instructing the jury on the background and purpose of the Federal Employers' Liability Act where the court instructed that the background and purpose of the Act were not at issue in the case and immediately instructed the jury accurately as to the duties owed by railroad employers to employees under the Act.

The trial court erred in instructing the jury as to violation of a statute as evidence of negligence where it was undisputed that violation of a statute was not an issue in the case, *i.e.* both parties agreed that no statute was alleged to have been violated.

The erroneous jury instruction as to violation of a statute as evidence of negligence was not prejudicial and was harmless error as: (1) the jury was not advised of a specific statute alleged to have been violated; (2) no specific statute alleged to have been violated was read aloud to the jury; (3) there was no argument or reference to the erroneous instruction by either party in closing argument; and (4) there were no questions from the jury as to the erroneous instruction or any indication that the jury focused on the erroneous instruction.

The trial court properly exercised its discretion in denying a motion for new trial and/or remittitur on the ground that the jury's verdict as to economic and non-economic damages was not excessive where: (1) the testimony in the case revealed that appellee experienced years of difficulties with his knees, underwent surgery on both knees followed by physical therapy, was expected to undergo knee replacement surgery in the future, continued to receive gel lubricant injections in both knees as party of continuing treatment, and appellee's activities became limited compared to prior to the injuries; and (2) appellee's experts provided testimony sufficient to support the economic damages award.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated February 3, 2012, the following attorney has been disbarred:

DARLENE H. SMITH

*

By an Order of the Court of Appeals dated February 6, 2012, the following attorney has been disbarred:

ADRIAN VAN NELSON, II

*

By an Order of the Court of Appeals dated February 7, 2012, the following attorney has been indefinitely suspended by consent:

DARYL DAVID JONES

*

By an Order of the Court of Appeals dated February 7, 2012, the following attorney has been disbarred:

HARVEY MALCOLM NUSBAUM

*

By an Opinion and Order of the Court of Appeals dated February 22, 2012, the following attorney has been disbarred:

MICHELE L. PAYER

*

By an Opinion and Order of the Court of Appeals dated February 22, 2012, the following attorney has been reprimanded:

JUDE AMBE

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JUDICIAL APPOINTMENTS

On December 22, 2011, the Governor announced the appointment of **DAVID W. DENSFORD** to the Circuit Court for St. Mary's County. Judge Densford was sworn in on February 3, 2012 and fills the vacancy created by the retirement of the Hon. C. Clarke Raley

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