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Facts:

In 2010, Respondent, Ronald Lipella, was arrested and detained for suspicion of driving under the influence. Deputy Barnhart of the Washington County Sheriff's Office observed Lipella swerve on and off the road twice before pulling him over. The Deputy noted a strong odor of alcohol and slurred speech emanating from the driver when he approached him. Lipella either failed or could not complete the three Field Sobriety Tests. A field breathalyzer test resulted in a 0.16 blood alcohol content (BAC) reading. Lipella was transported to the Sheriff's office where a certified breathalyzer test resulted in a 0.16 BAC reading. His license was suspended and confiscated. Lipella appealed timely for an administrative hearing of the suspension.

At the administrative hearing, Lipella argued that: the Deputy's Alcohol Influence Report was inadmissible because it was unsworn; he could not present a bad faith defense because the officer did not provide on the DR-15A form the specific reason or reasons for the traffic stop; and the Motor Vehicle Administration ("MVA")did not make a prima facie case because the DR-15A was insufficient. The administrative law judge (ALJ) held that: the MVA made a prima facie case; the Alcohol Influence Report was admissible corroborative evidence; and Lipella failed to pesent evidence of bad faith on the part of the officer. Thus, the ALJ suspended Lipella's driver's license for 90 days.

Upon judicial review, the Circuit Court for Washington County observed that, without a documented reason for the traffic stop, Lipella could not make a bad faith argument and, therefore, reversed the ALJ. The Court of Appeals granted the MVA's petition for a writ of certiorari in order to consider this question:

> In determining the sufficiency of an officer's sworn certification of grounds to request an alcohol concentration test under Section 16.205.1 of the Transportation Article, as recorded on the DR-15A, did the ALJ err in determining that the specific reasons for the

> underlying traffic stop need not be recorded under the section labeled "REASONABLE GROUNDS?"

Held: Reversed.

The Court reversed the Circuit Court's judgment and remanded the case to that court with instructions to affirm the ALJ's decision. The Court determined that the plain reading of Section 16-205.1 Md-Code, Transportation Article, and the DR-15A that was derived from it, requires only the reasons for the development of suspicions of intoxicated driving, which may or may not include what provoked the underlying traffic stop.

The Court reiterated the liberal evidentiary rules for administrative hearings–documentary evidence need not be sworn in order to be considered. In regards to the development of suspicions of intoxication and the underlying traffic stop, the Court based its decision on prior rulings that the Legislature indicated its view that these two events are view separately and, therefore, the DR-15A only needs to include information regarding the intoxication of the driver. The Court held that, in light of the evidence presented to the administrative law judge, there was sufficient evidence to show Lipella drove while intoxicated and his license should be suspended for 90 days.

Attorney Grievance Commission v. Saladin Eric Shakir, Misc. Docket AG No.8, September Term 2009, filed June 25, 2012. Per Curiam.

http://mdcourts.gov/opinions/coa/2012/8a09ag.pdf

ATTORNEY DISCIPLINE – ABANDONMENT OF CLIENT – FINANCIAL MALFEASANCE – DISBARMENT

Facts:

Respondent, Saladin Eric Shakir, was engaged by Leonel Vasquez on two separate occasions to perform legal services. In February of 2007, Vasquez paid Respondent $2500 to file an Application for Asylum in the United States. Respondent neither deposited the fee into an attorney trust account, nor filed the Application for Asylum. Respondent failed to return the unearned portion of the fee to Vasquez when the representation was terminated. In May of 2007, Vasquez paid Respondent $800 to represent him regarding DUI/DWI charges. Respondent failed to appear at two of Vasquez's hearings without giving notice. Respondent failed to deposit the fee into an attorney trust account and did not refund the unearned portion to his client upon termination of the representation. During Respondent's representation of Vasquez, the Attorney Grievance Commission received five additional but unrelated complaints against Respondent. Respondent admitted to these separate violations and consented to the imposition of a sanction of indefinite suspension. Respondent did not challenge or respond to the present allegations in any way.

Held:

The Court of Appeals concluded that Respondent violated Maryland Lawyer's Rules of Professional Conduct (MLRPC) 1.1, 1.3, 1.15, 1.16, 1.5, and 8.4(d). The Court explained that Respondent's failure to pursue his client's asylum application and repeated failure to appear at his client's DUI/DWI hearings violated MLRPC 1.1 and 1.3. Respondent's failure to perform the agreed-upon services made his fees unreasonable and in violation of MLRPC 1.5(a). His failure to deposit the unearned fees paid in advance into an attorney trust account violated MLRPC 1.15(c). Respondent's failure to refund the unearned portion of the fees at the termination of representation violated MLRPC 1.16(d). Respondent's failure to pursue his client's immigration application and DUI/DWI case and failure to refund unearned fees violated MLRPC 8.4(d). Disbarment was the appropriate sanction because of the severity of the violations and because of Respondent's indefinite suspension for similar misconduct.

Department of Human Resources, Baltimore City Department of Social Services v. Angela Hayward and William Dixon, No. 131, September Term 2007, filed May 23, 2012. Opinion by Bell, C.J.

http://mdcourts.gov/opinions/coa/2012/131a07.pdf

CIVIL PROCEDURE – REMEDIES – WRITS – COMMON LAW WRITS – MANDAMUS

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ADMINISTRATIVE LAW – JUDICIAL REVIEW – STANDARDS OF REVIEW – SUBSTANTIAL EVIDENCE

ADMINISTRATIVE LAW – AGENCY RULEMAKING

Facts:

Angela Hayward and William Dixon, employees of the Baltimore City Public School System and the respondents in this case, were accused of child abuse in December, 2005. After receiving reports of the abuse, the Department of Human Resources for the Baltimore City Department of Social Services conducted investigations, and concluded, in each case, that the abuse was "unsubstantiated." The names of the respondents were, nonetheless, entered into the central registry of child abuse investigations. The respondents subsequently submitted a request for a conference to review the Department's redacted investigation records pursuant to Maryland Code (1984, 2006 Repl. Vol., 2011 Supp.) § 5-706.1 (c) of the Family Law Article. The Department denied their requests, explaining that, according to COMAR 07.02.26.05, which sets forth the Department's interpretation of the statute, individuals involved in cases of "unsubstantiated" child abuse were not entitled to a conference or an appeal, since they were ultimately not "found responsible" for the abuse.

The respondents filed mandamus actions in the Circuit Court for Baltimore City, seeking review of the Department's interpretation of the statute. The petitioner, the Department, filed motions to dismiss in both cases, which the Circuit Court, after consolidating the cases, granted. The Court of Special Appeals reversed the ruling of the Circuit Court, and the Court of Appeals subsequently granted a timely filed petition for writ of certiorari to review the case.

Held:

(1) Individuals who are investigated by a local department, with a resultant finding of "unsubstantiated," have a right to appeal, regardless of any additional findings of actual responsibility; (2) The Circuit Court for Baltimore City erred by adopting the Department's interpretation of § 5-706.1 and, as a result, dismissing the respondents' consolidated Complaints

for Writ of Mandamus. The Court of Appeals demonstrated that the plain language of § 5-706.1 explicitly provides for a right to conference and appeal in "unsubstantiated" cases. The Court, applying longstanding principles of statutory construction, explained that since the statute is unambiguous, it was error for the Department to look beyond its language to ascertain the intent of the Legislature. Additionally, the Department's construction of the statute, as set forth in COMAR 07.02.26.05, is in direct conflict with the plain language of § 5-706.1. The Court reiterated the principle, therefore, that when an agency regulation conflicts with a statute, the statute always controls.

The Court of Appeals also explained that the common law remedy of mandamus is proper where there would be a lack of an available procedure for obtaining review and an allegation that the action complained of is illegal, arbitrary, capricious or unreasonable. The Court thus concluded that it was error for the Circuit Court to dismiss the respondents' Complaints for Writ of Mandamus on the basis of the Department's incorrect interpretation of § 5-706.1, because that interpretation was arbitrary, capricious and unreasonable, and, by foreclosing the right to appeal, left the respondents with no other avenue for obtaining recourse.

Alicia Gomez v. Jackson Hewitt, Inc, No. 72, September Term 2011, filed June 22, 2012. Opinion by Kenney, J.

http://mdcourts.gov/opinions/coa/2012/72a11.pdf

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESSES ACT – DEFINITION OF "CREDIT SERVICES BUSINESS" – INDIRECT PAYMENT FROM CONSUMER.

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESSES ACT – LEGISLATIVE HISTORY – CREDIT REPAIR AGENCIES.

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESSES ACT – REFUND ANTICIPATION LOANS – EFFECT OF OTHER LEGISLATION.

Facts:

Respondent, Jackson Hewitt, Inc., and Santa Barbara Bank & Trust ("SBBT") have a contractual relationship whereby SBBT may offer "refund anticipation loans" ("RALs") to respondent's customers; respondent's franchisees will "facilitate" the offering of RALs to these customers. SBBT pays compensation to respondent for this right. A "RAL is a loan from SBBT in the amount of all or part of [an applicant's anticipated] refund. [The] refund is used to pay back the loan." A franchisee of respondent prepared Alicia Gomez's 2006 federal income tax return and helped Gomez obtain a RAL from SBBT. Gomez did not pay the franchisee a tax preparation fee "up-front;" rather, that amount later was directly taken out of the RAL disbursement.

Section 14-1901 of the Maryland Credit Services Businesses Act ("the CSBA"), Md. Code Ann., Com. Law ("CL"), § 14-1901 *et seq.*, states, in pertinent part:

> (e) *Credit services business.* – (1) "Credit services business" means any person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that such person can or will sell, provide, or perform, any of the following services *in return* for the payment of money or other valuable consideration:
>
> (i) Improving a consumer's credit record, history, or rating or establishing a new credit file or record;
>
> (ii) Obtaining an extension of credit for a consumer; or
>
> (iii) Providing advice or assistance to a consumer with regard

> to either subparagraph (i) or (ii) of this paragraph.

(Emphasis added.)

Asserting that respondent is a "credit services business" under § 14-1901(e)(1), Gomez filed a complaint reasoning that she "*indirectly*" paid respondent for arranging the RAL, because: (1) the tax preparation fee was taken directly out of the RAL disbursement, and (2) SBBT pays respondent for its RAL "facilitation." The complaint alleged violations of the CSBA and the Maryland Consumer Protection Act ("the CPA"), CL § 13-301 *et seq*.

Respondent moved to dismiss the complaint for failure to state a claim, contending that, because respondent did not receive *direct* payment from Gomez for credit services, respondent was not a "credit services business" under the CSBA. The Circuit Court dismissed the complaint. Finding the plain language of the CSBA ambiguous, the court observed that the legislative history demonstrates that the statute was designed to regulate "credit repair agencies," not "firms engaged in the business of selling goods or services to their customers, when such goods or services are not aimed at improving one's credit rating."

Gomez noted an appeal to the Court of Special Appeals. That court affirmed the Circuit Court, reasoning that the plain language of the phrase "in return" in § 14-1901(e)(1) requires *direct* payment from the consumer to the alleged credit services business *for credit services*. The Court also found that the legislative history "indicate[es] that the General Assembly [n]ever contemplated regulating a business engaged in income tax return preparation that acts as a facilitator to permit a customer to pay a third party for a RAL." The Court also noted the enactment of new subtitle 38 in Section 14 of the Commercial Law Article (the "2010 RAL legislation"), which was "specifically aimed at regulating tax preparers involved in facilitating RALs." Gomez filed a petition for a writ of certiorari. The Maryland Commissioner of Financial Regulation of the Department of Labor, Licensing & Regulation ("the Commissioner") and the Consumer Protection Division of the Office of the Maryland Attorney General ("the Division") filed a joint motion to intervene and their own joint petition for a writ of certiorari. Both petitions and the motion were granted.

Held:

The term "in return," as it is used in § 14-1901(e)(1) of the CSBA, and in the context of the CSBA as a whole, can reasonably be understood to envision an exchange of assistance for payment between the consumer and the provider of that assistance and to mean that any payment to the credit services business for such assistance in obtaining the extension of credit must come *directly* from *the consumer*. Gomez made no payment to respondent for credit services; whatever respondent received for its involvement in her RAL came from SBBT. Thus, respondent was not a "credit services business."

While the legislative history of amendments to the CSBA indicates that the reach of the CSBA extends beyond ordinary credit repair services, the legislation was clearly industry specific and did not address expressly the issue of direct or indirect payment from the consumer to a RAL facilitator.

The legislative history of the 2010 RAL legislation indicates that the General Assembly, though cognizant of the position of the Commissioner that the CSBA applied to "tax preparers who are compensated to assist consumers in obtaining a [RAL] from third-party lenders," enacted industry-specific legislation to regulate RAL facilitators rather than amend the CSBA. This is a strong indication that the General Assembly did not share the Commissioner's position that RAL facilitators were already covered by the CSBA.

Jerome Pinkney v. State of Maryland, No. 97, September Term 2011, filed June 22, 2012. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/97a11.pdf

CRIMINAL PROCEDURE – MARYLAND RULE 4-215 WAIVER OF COUNSEL

Facts:

Petitioner, Jerome Pinkney, was charged in the District Court of Maryland, sitting in Baltimore City, with second degree assault, resisting arrest, and disorderly conduct in connection with an incident during which he allegedly struck a female in the face. Petitioner prayed a jury trial, and the case was transferred to the Circuit Court for Baltimore City. Prior to trial, Petitioner filed a motion with the trial court, seeking to discharge the assistant public defender who had been appointed as his trial counsel. In his motion, Petitioner stated, "I ask the court to find me legal counsel[.]" The trial judge denied Petitioner's motion but indicated in the court's Order that Petitioner could renew the motion at trial. Petitioner's case was called for trial on December 21, 2009, at which time Petitioner renewed his request to discharge his trial counsel. After inquiring into Petitioner's reasons for making the request, the trial judge determined that Petitioner's reasons were not meritorious. The judge denied Petitioner's motion, and the case proceeded to trial with Petitioner represented by the Office of the Public Defender. The jury convicted Petitioner of second degree assault.

Petitioner noted an appeal to the Court of Special Appeals, contending that the trial judge had violated Maryland Rule 4-215(e) by failing to inform him of his right to discharge counsel and proceed *pro se*. The intermediate appellate court affirmed the judgment of the trial court, concluding that Rule 4-215(e) does not require a trial judge to inform a defendant of the right to self-representation in a situation where the defendant presents unmeritorious reasons for requesting to discharge his counsel and the defendant does not make any statements that would reasonably indicate to the judge a desire to invoke the right to represent himself.

Held: Affirmed.

Maryland Rule 4-215(e) governs a criminal defendant's discharge of trial counsel and waiver of the right to counsel. In accordance with the Rule, when a defendant requests to discharge his trial counsel, the trial judge must inquire into the defendant's reasons for making the request. The judge must then determine whether the reasons are meritorious. If the reasons given by the defendant are meritorious, the trial judge must allow the defendant to discharge his counsel. If the judge determines that the reasons given by the defendant are not meritorious, the judge may proceed in a number of ways, including declining to allow the discharge of counsel and proceeding to trial. The plain and unambiguous language of Rule 4-215(e) does not require the trial judge to advise a defendant of the right to self-representation in a situation where the

defendant has not presented meritorious reasons for requesting discharge of counsel and has not made any statements reasonably indicating to the judge a desire to invoke the right to proceed *pro se*. Furthermore, Maryland case law provides that when a defendant desires to invoke the right to self-representation, he or she must clearly and unequivocally assert that right. The trial judge in the instant case did not err in declining to permit Petitioner to discharge his trial counsel when Petitioner presented unmeritorious reasons for his request and he did not reasonably express a desire to represent himself.

Ellis C. Burruss, et al. v. Board of County Commissioners of Frederick County, et al., No. 99, September Term 2011, filed June 25, 2012. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/99a11.pdf

ELECTION LAW – MANDATORY REQUIREMENTS OF § 6-203(a)

CIVIL PROCEDURE – OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL

CONSTITUTIONAL LAW – RATIONAL BASIS TEST

Facts:

On March 10, 2011, the Board of County Commissioners of Frederick County (BOCC) appointed a local charter board. Article XI-A, § 1A of the Maryland Constitution provides that, upon submission of a petition containing the requisite number of valid signatures, the BOCC shall hold a special election for consideration of additional nominated charter board members. Petitioners circulated, and subsequently submitted to the BOCC, a petition in support of nominating charter board candidates for consideration at a special election. The Frederick County Board of Elections (the Board) reviewed the petition, and determined that many of the submitted signatures were invalid under Md. Code (2002, 2010 Repl. Vol.), § 6-203(a) of the Election Law Article. Stuart Harvey, Election Director and Chief Election Official, notified the BOCC of the Board's determination, and the BOCC declined to call a special election.

Petitioners filed a Petition for Judicial Review in the Circuit Court for Frederick County, seeking a declaratory judgment that the Board incorrectly applied the law regarding validation of petition signatures and that the applicable law was whether there was "sufficient cumulative information," a phrase appearing in *Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections*, 418 Md. 463, 15 A.3d 798 (2011), from which the Board could identify a signatory on a petition as a registered voter in Frederick County. Petitioners also claimed that the doctrine of offensive non-mutual issue preclusion bound Respondents – the BOCC, the Board, and Stuart Harvey – to the determinations of law made by the Circuit Court for Anne Arundel County in *Libertarian Party, et al. v. Md. State Bd. of Elections, et al.* In their alternative argument, Petitioners contended that if the court did not adopt their suggested "sufficient cumulative information" standard for validation of petition signatures and did not apply the doctrine of offensive non-mutual collateral estoppel, § 6-203(a) and COMAR § 33.06.03.06B(1) should be declared unconstitutional. The Circuit Court judge declined to adopt Petitioners' suggested "sufficient cumulative information" standard and determined that the signature validation requirements in § 6-203(a) are mandatory. The judge also concluded that collateral estoppel was not applicable to the circumstances of the case. Lastly, the judge determined that no matter what level of scrutiny applied to the challenged enactments, they are not unconstitutional.

Held: Affirmed.

The signature validation requirements in § 6-203(a) and COMAR § 33.06.03.06B(1) are mandatory. *Fire-Rescue* did not establish a new standard for State and local boards of elections to employ when validating petition signatures. Rather, the Court in *Fire-Rescue* merely held that an illegible signature, alone, does not preclude a State or local board of elections from validating a signature contained in an entry that satisfies the mandatory requirements of § 6-203(a). The Court of Appeals has not embraced the doctrine of offensive non-mutual collateral estoppel, and it declined to do so under the circumstances of the instant case. In evaluating a constitutional challenge to an enactment that imposes a burden upon signers of a local charter board nominating petition, we first consider, in a realistic light, the nature and extent of the burden on voters. If the burden is minimal, we consider whether the enactment is reasonable and nondiscriminatory, and the State's important regulatory interests typically outweigh any burden imposed by the challenged enactment. The burden imposed in the case *sub judice* on the registered voters in Frederick County by the challenged enactments is minimal. We applied the rational basis test and held that the enactments are reasonable, nondiscriminatory measures to implement the State's important interest in preventing fraud and identifying the signers of petitions. Therefore, the challenged enactments are not unconstitutional.

Darnella Thomas, et vir. v. Jeffrey Nadel, et al., No. 106, September Term 2011, filed June 25, 2012. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2012/106a11.pdf

REAL PROPERTY – FORECLOSURE PROCEEDINGS – POST-SALE EXCEPTIONS – FRAUD

Facts:

Petitioners Darnella and Charles Thomas challenged the foreclosure sale of their home in a post-sale proceeding at which they alleged defects in the chain of title of the note evidencing their debt and of the deed of trust. There was no question as to the validity of the debt or the authenticity of the documents, only as to the proper party entitled to enforce it. Respondents Jeffrey Nadel and others, the trustees under the deed of trust and the plaintiffs in the foreclosure action, challenged the timeliness of the exceptions, arguing that Maryland Rule 14-305 and *Greenbriar Condo. v. Brooks*, 387 Md. 683, 878 A.2d 528 (2005), permitted post-sale exceptions only when they relate to procedural irregularities at the sale or the auditor's statement of account. Relying on *Bierman v. Hunter*, 190 Md. Appl. 250, 988 A.2d 530 (2010), the Thomases argued for a fraud exception to the general rule of 14-305 and asserted that the alleged defects in title amounted to fraud on the court. The circuit court agreed with Nadel and denied the exceptions. Subsequent to the exceptions being filed, the Court of Appeals decided *Bates v. Cohn*, 417 Md. 309, 9 A.3d 846 (2010), and left open the question of whether there might be a fraud exception to the limits of Rule 14-305. The Thomases timely appealed to the Court of Special Appeals, and the Court of Appeals granted certiorari prior to review by the lower court.

Held: Affirmed.

The Court of Appeals concluded that gaps in the chain of title of a note do not alone establish that the note was the product of fraud. The Court noted that the various modes of fraud generally involved some form of misrepresentation or deception. Further, the Court emphasized the general rule that one arguing fraud must state the particular facts and circumstances constituting the fraud. As the Thomases did not allege particularized facts that would constitute fraud, the Court did not reach the question of whether there is a fraud exception to the limitations on post-sale exceptions. Because the Thomases' exceptions did not otherwise relate to either the procedure of the sale or the accounting, they were properly denied.

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Angelia M. Anderson v. United States of America, Misc. No. 14, September Term 2011, filed June 22, 2012. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2012/14a11m.pdf

STATUTORY INTERPRETATION – MARYLAND MEDICAL MALPRACTICE CLAIMS STATUTE – STATUTE OF LIMITATION

Facts:

Angelia M. Anderson brought a medical malpractice claim against the United States of America under the Federal Tort Claims Act (FTCA) for damages she sustained from allegedly negligent treatment at the Veterans Administration Hospital in Baltimore, Maryland in 2002. After engaging in prolonged administrative and settlement activities that were unsuccessful ultimately, Anderson filed suit in 2008 in the U.S. District Court for the District of Maryland. The FTCA permits a plaintiff to maintain an action against the federal government if that person would have a cause of action under state law against a private person under similar conditions. The District Court dismissed Anderson's claim, concluding that, despite sometimes contradictory case law statements in Maryland and Federal courts, Maryland Code (1973, 2006 Repl. Vol.) Cts. & Jud. Proc. Art., § 5-109(a)(1) (five years to bring a medical malpractice claim from an injury) was a statute of repose and, thus, its substantive provisions governed over the procedural two-year statute of limitations contained within the FTCA. Anderson appealed to the United States Courts of Appeal for the Fourth Circuit, which certified the following question of law to the Court of Appeals:

> Does Section 5-109(a)(1) of the Courts and Judicial Proceedings Article of the Maryland Code constitute a statute of limitations or a statute of repose?

Held:

The Court of Appeals held that Courts and Judicial Proceedings Article § 5-109(a)(1) is a statute of limitations, rather than one of repose. The plain language of the statute indicates, and its legislative history confirms, that the Maryland General Assembly did not intend, by adoption of the statute, to create an absolute time bar or a grant of immunity for potential defendants in medical malpractice claims. The Court of Appeals noted that statutes of limitation are enacted generally to promote the prompt resolutions of claims, to avoid the pitfalls associated with extended delays in bringing an action, but do not create any substantive rights in a defendant to be free from liability. Statutes of limitation are triggered typically by the accrual of a cause of action and may be tolled for reasons of minority or fraudulent concealment. Statutes of repose, on the other hand, are enacted to shelter a legislatively-designated group from liability after a certain period of time, in furtherance of an economic or policy reason. Statutes of repose are

triggered typically by an event that is unrelated to when the injury or discovery of the injury occurs. The Court of Appeals concluded that because Courts and Judicial Proceedings Article § 5-109(a)(1) was triggered by the potential plaintiff's injury, rather than an independent act or omission of the health care provider, and that the statute was tolled expressly by minority and fraudulent concealment, the General Assembly did not intended to create a strict time bar. This conclusion was supported further by the General Assembly's rejection in 1987 of an amendment to Courts and Judicial Proceedings Article § 5-109(a)(1) that would have changed the trigger from an injury to a "negligent act or omission."

Michael S. Barclay, et ux. v. Lena Briscoe, et al., Lena Briscoe, Personal Representative of the Estate of Christopher Eugene Richardson v. Ports America Baltimore, Inc., No. 41, September Term 2011, filed June 27, 2012. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/41a11.pdf

TORT LAW – *RESPONDEAT SUPERIOR*

TORT LAW– DUTY

Facts:

A motorist was seriously injured when another car, operated by Christopher Richardson, crossed the center line, causing a head-on collision. The facts presented indicated that Richardson, a longshoreman, fell asleep at the wheel while driving his personal vehicle home after working a twenty-two hour shift at his job site located at the Port of Baltimore. The injured motorist, Sergeant Michael Barclay, and his wife, Robin Barclay, filed a complaint in the Circuit Court for Carroll County against several parties, including Richardson's employer, Ports America Baltimore, Inc. The complaint alleged that Ports was liable for Sgt. Barclay's injuries under two theories, *respondeat superior*, and primary negligence in failing to protect the general motoring public from an employee driving home following an unreasonably long shift. Ports filed a motion for summary judgment asserting that neither theory was grounds for relief under the facts. First, Ports argued that *respondeat superior* was inapplicable because Richardson was not acting within the scope of his employment while commuting home from work. Second, Ports contended that it could not be held primarily liable for the injuries because it owed no duty to the public to ensure that an employee was fit to drive his personal vehicle home. The trial court agreed with Ports and granted the motion. The Court of Special Appeals affirmed.

Held: Affirmed.

In the motor vehicle context, the doctrine of *respondeat superior* is properly invoked if the master has, expressly or impliedly, authorized the servant to use his or her personal vehicle in the execution of his or her duties, and the employee is in fact engaged in such endeavors at the time of the collision. Therefore, the general rule is that absent special circumstances, an employer will not be vicariously liable for the negligent conduct of its employee occurring while the employee is traveling to or from work.

The Barclays were incorrect in arguing that on-the-job fatigue was a "special circumstance" sufficient to prevent the application of the general rule. Any "special circumstance" must simply prove that the employee is, in fact, not only commuting to or from work, but additionally, is

using his personal vehicle, as authorized by the employer, to engage in the execution of his duties on behalf of the employer. Thus, even assuming, *arguendo*, that Ports forced Richardson to work for an unreasonable amount of time, and thereby contributed to the impairment which ultimately caused the collision, this would be insufficient, as a matter of law, to create *respondeat superior* liability when it is undisputed that Richardson was traveling home from work, and not in any way attending to his employer's business. It was not, as the Barclays argued, a question of Ports' control over Richardson's fatigue, *i.e.*, scheduling him to work long hours, rather, the pertinent inquiry centered on the employer's influence over the operation of the vehicle.

Further, Ports could not be held primarily, as opposed to vicariously, liable for Richardson's off-duty motor tort, even assuming, *arguendo*, that it was foreseeable that Mr. Richardson was fatigued and would drive home. We have made clear that the fact that a result may be foreseeable does not itself impose a duty in negligence terms. For this reason, the general rule followed in most jurisdictions, including Maryland, is that there is no duty to control a third person's conduct so as to prevent personal harm to another, unless a "special relationship" exists either between the actor and the third person or between the actor and the person injured. In the instant case, Ports had no special relationship with Sgt. Barclay, as it had no familiarity with or knowledge of him prior to learning of the collision. Further, Ports had no special relationship with its employee, Mr. Richardson, pursuant to Restatement (Second) of Torts § 317. Lastly, Ports engaged in no affirmative act of control *following* and prompted by Mr. Richardson's incapacity, and we declined to create a duty where an employer's only affirmative act of control *preceded* the employee's shift and incapacity.

COURT OF SPECIAL APPEALS

Roger Schneider v. Victoria Little, No. 1346, September Term 2010, filed June 1, 2012. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2012/1346s10.pdf

CIVIL PROCEDURE – DISCOVERY – EVIDENCE – HARMLESS ERROR RULE

Facts:

Victoria Little filed suit against Dr. Roger Schneider, Dr. Mark Gonze, Vascular Surgery Associates, LLC, Dr. Michael Eves, and Northern Chesapeake Anesthesia Associates, alleging medical malpractice. A jury trial was held in the Circuit Court for Harford County. The jury returned a verdict in favor of Little against Schneider, Gonze, and Vascular Surgery Associates, LLC. The jury returned a verdict in favor of Eves and Northern Chesapeake Anesthesia Associates. After trial, Gonze and Vascular Surgery Associates decided not to pursue an appeal and entered into a settlement with Little, leaving only Schneider continuing this appeal.

Schneider appealed, raising three evidentiary issues. First, Schneider argued that the circuit court erred by precluding a CAT scan as a discovery sanction. Schneider had received the CAT scan during discovery from a former defendant and reasonably believed that Little had received the same CAT scan. Little argued that she had never received the CAT scan and that it should be precluded as a discovery sanction. The circuit court, after a lengthy hearing on the issue, precluded the CAT scan. The circuit court emphasized the importance of discovery and the need to comply with discovery rules and deadlines.

Second, Schneider argued that the circuit court erred by allowing evidence of his lack of board certification. The circuit court had initially precluded this evidence, but after Schneider's counsel elicited testimony regarding positive background information about Schneider, the circuit court allowed the introduction of the lack of board certification evidence, stating that if Schneider was permitted to "puff up," Little should be permitted to respond by "puffing down." Little then referenced Schneider's lack of board certification throughout trial, and used the evidence at closing to argue that Schneider was different from all of the other doctors who had testified. Little also argued that Schneider's lack of board certification served to undermine his credibility.

Third, Schneider argued that the circuit court erred by allowing Little's expert, Dr. Dodds, to testify on the issue of causation of Little's spinal cord injury. At trial, Schneider had argued that Dodds should not be permitted to testify as to causation because, as an anesthesiologist, he did not have the requisite training, experience, education, knowledge or skill to testify as an expert

in the area of spinal cord injuries. The circuit court allowed Dodds to testify on the causation issue, finding that Dodds had the requisite training, experience, education, knowledge and skill to testify as an expert and that Schneider's arguments regarding Dodds' qualifications went to the weight and not the admissibility of Dodd's testimony.

Schneider raised a fourth issue on appeal, whether Little satisfied her burden of proving causation, which the Court of Special Appeals declined to address as its opinion rendered the issue moot.

Held: Reversed and remanded to the circuit court for a new trial.

The Court of Special Appeals held that the circuit court erred when it precluded the CAT scan from evidence. The Court held that the circuit court's finding of a discovery violation was clearly erroneous when there was no evidence put forth that would indicate that Schneider had failed to produce the CAT scan during discovery. Moreover, the Court held that, assuming *arguendo* a discovery violation had occurred, the circuit court abused its discretion by failing to consider the *Taliaferro* factors when determining an appropriate discovery sanction. When fashioning remedies for discovery violations, circuit courts are required to take into account the specific facts and circumstances of each discovery violation, rather than emphasizing general ideas of fairness and the overall importance of compliance with discovery rules. The Court held that the error constituted reversible error because the CAT scan could have conclusively established the size of Little's aorta, a fact that was central to the malpractice claim.

Regarding the board certification issue, the Court held that the circuit court erred by admitting into evidence Schneider's lack of board certification. Whether a defendant physician is board certified or not is not relevant to whether the physician complied with the standard of care in his or her treatment of a patient, and therefore is not admissible in a malpractice case. Finding error, the Court then considered whether the error constituted harmless or reversible error. The Court noted that appellate courts will not reverse a lower court judgment if an error is harmless, and the burden is on the complaining party to show probable prejudice as well as error. The reviewing court must focus on the context and magnitude of the error, recognizing that it is not possible to "unbake" the jury verdict and examine the impact of any one ingredient. The Court engaged in a comprehensive review of the record and based its determination on the nature of the error and its relation to the case.

The Court noted that, when considering an error involving wrongfully admitted evidence, a reviewing should consider the degree of conflict in the evidence on critical issues and whether argument to the jury may have exacerbated the effect of the wrongfully admitted evidence. In the instant case, a careful review of the record indicated that there was significant conflict in the evidence on critical issues. Additionally, a piece of wrongfully admitted evidence was emphasized repeatedly throughout the trial and argued extensively at closing, and the evidence was probative on an issue central to a party's theory of the case. Accordingly, the evidence was likely to have affected the verdict and the prejudice burden was satisfied.

The Court rejected Schneider's argument that Dodds should not have been permitted to testify as to the cause of Little's injury. As a vascular anesthesiologist, Dodds had the requisite training, experience, education, knowledge, and skill to be certified as an expert. The Court noted that Schneider was entitled to impeach Dodds' testimony, but that such arguments went to the weight rather than the admissibility of Dodds' testimony.

Direse Helen Hastings v. Catherine Lynn Turner, Case No. 2448, September Term 2010, filed June 5, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/2448s10.pdf

CIVIL PROCEDURE – JURY VERDICT – UNANIMOUS – RETURN IN OPEN COURT – JURY POLLING – HEARKENING TO THE VERDICT – WRITTEN FINDINGS – FINAL VERDICT

Facts:

This case involves a negligence action brought by Catherine Lynn Turner, appellee, against Direse Helen Hastings, appellant, subsequent to a motor vehicle accident. The jury was supplied with a verdict sheet containing four questions. Question No. 3 asked: "Has it been proven by a preponderance of the evidence that [appellee] sustained injuries as a result of the motor vehicle accident referred to in the evidence?" The jury answered this question in the negative. Despite instructions given orally by the judge prior to jury deliberations and written instructions on the verdict sheet not to answer Question No. 4, regarding damages in the event the jury answered "no" to Question No. 3, the jury wrote the amount $21,145 on the verdict sheet in response to Question No. 4.

The jury announced its verdict as to Questions No. 1, 2, and 3 orally in open court in response to the courtroom clerk's questions. The courtroom clerk did not inquire about Question No. 4. Neither party requested that the jury be polled pursuant Maryland Rule 2-522(b), and the circuit court did not conduct a poll on its own initiative. The jury was hearkened to the verdict as to Questions No. 1, 2, and 3, and was dismissed by the judge. Following a short recess, the trial judge advised counsel that although the jury had answered "no" to Question No. 3, it had nonetheless answered Question No. 4 on the verdict sheet. The trial judge gave the parties thirty days to file memoranda addressing the apparent discrepancy. On December 7, 2010, subsequent to filings by both parties, the circuit court issued an order, without explanation, awarding damages in the amount of $21,145 to appellee.

Held:

The Court of Special Appeals vacated the judgment and remanded for entry of judgment consistent with the verdict as announced in open court.

Maryland Rule 2-522(b) provides that "[t]he verdict shall be returned in open court." The plain language of Maryland Rule 2-522(b) mandates that verdicts be returned in open court, and, as such, requires oral announcement of the verdict in open court.

Maryland Rule 2-522(b) provides that "[o]n request of a party or on the court's own initiative, the jury shall be polled before it is discharged." The poll is to be taken aloud, on-the-record, in open court.

The process of hearkening a jury to its verdict affords an opportunity for jurors to dispute the verdict, providing assurance that the verdict as announced was the verdict unanimously reached by the jurors. The requirement of polling or hearkening is longstanding in criminal cases. In *State v. Santiago*, 412 Md. 28, 32, 34 (2009), a case in which the jury was neither polled nor hearkened, the Court of Appeals reiterated that in a criminal case, if the jury is not polled, the court must hearken the verdict. The Court of Appeals held: "Though polling may be waived, both polling and hearkening may not be waived in the same case." *Id.* at 32.

In civil cases, either polling or hearkening is necessary to ascertain the jury's assent to the verdict as announced in open court.

Although Maryland Rule 2-522(c) gives the court discretion to "require a jury to return a verdict in the form of written findings upon specific issues[,]" this does not obviate the requirement of subsection (b) that the verdict shall be returned, *i.e.* read aloud, in open court.

In a civil case, a jury verdict becomes final upon the discharge and departure of the jury. The trial court may amend a final verdict only where the intention of the jury is manifest and beyond doubt.

Krause Marine Towing Corp., et al. v. Association of Maryland Pilots, et al., No. 561, September Term 2010, filed May 31, 2012. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2012/0561s10.pdf

MARYLAND'S ANTITRUST ACT – THE "RULE OF REASON" AS APPLIED TO THE WORK RULES OF THE ASSOCIATION OF MARYLAND PILOTS

Facts:

Krause Marine Towing Corporation ("KMTC"), a company that provides tug services, and Joseph L. Krause, Jr. ("Krause"), a docking master licensed by the Maryland Board of Pilots (the "Board"), challenged the rules of the Association of Maryland Pilots (the "Association") as they affect pilotage and tug services rendered to cargo ships in the Port of Baltimore.

KMTC argued that the Association's work rules impose an unreasonable restraint on competition and violate Maryland's Antitrust Act. MD. CODE ANN., COM. LAW ("CL") §§ 11-201 *et seq.* (1975, 2005 Repl. Vol.). Specifically, KMTC contended that the rotation system governing job assignments for pilots is unnecessarily anti-competitive. KMTC asserted that it should have the option of selecting its own docking masters instead of automatically accepting the docking master assigned by the Association's rotation system.

Krause argued that docking masters should not be required to be members of the Association as mandated under the Maryland Pilots Act (the "Act"). MD. CODE ANN., BUS. OCC. & PROF. ("BOP") §§ 11-101 *et seq.* (1989, 2010 Repl. Vol.). Krause challenged this required membership as an infringement on his freedom of contract rights.

The trial court granted a motion for judgment against KMTC and Krause "for the reason that the plaintiffs failed to present any credible evidence sufficient to establish any of their claims against any of the defendants." KMTC and Krause appealed this decision.

Held:

KMTC failed to demonstrate that the Association's work rules implementing the rotation system are unreasonable or violate Maryland's Antitrust Act. After conducting a "rule of reason" analysis, the Court concluded that Maryland's regulated pilotage system provides highly specialized services vital to the State's economic health as well as to the environment of the Chesapeake Bay. The Association's work rules permit docking masters to perform their duties impartially. There is an incidental anti-competitive effect but limitations on competition among pilots have long been an aspect of Maryland's pilotage law and are typical features of pilotage laws in the United States.

As for Krause's assertion that he should not be required to be a member of the Association, the Court held that this claim, as presented to this Court, was not preserved. Throughout the proceedings before the trial court, Krause argued that the Pilots Act *as a whole* was facially invalid and unconstitutional. On appeal, he no longer challenges the Pilots Act *as a whole*, but instead claims that the appeal is only a challenge "to the required Association membership." This argument is radically different from and inconsistent with the argument that he offered to the trial court. Because the contention before this Court was not the same as the argument presented to the trial court, the Court of Special Appeals did not consider Krause's assertion.

Ebenezer United Methodist Church v. Riverwalk Development Phase II, LLC, et al., No. 2852, September Term 2010, filed June 6, 2012. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2012/2852s10.pdf

LIMITED LIABILITY COMPANY – FIDUCIARY DUTIES – SELF-DEALING – CORPORATE OPPORTUNITY

Facts:

Appellant, Ebenezer United, purchased a fifty percent interest in Riverwalk One, LLC from appellee Synvest, which retained the remaining fifty percent interest. At some point in time before this purchase, Ebenezer United learned that Synvest had come to own a 32-acre parcel elsewhere in Harford County. Synvest later transferred that 32-acre parcel to Riverwalk Two, LLC and developed it. Synvest's president caused Riverwalk One, Riverwalk Two, and a third entity known as Green Spring Valley Overlook, to enter into an agreement by which Regal Bank & Trust extended a line of credit to the three entities, secured by deeds of trust to all three properties. Ebenezer United sued appellees, alleging that they usurped the opportunity to develop the 32-acre parcel, in violation of their fiduciary duties. At the conclusion of a bench trial, the circuit court ruled that the opportunity to develop the 32-acre parcel was not a corporate opportunity.

Held: Affirmed.

Although there is some question as to whether the corporate opportunity doctrine extends to individual LLC members, the parties stipulated that appellees were Ebenezer United's fiduciary. Ebenezer United alleged that the pooled line of credit and security agreement was self-dealing because it benefitted appellees' other projects and placed Riverwalk One at risk. Even if this arrangement was not in Ebenezer United's best interests and was self-dealing, that is a harm distinct from denial of a corporate opportunity. The alleged self-dealing did not depend on how the proceeds were used, and the alleged usurpation of corporate opportunity did not depend on its source of financing; they aligned in this case by happenstance. Maryland courts examine alleged corporate opportunities under the interest or reasonable expectancy test. Because a fiduciary owes it principals no general duty to disclose or to offer participation in other real estate development opportunities, a reasonable interest or expectancy requires more than common management or geographical proximity. Here, there was no evidence that the Riverwalk Two development had—or would have had—any effect on the value of the Riverwalk One project, and the security agreement benefitted the Riverwalk One as an efficient financial consolidation. Like common management, joint financial risk is too common to give rise to any particularized interest or expectancy.

Warren Pitts, Jr. v. State of Maryland, No. 2791, September Term 2010, filed June 5, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/2791s10.pdf

CRIMINAL LAW & PROCEDURE – PRELIMINARY PROCEEDINGS – DETAINER – TIMING

GOVERNMENTS – LEGISLATION – INTERPRETATION

Facts:

On February 2, 2007, the State of Maryland charged appellant, Warren James Pitts, Jr., in the District Court for Queen Anne's County with second-degree burglary, theft of property valued at over $500, malicious destruction of property valued at over $500, and lesser offenses. At that time, Pitts was incarcerated in the State of Virginia for offenses he had committed there. On November 13, 2007, Pitts was advised that a detainer had been filed against him as a result of the charges pending in Queen Anne's County. On November 15, 2007, Pitts elected to invoke his right to a speedy disposition of the Maryland charges under the Interstate Agreement on Detainers ("IAD"), codified at Maryland Code (1999, 2008 Repl. Vol.) §§ 8-401 to 8-417 of the Correctional Services Article. On December 7, 2007, the Circuit Court for Queen Anne's County received the appropriate documentation from Pitts declaring his desire to be tried within 180 days as per the IAD.

On March 27, 2008, the State's Attorney for Queen Anne's County informed the Virginia Department of Corrections via letter that he had "decided not to extradite Mr. Pitts from Virginia" and requested that Pitts "be released from your custody in reference to our charges." The Virginia Department of Corrections responded on April 3, 2008, informing the State's Attorney that the detainer against Pitts had been removed. Pitts subsequently served the rest of his term of incarceration in Virginia.

Almost immediately after his release, on June 30, 2010, Pitts was arrested in Queen Anne's County pursuant to the warrant originally issued on the Maryland charges. On September 7, 2010, Pitts moved to dismiss the charges pursuant to the requirements of the IAD. On September 22, 2010, the State of Maryland charged Pitts with the same offenses from the 2007 indictment, in circuit court. Pitts's attorney filed another motion to dismiss the charges on September 27, 2010.

The court denied Pitts's motion, and Pitts was subsequently tried on January 28, 2011. Pursuant to an agreed statement of facts, the court found Pitts guilty of fourth degree burglary and theft of property valued at under $500. He was sentenced to a period of incarceration of three years, with all but nine months suspended followed by one year of supervised probation. Pitts appealed, and was released on bond pending the outcome of this appeal.

Held: Reversed.

The circuit court improperly denied Pitts's motion to dismiss the charges that formed the basis for the detainer lodged against him during his incarceration in Virginia in 2007. Once properly invoked in response to a valid detainer, the provisions of the Interstate Agreement on Detainers cannot be subverted by the withdrawal of the detainer without the accompanying resolution of the underlying charges.

Abraham Kamara v. State of Maryland, No. 650, September Term 2011, filed June 7, 2012. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/0650s11.pdf

INDEPENDENT SOURCE DOCTRINE – INEVITABLE DISCOVERY – FOURTH AMENDMENT – SEARCH AND SEIZURE – SUFFICIENCY OF THE EVIDENCE – POSSESSION – AGREED STATEMENT OF FACTS

Facts:

An undercover police officer approached a person about purchasing marijuana. The officer gave the person "pre-marked drug enforcement money" and watched him go to appellant's house. Approximately five minutes later, the buyer left the house and gave the officer the marijuana.

A different officer approached appellant's house to conduct a "knock and talk." Appellant's brother asked for a warrant. A sergeant arrived, who advised that he was going to get a search warrant for the residence, and the police were going to detain appellant and his brother while they sought a search warrant. He handcuffed the two men. Two officers then performed a protective sweep of the residence and discovered marijuana in a bedroom in plain view.

A warrant was subsequently obtained, and a search was conducted pursuant to the warrant.

Held:

Although the initial, warrantless entry into appellant's home was improper, the drugs and paraphernalia ultimately seized were admissible pursuant to the independent source doctrine because they were seized pursuant to a valid warrant. The warrant was independent of any observations made in the initial protective sweep because: (1) the police made the decision to seek a search warrant prior to that time; and (2) the application for a warrant, deleting reference to the observations obtained during the protective sweep, contained sufficient probable cause to issue the warrant. Accordingly, the evidence seized was admissible pursuant to the independent source doctrine, and the trial court correctly declined to suppress the evidence seized pursuant to the search warrant.

When drugs are found in a bedroom of which the defendant is the sole occupant, that evidence is sufficient for the factfinder to infer that the defendant had knowledge and control of those drugs, and it is sufficient to support a conviction of constructive possession.

Dennis J. Tetso v. State of Maryland, Case No. 2219, September Term 2010, filed June 4, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/2219s10.pdf

CRIMINAL LAW AND PROCEDURE – REVIEWABILITY – PRESERVATION FOR REVIEW – JURORS & JURIES – VOIR DIRE – QUESTIONS TO VENIRE PANEL AND INDIVIDUAL JURORS – CONSTITUTIONAL LAW – BILL OF RIGHTS – FUNDAMENTAL RIGHTS – CRIMINAL PROCESS – ASSISTANCE OF COUNSEL – SUFFICIENCY OF EVIDENCE – EVIDENCE – JURY INSTRUCTIONS – CLOSING ARGUMENTS – HARMLESS ERROR

Facts:

A jury sitting in the Circuit Court for Baltimore County convicted Dennis J. Tetso, appellant, of the second-degree murder of his wife, Tracey Tetso. On November 23, 2010, appellant was sentenced to thirty years' imprisonment with all but eighteen years suspended, followed by five years of supervised probation.

During voir dire, a juror responded affirmatively that she believed appellant should prove his own innocence. During individual follow-up questioning at the bench neither appellant's counsel nor the trial judge questioned the juror about her response. The juror was impaneled on the jury without objection.

At trial, the circuit court sustained the State's objections to appellant's cross-examination of the victim's stepmother, regarding the victim having run away in the past. The court sustained objections to appellant's cross-examination of a detective regarding information he learned after conducting interviews of two individuals not called as witnesses at trial.

After the State's case-in-chief, appellant made a motion for judgment of acquittal arguing that the evidence was insufficient to convict appellant of first-degree premeditated murder. Despite saying that the sufficiency of the evidence as to second-degree murder would be addressed "later," the record reflects that appellant's counsel failed to address the sufficiency of the evidence as to second-degree murder. The court denied the motion for judgment of acquittal. Appellant renewed the motion at the conclusion of evidence, on the same grounds as argued earlier, and the court denied the motion. During closing remarks, the prosecutor informed the jury of a quote from a Maryland appellate case regarding circumstantial evidence. The trial court had not instructed the jury as to the quote. Appellant objected, contending that the prosecutor was not permitted to argue law, the court overruled the objection.

On appeal, appellant contended that he was denied his right to a fair and impartial jury and to the effective assistance of counsel because the juror who responded affirmatively to the question that appellant should be required to prove his innocence served on the jury. Appellant argues that the

evidence was insufficient to support his conviction for second-degree murder, as this was a case of solely circumstantial evidence–there was no body, forensic evidence or confession. Appellant argues that the circuit court erred in limiting his cross-examination of two witnesses who would have allegedly established that the victim had run away from home in the past and that the victim was seen by witnesses after the date the State claimed she was murdered. Appellant contends that the circuit court committed plain error in instructing the jury on circumstantial evidence, and the circuit court improperly permitted the prosecutor to argue law during closing remarks.

Held: Affirmed.

A criminal defendant has the right to trial by an impartial jury. *Voir dire* is the means by which to identify and challenge unqualified jurors.

A defendant fails to preserve for appellate review an issue concerning an alleged biased juror by failing to object that no individual follow-up questions were asked of the juror, failing to request that individual follow-up questions be asked, affirmatively accepting the juror for impaneling on the jury, and subsequently accepting without objection the jury with the juror as a member.

Recently, in *Alford v. State*, 202 Md. App. 582 (2011), we reviewed *Dingle v. State*, 361 Md. 1 (2000), and unambiguously held that the statement by the Court of Appeals in *Dingle*–that it is the task of the trial court to impanel a fair and impartial jury–does not stand for the proposition that a trial court automatically commits reversible error in failing to ask, *sua sponte*, follow-up questions of a juror.

An unpreserved issue of structural error is subject to plain error review.

Structural error is an error that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself, and transcends the criminal process. The trial court's alleged failure to ask follow-up questions of a juror, who responded affirmatively to a question regarding whether the defendant should prove his innocence is not structural error mandating automatic reversal, if preserved.

Where a juror responds affirmatively to a question posed to the venire group indicating that the juror holds a personal belief that is inconsistent with applicable law but responds to other questions in a manner indicating that he would accept and apply the law as explained by the trial court, and appellant's trial counsel is given the opportunity to ask individual questions of the juror, the trial court has no independent duty to ask follow-up questions of the juror *sua sponte*.

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

Maryland Rule 4-324(a) provides: "A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted." The language of the rule is mandatory.

The issue of sufficiency of the evidence is not preserved where appellant's motion for judgment of acquittal is on a ground different than the ground pursued on appeal. A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal.

The standard for appellate review of the sufficiency of the evidence is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We affirm the denial of a motion for acquittal unless we determine that no rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. The same standard of review applies to all criminal cases, including those resting upon circumstantial evidence, because, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct evidence. Circumstantial evidence is entirely sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.

In a homicide case, the proof of the *corpus delicti* is sufficient where the evidence, even entirely circumstantial evidence, establishes the fact that the person for whose death the prosecution was instituted is dead, and that the death occurred under circumstances which indicate that it was caused criminally by appellant. The State may establish the *corpus delicti* by either direct or circumstantial evidence.

An issue is not preserved for appellate review when the trial court sustains an objection, unless the substance of the evidence was made known to the court by proffer on the record or was apparent from the context within which the evidence was offered.

The scope of examination of witnesses at trial is a matter left largely to the discretion of the trial court, and no error will be recognized unless there is clear abuse of such discretion. The determination of relevance is reserved for the discretion of the trial court; we will not disturb the trial court's ruling unless it has abused that discretion.

In order to preserve a challenge to the instructions provided to the jury, a party must object to the instructions, state the issue being objected to, and provide the grounds for the objection.

Maryland appellate courts have the discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court. Maryland appellate courts have often been called upon to exercise the discretion to recognize plain error; however, neither the

Court of Appeals nor this Court has chosen to do so except in a few egregious cases. Reversal is only required when it appears that the trial court's jury instructions actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice.

The regulation of closing argument rests within the sound discretion of the trial court.

Arguing law includes stating, quoting, discussing, or commenting upon a legal proposition, principle, rule, or statute. Unless there exists a dispute as to the proper interpretation of the law of the crime for which there is a sound basis, the trial court's instructions as to the law are binding on the jury and counsel as well. As such, a trial court errs in allowing a prosecutor in closing argument to argue law that is different or exceeds the law given in the trial court's instructions.

Where an appellate court concludes that a trial court errs in permitting counsel to argue law in closing remarks, the appellate court must then determine whether the improper argument constituted reversible error. The harmless error standard is highly favorable to the defendant, and the burden is on the State to show that the error was harmless beyond a reasonable doubt and did not influence the outcome of the case.

The error is harmless when counsel does not exceed the law of the case by presenting argument which substantively altered the binding instructions.

Mark Terrill Rich v. State of Maryland, No. 2339, September Term 2009, filed May 31, 2011. Opinion by Raker, J.

http://mdcourts.gov/opinions/cosa/2012/2339s09.pdf

CRIMINAL LAW – RESISTING ARREST

Facts:

A police officer was performing a consensual search of the passenger of a stopped vehicle, Mark Terrill Rich, when the officer discovered marijuana under Rich's hat. Rich ran immediately, and the officer caught him, placed him under arrest, and handcuffed him. The officer escorted Rich back to the stopped cars, but when the officer bent down to pick up the marijuana, Rich ran for a second time. Again, the officer pursued and caught Rich.

Rich was charged, *inter alia*, with resisting arrest, an offense codified at § 9-408(b)(1) of the Criminal Law Article, but otherwise defined by the common law. Rich moved for judgment of acquittal. The State argued that Rich's flight satisfied the conduct necessary to convict him of resisting arrest. The circuit court denied the motion, and the jury found Rich guilty.

Held: Reversed.

To convict a defendant of the offense of resisting arrest, the State must prove the following elements: (1) that a law enforcement officer arrested or attempted to arrest the defendant;(2) that the officer had probable cause to believe that the defendant had committed a crime, *i.e.*, that the arrest was lawful; and (3) that the defendant refused to submit to the arrest and resisted the arrest by force.

The issue the Court addressed was whether resistance by force is a necessary element and whether flight amounts to such conduct, or whether refusal to submit alone is sufficient. The Court held that mere flight, without more, does not constitute resistance by force. Looking to the generally accepted definition of the word "resist," the purpose undergirding the criminalization of resisting arrest, and the absence of any reported Maryland case where flight alone sufficed to convict a defendant, the Court concluded that the Maryland common law, which the statute embraced, did not consider simply running away to be resistance by force. Hence, neither of Rich's flights could sustain his conviction.

In the course of considering whether flight, without more, satisfies the third element of resisting arrest, the Court observed that the element has been expressed inconsistently in the Maryland case law. Some cases say that the State must prove that a defendant refused to submit to the arrest *and* resisted by force; others say that the State must show that a defendant refused to submit to the arrest *or* resisted by force. Based upon discussion of the common law offense of

resisting arrest in treatises and the case law, the earliest formulation of the elements in *Preston v. Warden of Maryland House of Correction*, 225 Md. 628 (1961), and the character of conduct in every reported Maryland case, the Court held that both refusal to submit *and* resistance by force are required to convict an individual of resisting arrest.

Dakota D. McDaniel v. State of Maryland, No. 258, September Term 2011, filed June 7, 2011. Opinion by Raker, J.

http://mdcourts.gov/opinions/cosa/2012/0258s11.pdf

CRIMINAL PROCEDURE – RESTITUTION

Facts:

The defendant Dakota D. McDaniel, who hit his victim in the face with a handgun and knocked out one of his teeth, was convicted of assault in the second degree. At sentencing, the State requested restitution for the victim and presented a dental estimate for the cost of replacing the tooth. The dental work had begun but had not been completed at the time of sentencing. The circuit court ordered the defendant to pay restitution as a condition of his probation.

McDaniel appealed, arguing that the victim did not have actual dental losses within the meaning of § 11-603(a)(2)(i) of the Criminal Procedure Article, and, hence, the restitution order was an illegal sentence, because the circuit court was not authorized to order restitution in his case.

Held: Affirmed.

Section 11-603(a)(2)(i) permits restitution for "actual medical, dental, hospital, counseling, funeral, or burial expenses or losses." The term "losses," the Court determined, covers situations, and permits restitution, where victims suffer harms or injuries caused by defendants but have not yet incurred expenses for treating or fixing those harms or injuries.

This holding was based upon the generally accepted meaning of "losses," which the General Assembly added to the statute, but did not define, as part of 2005 amendments. The Court looked as well at the evolution of the legislative attempts to amend § 11-603(a)(2)(i), which culminated in the 2005 amendments, and the general purpose of those amendments to broaden the circumstances in which, and recipients for whom, restitution could be awarded. Finally, the Court observed that McDaniel's argument would have made "losses," synonymous with "expenses," thereby rendering impermissibly "losses" nugatory, even though the General Assembly deliberately added the phrase "or losses" in 2005.

David Scull, et al. v Doctors Groover Christie & Merritt, P.C., No. 332, September Term 2011, filed June 7, 2012. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2012/0332s11.pdf

HEALTHCARE LAW – MANAGED HEALTHCARE – HEALTH MAINTENANCE ORGANIZATIONS – PRIVATE CAUSE OF ACTION

CONSUMER PROTECTION – EXEMPTION FOR PROFESSIONAL SERVICES – INCLUSION OF SECONDARY SERVICES

Facts:

Scull is an enrollee in the United Healthcare Select HMO. In May 2008, Scull was referred to Doctors Groover Christie & Merritt, P.C. ("GCM") by an orthopedic specialist for x-rays on his knee. It was Scull's understanding that his insurance policy with United HealthCare ("UHC") fully covered payment for the x-ray procedure. Approximately one year later, in May 2009, Scull received an invoice from GCM. The invoice reflected that Scull owed $121.00 for the x-rays taken on his knee because GCM was "unable to collect from [his] insurance because, [his] insurance states [he has] other primary coverage." The invoice also instructed Scull to contact Health Care Management Group ("HCMG"), if he had any questions or concerns about the bill.

An HCMG employee informed Scull that UHC reversed the payment it made to GCM. Accordingly, HCMG recommended Scull submit his claim to Medicare. Scull, thereafter, called UHC because he believed the x-rays were fully covered and paid for by UHC. UHC informed Scull that it "had paid GCM for the covered service." Subsequently, Scull emailed to HCMG about this discrepancy. An employee of HCMG responded to Scull's email advising him to disregard any invoices and informing him that his account was adjusted to reflect a $0.00 balance.

Approximately one week later, however, Scull received an additional copy of the initial invoice reflecting a balance due of $121.00. Despite being told by HCMG to disregard any invoices, Scull sent GCM a check for the balance. Two to three months later, Scull received a check from GCM in the amount of $121.00. This check was accompanied with a letter stating that GCM discovered Scull's overpayment.

Believing "GCM adjusted his account and sent him a check because he discovered [GCM]'s practice of balance billing," Scull decided not to cash the check. Instead, he filed a class action complaint which alleged violations the Maryland HMO Act and the Maryland Consumer Protection Act.

The circuit court dismissed all three counts because there is no private cause of action under the Maryland HMO Act and GCM is exempt from the Maryland Consumer Protection Act.

Held: Affirmed.

The circuit court's dismissal of Scull's complaint for failure to state a claim was correct as a matter of law. The HMO Act applies not only to registered HMOs but also to persons and organizations that interact with HMOs, such as medical providers.

The legislative history of the HMO Act is silent concerning an intent to create a private cause of action. Normally, legislative silence weighs against reading an implied cause of action into a statute. This, however, typically only applies on the federal level because of the vast differences in legislative record keeping between Congress and the Maryland General Assembly.

The analysis concerning whether an implied private cause of action exists in a state law, therefore, focuses on whether there is any express method of redress in the statute and whether the statute was designed to benefit the public as a whole or a particular subgroup of the public. When a statute has other private rights of action and is intended to benefit the public as a whole rather than a particular subgroup of the public, an implied private cause of action is less likely to be read into a statute. On the other hand. when a statute contains no private causes of action and was intended to benefit a particular subgroup of the public, an implied private cause of action will be more readily created.

Following this method of analysis, an implied cause of action cannot be read into the HMO Act because: 1) the General Assembly clearly explained how claims under the HMO Act should be initiated, that is, by and through the Insurance Commissioner, and this method for claims provides a vehicle to address the private claim at issue here; and 2) the General Assembly intended the HMO Act to benefit the public as whole rather than a particular subgroup of the public or to preserve or create individual rights.

The billing services of a medical provider are exempt from the Maryland Consumer Protection Act. The exemption of professional services included in § 13-104(1) of the Commercial Law Article covers not only those professional services described in the section but also secondary services necessary for the provision of the exempted services, such as billing and fee setting.

Brian C. DeMuth, et al. v. Walter William Strong, No. 195, September Term 2011, filed June 6, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/0195s11.pdf

MEDICAL MALPRACTICE ACTIONS – MARYLAND HEALTH CARE MALPRACTICE ACT – COURTS AND JUDICIAL PROCEEDINGS ARTICLE SECTION 3-2A-02(c) – QUALIFICATIONS OF EXPERT WITNESSES TO PROVIDE CERTIFICATE OR TESTIFY THAT DEFENDANT BREACHED STANDARD OF CARE – MEANING OF "RELATED SPECIALTY" IN SUBSUBPARAGRAPH REQUIRING THAT, WHEN DEFENDANT IS BOARD CERTIFIED IN A SPECIALTY, STANDARD OF CARE EXPERT BE BOARD CERTIFIED IN THE SAME OR RELATED SPECIALTY.

Facts:

The defendant physician, an orthopedic surgeon, performed a total left knee replacement surgery on the plaintiff. In the postoperative period, the plaintiff exhibited symptoms of lack of blood flow to his left foot and leg, which the defendant diagnosed as a minor nerve injury. After the plaintiff's symptoms progressed and he developed compartment syndrome, the defendant performed tests that showed the left foot and leg had not been receiving adequate blood flow. Despite two emergency surgeries, the damage could not be reversed, and the plaintiff's left leg was amputated above the knee. The plaintiff brought a medical malpractice action and the jury returned a verdict in favor of the plaintiff.

The defendant physician appealed, arguing the trial court should not have allowed one of the plaintiff's expert witnesses, a vascular surgeon, to testify that the defendant breached the standard of care in his postoperative treatment of the plaintiff. Md. Code (1974, 2006 Repl. Vol.), section 3-2A-02(c)(2)(ii)1.B. of the Courts and Judicial Proceedings Article ("CJP") requires that, when a defendant is board certified in a medical specialty, an expert who provides a certificate of qualified expert or testifies concerning the standard of care "shall be board certified in the same or a related specialty as the defendant." The defendant maintained that vascular surgery was not the same or a related specialty vis-à-vis orthopedic surgery.

Held: Affirmed.

The trial court did not err in permitting the board certified vascular surgeon to testify that the defendant, a board certified orthopedic surgeon, breached the standard of care in his treatment of the plaintiff. "Related," as it is used in CJP section 3-2A-02(c)(2)(ii)1.B., means "being connected, associated." The determination whether a specialty is connected or associated with another specialty depends upon the context of the treatment or procedure at issue in the case and, given that context, whether there is an overlap between the specialties so that members of one specialty would have knowledge of the standards of care applicable to the other specialty.

Because board certified orthopedic surgeons and board certified vascular surgeons both participate in the diagnosis and treatment of vascular compromise in postoperative orthopedic patients, for purposes of the medical issues in this case, orthopedic surgery and vascular surgery were “related” specialties.

William S. Dize v. Association of Maryland Pilots, No. 26, September Term 2010, filed May 31, 2012. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/0026s10.pdf

JONES ACT – SEAMAN STATUS – SUMMARY JUDGMENT

Facts:

Mr. Dize filed a claim against the Association of Maryland Pilots in the Circuit Court for Baltimore City pursuant to the Jones Act. He alleged that, while employed by the Association, he was "assigned to sandblast old paint from the bottom of the Annapolis Pilot," while the boat was dry-docked. Mr. Dize was diagnosed with silicosis of the lungs on January 14, 2008. He maintained that the Association negligently caused his injuries.

The Association filed a Motion for Summary Judgment, alleging that there was no dispute that Mr. Dize did not spend 30% of his time working onboard a vessel, as required to qualify as a seaman under the Jones Act. Mr. Dize provided percentages of his time spent on the water; these percentages varied, but the average was well under 20%.

The circuit court granted the Association's motion for summary judgment. The court noted that the Supreme Court adopted, as "an appropriate rule of thumb," a requirement that a worker spend at least 30% of his time in the service of a vessel in navigation to qualify as a seaman. The court reviewed the parties' calculations regarding the time Mr. Dize spent on the water performing his duties, and it concluded that the calculation of time fell well-short of the 30% requirement.

The court then addressed Mr. Dize's claim that it should look to other duties he performed, duties that Mr. Dize asserted were in the service of a vessel or fleet of vessels. The court listed these duties as including "maintenance of the vessels; enforcement of Association policies and work rules; servicing vessels in navigation; keeping shop supplies on hand to service the vessels; ordering fuel; managing the repair shop; dispatching pilots and launch operators to ships; assisting with cleaning the quarters on the boats; and supervising fueling." The court, for summary judgment purposes, assumed that these activities would raise the figure to over 30%."

The court noted that the language in Supreme Court cases supported the view that the 30% requirement applied only to time aboard a vessel in navigation. It found that the "duration requirement must be measured in terms of time actually spent aboard vessels in navigation," and that Mr. Dize's time spent on the vessel was "well short of 30% of his work hours."

The court rejected Mr. Dize's argument that a departure from the 30% test was appropriate because Mr. Dize did not provide a "specific reason why the threshold is not [an] appropriate tool under the facts of the case." It concluded that, "as a matter of law, [Mr. Dize] is not a

seaman within the meaning of the Jones Act, which compels the conclusion that his claim under the statute must fail." Accordingly, the court entered summary judgment in favor of the Association.

Held: Affirmed.

Case law supports the proposition that the determination of whether a person qualifies as a seaman pursuant to the Jones Act, due to a substantial connection to a vessel in navigation, involves looking to whether the employee's duties were of a seagoing nature that exposed the employee to the perils of the sea. This case law comports with the Supreme Court's statement that the purpose of the Jones Act was to "separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Chandris*, 515 U.S. at 368.

The circuit court looked to all of Mr. Dize's activities in assessing whether Mr. Dize was a seaman under the Jones Act, and it properly looked only to the activities on board a vessel that actively subjected him to "the perils of the sea." There is no dispute that Mr. Dize's time aboard a pilot launch was less than 30% of his time.

Mr. Dize has not given any persuasive reason why the 30% rule should be rejected here. The circuit court properly determined that a reasonable jury could not find that Mr. Dize was a seaman under the Jones Act, and it properly granted summary judgment in favor of the Association.

Daniel C. Hayes v. Darien J. Pratchett, No. 2751, September Term 2010, filed June 5, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/2751s10.pdf

WORKERS' COMPENSATION & SSDI – COMPENSABLITY – COURSE OF EMPLOYMENT – GENERAL OVERVIEW

WORKERS' COMPENSATION & SSDI – REMEDIES UNDER OTHER LAWS – EXCLUSIVITY – GENERAL OVERVIEW

Facts:

This appeal arises from a suit for personal injuries filed by appellant, Daniel C. Hayes, against appellee, Darien J. Pratchett, in the Circuit Court for Prince George's County. In his complaint, Hayes alleged that Pratchett's negligent operation of a motor vehicle resulted in Pratchett's vehicle colliding with Hayes's vehicle in the parking lot of the BJ's Wholesale Club located on Ballpark Road in Bowie, Maryland on July 26, 2006. Both Hayes and Pratchett were employees of BJ's Wholesale Club. Hayes was an employee in the tire center, while Pratchett was his supervisor. When the collision occurred, Hayes was leaving the BJ's parking lot, and Pratchett was in the process of moving a customer's car from a parking space into the tire service center.

On October 22, 2010, Pratchett filed a Motion for Summary Judgment arguing that Hayes's sole remedy was under the Workers' Compensation Statute because, as a supervisory coemployee, Pratchett benefitted from his employer's immunity from suit under the Statute. On December 22, 2010, the circuit court held a hearing on Pratchett's motion, and granted summary judgment in favor of Pratchett concluding that Pratchett was performing a nondelegable duty of his employer and therefore was immune from suit under the Workers' Compensation Statute. This appeal followed.

Held: Reversed.

The circuit court erred in granting summary judgment in favor of Pratchett where he was performing a routine work assignment himself when the incident occurred and, therefore, did not benefit from his employer's immunity from suit under the Statute. A supervisory coemployee performs his or her employer's nondelegable duty to provide a safe workplace when the supervisor delegates tasks to other employees or supervises other employees in the performance of their tasks. A supervisory coemployee does not perform his or her employer's nondelegable duty to provide a safe workplace, and, thus, is not immune from suit under the Statute, when the supervisor commits an affirmative act of negligence.

Annapolis Roads Property Owners Association, et al. v. Thomas C. Lindsay, Sr., et al., No. 1380, September Term 2010, filed June 4, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/1380s10.pdf

REAL PROPERTY – ROADS – CONVEYANCES – EXPRESS RESERVATIONS – MORTGAGES; – DEEDS OF RELEASE – EASEMENTS – IMPLIED EASEMENTS BY VIRTUE OF PLAT REFERENCE – PLAT LEGENDS

Facts:

This case involves conflicting claims of ownership over a ten-foot strip of land (the "Strip") located between four lots in the Annapolis Roads subdivision in Annapolis, Maryland. The Strip is approximately ten feet wide and one hundred sixteen feet long, beginning at Carrollton Road and running between two of the lots for the first one hundred feet of its length. The remaining fifteen feet of the Strip extend beyond the back lot lines of the two lots, where it connects at the end of the other two lots. The Strip itself was depicted on a plat recorded in 1928, which created the lots at issue. The plat labels the Strip as "10'" and labels Carrollton Road as "Carrolton Road."

In deeds to two of the lots, the Annapolis Roads Company conveyed the lots along with all of the "rights, alleys, ways, privileges, appurtenances and advantages to the same belonging or in anywise appertaining," but reserved and retained "all riparian rights, appurtenant to the land as well as the beds of all roadways[.]" In a deed to the two other lots, the Annapolis Roads Company conveyed the lots along with the "rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging or in anywise appertaining," but the deed included no reservation in the beds of roadways or any other reservation, restriction, or retention of any kind. None of the deeds specifically mentioned the Strip by name or other designation. All four lots were encumbered by a mortgage lien, which was later released as to each lot through deeds of release, conveying and releasing the lots by lot reference.

The circuit court granted a motion for summary judgment in favor of appellees, Thomas C. Lindsay, Sr. and The Thomas C. Lindsay, Sr. Revocable Trust (the "Lindsay Trust"), and against appellants, the Annapolis Roads Property Owners Association ("ARPOA"), Stanley and Barbara Samorajczyk, and Margaret Talbot. The circuit court issued two declaratory judgments. In the first Declaratory Judgment, the circuit court declared that ARPOA holds no right, title, or interest in the Strip binding upon the four lots of the Annapolis Roads subdivision. In the second Declaratory Judgment, the circuit court declared that the Lindsay Trust holds all right, title, and interest in the Strip binding upon the four lots, subject, however, to an easement appurtenant to one of the lots for use of the Strip for ingress and egress to Carrollton Road.

Held: Affirmed.

Where a grantor in a deed reserves and retains rights in the "the beds of all roadways," but conveys all of the "alleys, ways, privileges, appurtenances and advantages to the same belonging or in anywise appertaining," the grantor fails to reserve rights in a strip of land that is not a roadway.

A strip of property that connects four lots, and provides access to a main road, but is not an open way for public passage for vehicles between one place or another, is not a "road," but rather is a "way."

Md. Code Ann., Art. 21 § 5-114 provides that a deed that conveys land binding on a street or highway "shall be construed to pass" to the grantee all of the grantor's right, title, and interest in the street or highway unless the grantor "shall in express terms in the writing by which the devise, gift or conveyance is made, reserve to himself all the right, title and interest to the said street or highway." The burden is on the grantor to demonstrate an express intention to reserve the street after conveying the land bordering the street.

Where the language of the deed is capable of more than one interpretation, the instrument fails to make an express reservation as required pursuant to Md. Code Ann., Art. 21 § 5-114, and the grantor's interest in the street or highway passes to the grantee.

Although a mortgage technically conveys legal title to the property, the conveyance is simply security for payment.

Where a mortgage provides for a redemise of the property to the mortgagor, the mortgagor is regarded as the real and beneficial owner of the property and has the power to convey the mortgaged property to another.

Where a deed of release expressly releases a lot from a mortgage, and the lot included an interest in an adjacent strip of property, the release includes a release of the interest in the adjacent strip of property as well.

An express easement by grant or reservation is created through a written instrument that complies with the Statute of Frauds and contains "the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted." In construing the language of a deed of easement, a court should, where possible, ascertain and give effect to the intention of the parties at the time the contract was made.

A party creates an express easement where the party, in a written instrument, conveys fee simple title to property, but unambiguously and specifically reserves the right to use that property for ingress and egress to a main roadway.

A deed that is silent as to a right of way, but refers to a plat that establishes such a right of way, creates a rebuttable presumption that the parties intended to incorporate the right of way in the transaction.

An implied easement by virtue of plat reference may exist where the plat depicts a right of way.

Where a deed does not explicitly include a reference to a plat in the property description, but refers to the plat in other specific ways, such as by name of the development, lot of land, and section of land–all pieces of information used to describe the property conveyed, and none of which existed prior to creation of the plat–those pieces of information, combined with the chain of title containing a specific reference to the plat, are sufficient to constitute a specific plat reference for purposes of conveyance and an easement to use the right of way.

The absence of a legend on a plat does not establish that the parties did not intend to convey an easement. Rather, a deed which refers to a plat depicting a right of way may demonstrate an intention to convey an easement.

Where a party conveys the right, title, and interest to a lot's portion of a right of way, the conveyance does not extinguish another lot owner's existing right to use the right of way. Rather, the subsequent owners of the lot purchased title to the lot's portion of the right of way subject to the other lot owner's easement. The subsequent owners' purchase, thus, merely reduces the number of servient tenements.

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Gloria Dixon, etc., et al. v. State of Maryland, No. 187, September Term 2011, filed June 6, 2012. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2012/0187s11.pdf

TORT LAW – DUTY TO CONTROL THE CONDUCT OF A THIRD PERSON

Facts:

The State released a man from prison after he served a sentence for the rape of a thirteen-year-old girl. The man's mandatory supervision order imposed ten conditions, the violation of which could subject him to re-incarceration. The Department of Parole and Probation ("DPP") was responsible for supervising the man while he was on mandatory supervision. DPP failed to verify the man's address after his release, and it allowed numerous other violations of his mandatory release order to go un-punished. DPP later lost contact with the man for an entire month. He later reappeared in Washington, D.C., where he confessed to killing a fifteen-year-old boy. The boy's parents brought wrongful death and survival actions against the State under the theory that its negligent supervision of the man caused their son's death. The circuit court granted summary judgment in favor of the State.

Held: Affirmed.

In granting summary judgment for the State, the circuit court held correctly that the State did not have a duty to control the man's conduct so as to prevent him from harming the victim. The Court of Appeals rejected a similar argument in *Lamb v. Hopkins*, 303 Md. 236 (1985). Under *Lamb* and the Restatement (Second) of Torts §§ 315 and 319, there is no duty to prevent a third person from causing harm to another absent a "special relationship." That relationship may arise under the common law or by statute. A common law special relationship must be custodial in nature, rather than merely supervisory. The State did not have custody over the individual in the traditional sense, so it did not have a duty to control his actions. Further, the statutory duties created by DPP's enabling statute run to the courts, and do not extend to the general public or to any specific person. Therefore, the State had no enforceable legal duty to protect the victim from harm caused by a man released from prison on mandatory supervision.

Denise Bryan et. al. v. State Farm Mutual Insurance Company, No. 353, September Term 2011, filed June 7, 2012. Opinion by Rodowsky, J.

http://mdcourts.gov/opinions/cosa/2012/0353s11.pdf

JUDGMENTS – ISSUE PRECLUSION – FINAL JUDGMENT – NONMUTUAL ISSUE PRECLUSION – PRIOR JUDICIAL PROCEEDING – SPECIAL VERDICT

Facts:

An auto collision that occurred in New York produced two legal actions. In the first case, the trial of liability issues was bifurcated from damages. The jury found against the driver. The first case then settled, without an entry of final judgment. In the second case, currently before the Court, the driver and his passengers sued the motorist coverage carrier, alleging that the auto accident was caused by a phantom driver.

The circuit court applied issue preclusion and entered summary judgment against both the driver and the passengers, based on the jury verdict and settlement in the first case.

The Court addressed the following issue:

> "Was a jury verdict on liability, followed by settlement, sufficiently final, under modern rule, to apply issue preclusion?"

Held: Affirmed as to driver. Reversed as to passengers.

The Court first noted that even though the first case occurred in a New York court, it would decide the instant matter under Maryland law because neither party raised an issue of choice of law or asked the Court to take judicial notice of New York law.

The Court then outlined the four elements of issue preclusion, or collateral estoppel: (1) was the issue decided in the prior adjudication identical with the one presented in the action in question?; (2) was there a final judgment on the merits?; (3) was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) was the party against whom the plea is asserted given a fair opportunity to be heard on the issue? The Court stated that only the second element, the need for a final judgment on the merits, was in question.

The Court noted that the final judgment requirement has been frequently characterized as a "valid and final" judgment. The Court discussed the parties' respective positions. The plaintiffs contended that issue preclusion requires a final judgment and that a jury verdict is not such. The defendant contended that there had been a trial and a determination within a judicial system on the issue of liability and that, by virtue of the settlement and termination of the proceeding, that

factual determination was beyond modification by a court and thus final for issue preclusion purposes.

The Court addressed the differences between the traditional underpinnings of issue preclusion's companion concept, *res judicata*, and the more modern precedents. Traditionally, the authorities equated finality for purposes of appealability with finality for purposes of *res judicata*, including claim preclusion, and therefore did not give *res judicata* effect to a jury verdict. The more modern precedents, however, support the proposition that the finality requirement is relaxed by applying issue preclusion to matters resolved by preliminary rulings or to determinations of liability that have not yet been completed by an award of damages or other relief.

The Court noted that the issue before it was one of nonmutual issue preclusion. The Court stated that regardless, if the degree of finality required to trigger the doctrine of issue preclusion was satisfied in a mutual setting, it should be sufficient in a nonmutual setting. The Court then stated that Maryland has recognized nonmutual issue preclusion since the 1960's. The Court further noted that there was at least one case decided by the Court of Appeals regarding whether nonmutual defensive issue preclusion was available following a litigation settlement. *See Welsh v. Gerber Products, Inc*., 315 Md. 510, 555 A.2d 486 (1989). The Court noted that in the case *sub judice*, unlike in *Welsh*, the issue of liability, the issue which the carrier sought to be precluded, had actually been litigated.

The Court then discussed cases from other jurisdictions applying issue preclusion to similar factual situations. It then discussed the Restatement (Second) of Judgments, noting that the Restatement also supported the modern approach to issue preclusion.

The Court concluded that, as to the plaintiff-driver, preclusive effect should be given to the determination by the jury in the New York action that the driver was responsible for the accident, inasmuch as the settlement removed the jury's findings from the possibility of subsequent modification.

The Court then concluded that, as to the plaintiff-passengers, preclusive effect would not be given to the New York judgment because they were not parties to the New York litigation. The Court stated that findings averse to non-parties in earlier litigation cannot be binding upon them.

Peter N. Yaffe, et al. v. Scarlett Place Residential Condominium, Inc., et al., No. 2775, September Term 2010, filed June 5, 2012. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2012/2775s10.pdf

TORT LAW – DAMAGES – REPAIRABLE DAMAGE TO REAL PROPERTY

Facts:

On May 5, 2009, Peter N. Yaffe, individually and as successor in interest to and assignee of Budreaux & Sammy, LLC ("Budreaux") and Columbus Piazza, LLC ("Columbus Piazza") (collectively referred to as "appellants"), filed a complaint in the Circuit Court for Baltimore City against Scarlett Place Residential Condominium, Inc. ("Scarlett Place"), Karl A. Knutsen, and Knutsen Engineering Group, LLC ("KEG") (collectively referred to as "appellees"). Appellants sought damages, specific performance, and injunctive relief stemming from alleged reoccurring water leaks and moisture infiltration in several condominiums owned by appellants located at Scarlett Place in Baltimore City. The circuit court conducted a bench trial and, at the conclusion of appellants' case, granted appellees' motions for judgment.

On appeal, appellants contended that the court erred in failing to find that Mr. Yaffe was a third party beneficiary of a an agreement between Scarlett Place and KEG to repair water leaks in Scarlett Place; in not awarding specific performance and injunctive relief; and in not awarding appellants carrying costs of their property which they were unable to use as a result of water leaks.

Held: Affirmed.

The evidence supported the following determination by the circuit court. Mr. Yaffe was not a third party beneficiary of any contract between Scarlett Place and KEG. The court did not abuse its discretion in denying the equitable remedies of specific performance or a permanent injunction. With respect to the remaining issue, damages for economic loss of use of real property, as a result of damage to the property that is repairable, are measured by the market value of the loss of use. Absent evidence of comparable market rental values, appellants could not recover the carrying charges associated with owning the property, i.e., mortgage interest, insurance premiums, and condominium fees.

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Sheng Bi v. Delores A. Gibson, No. 1663, September Term 2010, filed June 4, 2012. Opinion by Sharer, J.

http://mdcourts.gov/opinions/cosa/2012/1663s10.pdf

TORT LAW – STATUTE OF LIMITATIONS

Facts:

Appellant, Sheng Bi, filed an action for damages against appellee, Delores Gibson. The complaint was filed within the three-year statute of limitations. For reasons not clear from the record, Bi voluntarily dismissed his complaint more than three years after the cause of action arose.

Subsequently, Bi filed a complaint against Gibson, alleging the same facts that were said to support the earlier-filed complaint. Gibson's motion to dismiss based on the statute of limitations was granted.

Maryland Code, Courts & Judicial Proceedings, Section 5-101, provides that "a civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." On appeal, Bi attempted to read into CJ § 5-101 a "relation back" theory that would save his claim from the strict construction of the statute.

Held:

Because statutes of limitations are to be strictly construed, and because courts will decline to apply strained construction that will evade the purpose of such statutes, the Court of Special Appeals declined to apply a relation back theory to Bi's claims. Several states have enacted statutory provisions that apply relation back standards, but Maryland has not. Therefore, following the voluntary dismissal of a civil action without prejudice, a second complaint based upon the same facts still must be filed within the applicable limitations period, absent assertions of fraud, implication of the discovery rule, or other recognized exceptions.

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ATTORNEY DISCIPLINE

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

PHILLIP HAMILTON CHRISTIAN DORSEY

*

By an Order of the Court of Appeals dated June 12, 2012, the following attorney has been disbarred:

DONYA TARRAINE ZIMMERMAN

*

By an Order of the Court of Appeals dated June 20, 2012, the following attorney has been disbarred by consent:

ERWIN R.E. JANSEN, JR.

*

By an Opinion and Order of the Court of Appeals dated June 22, 2012, the following attorney has been indefinitely suspended:

JAMES CHARLES AUGUST MOELLER

*

By an Opinion and Order of the Court of Appeals dated June 25, 2012, the following attorney has been disbarred:

RANJI M. GARRETT

*

By an Opinion and Order of the Court of Appeals dated June 25, 2012, the following attorney has been disbarred:

HEUNG SIK PARK

*

By an Opinion and Order of the Court of Appeals dated June 25, 2012, the following attorney has been disbarred:

SALADIN ERIC SHAKIR

*

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JUDICIAL APPOINTMENTS

On April 13, 2012, the Governor announced the appointment of **ERIK HOWARD NYCE** to the Prince George's County District Court. Judge Nyce was sworn in on June 7, 2012 and fills the vacancy created by the retirement of the Honorable Joel D. Worshtil.

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred and Seventy Third Report of the Standing Committee on Rules of Practice and Procedure was filed on June 12, 2012:

http://mdcourts.gov/rules/rodocs/ro173supplement.pdf