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COURT OF APPEALS

State of Maryland v. Hector Leonel Gutierrez & Edgar Perez-Lazaro, No. 86, September Term 2014, filed January 28, 2016. Opinion by Battaglia, J.

Greene, Adkins and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/86a14.pdf

CRIMINAL LAW – POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE WITH AN INTENT TO DISTRIBUTE – POSSESSION OF A FIREARM WITH A NEXUS TO A DRUG TRAFFICKING CRIME – SUFFICIENCY OF THE EVIDENCE

Facts:

The police executed a search warrant on a one bedroom apartment in Hyattsville. When the police entered the apartment, they encountered Hector Gutierrez and Edgar Perez-Lazaro. Both Gutierrez and Perez-Lazaro stated that they slept in the apartment. During the search cocaine was found in a bathroom cabinet and a hallway closet. Additional cocaine and a loaded handgun were also recovered from a cabinet under the kitchen sink. Baggies and a "grinder," items commonly used in the packaging and distribution of cocaine, were also found in plain view in the living room and the kitchen.

Gutierrez's passport was found in the hallway closet near the cocaine. A pay-stub with Perez-Lazaro's name was found in the back bedroom.

Both Gutierrez and Perez-Lazaro were indicted and convicted for possession not only of a controlled dangerous substance, but also with intent to distribute a controlled dangerous substance, as well as possession of a firearm with a nexus to drug trafficking in addition to obliteration of the identification number of a firearm.

The Court of Special Appeals reversed and concluded that the State not only failed to prove that Gutierrez or Perez-Lazaro had possession of the cocaine and handgun, because they were not found in "close proximity" to the contraband, but did not prove "ownership of the apartment" and that the contraband was not out in the open.

Held: Reversed.

The Court applied a four factor test to determine that the evidence was sufficient to find that Gutierrez and Perez-Lazaro had constructive possession of the cocaine and handgun: [1] the defendant's proximity to the drugs, [2] whether the drugs were in plain view of and/or accessible to the defendant, [3] whether there was indicia of mutual use and enjoyment of the drugs, and [4] whether the defendant has an ownership or possessory interest in the location where the police discovered the drugs. *Smith v. State*, 415 Md. 174, 198, 999 A.2d 986, 999-1000 (2010).

The Court determined that both Gutierrez and Perez-Lazaro had a possessory interest in the apartment since they both stated they slept there and their personal papers were found in the apartment. Additionally, the drugs and handgun were found in common areas of the apartment allowing an inference that Gutierrez and Perez-Lazaro frequented those areas. The Court also stated that Gutierrez and Perez-Lazaro were in close proximity to the drugs given the small size of the apartment and the location of the drugs in the bathroom, hallway and kitchen. The Court additionally concluded that mutual use and enjoyment of the drugs could be found from the evidence indicating participation in drug distribution.

Sam Yonga v. State of Maryland, No. 30, September Term 2015, filed January 27, 2016. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2016/30a15.pdf

CRIMINAL PROCEDURE – NEWLY DISCOVERED EVIDENCE – WRIT OF ACTUAL INNOCENCE – MD. CODE ANN., CRIM. PROC. § 8-301 (2008 Repl.Vol., 2013 Supp.)

Facts:

Sam Yonga, a 25 year-old immigrant from Sierra Leone, was arrested and charged with second degree rape and a third degree sexual offense resulting from an encounter he had with T.R., a 13 year-old girl he met on a phone chat line. Yonga pled guilty to the third degree sexual offense during a colloquy before a judge for the Circuit Court for Baltimore County. During the colloquy, the judge assured that Yonga's plea was given freely, voluntarily and knowingly and that the sentence to be imposed was the result of a negotiated plea. Pursuant to the plea agreement, Yonga was sentenced to 364 days in the Baltimore County Detention Center, with all but six months suspended and was required to register as a sex offender.

Six years later, after allegedly reconnecting with T.R. through social media, Yonga petitioned for a Writ of Actual Innocence, under Section 8-301 of the Criminal Procedure Article of the Maryland Code, in which he alleged newly discovered evidence based on T.R. "recanting" her original statements given to police. Yonga's petition was denied on the merits after a hearing in the Circuit Court for Baltimore County. Yonga appealed the denial, arguing that the Circuit Court, in finding Yonga did not sufficiently establish newly discovered evidence as required under Section 8-301, erred. The State countered that the Writ of Actual Innocence was not applicable to a person who had pled guilty and, in the alternative, that the Circuit Court's denial on the merits was correct. The Court of Special Appeals affirmed, determining that, in the first instance, the Writ of Actual Innocence was not applicable to a guilty plea. Yonga petitioned for *certiorari*, which was granted by the Court of Appeals.

Held: Affirmed.

The Court concluded that the applicable standard for evaluating newly discovered evidence under Section 8-301(a)(1) of the Criminal Procedure Article, whether the newly discovered evidence "creates a substantial or significant possibility that the result may have been different", was similar to the standard applied to newly discovered evidence under a Rule 4-331(c)(1) motion for a new trial. Support for the Court's determination appeared in the legislative history of Section 8-301, which involved Senate Bill 486 ("S.B. 486"). The Floor Report for S.B. 486 referenced the judicially determined standard under Maryland Rule 4-331(c)(1), as did testimony from the State Office of the Public Defender referencing a number of appellate court decisions

utilizing the standard during evaluation of newly discovered evidence raised by a defendant following conviction in a jury or bench trial. In order to ascertain whether the new evidence creates a "substantial or significant possibility" of a different result, had the evidence been discovered at the time of the trial, the judge must weigh the significance of the newly discovered evidence "in relation to the evidence already presented at trial." *Campbell v. State*, 373 Md. 637, 670, 821 A.2d 1, 20 (2003).

Turning to the history and application of Rule 4-331(c)(1), the basis upon which the standard for newly discovered evidence under Section 8-301 was established, the Court reiterated the need for a trial so that the newly discovered evidence could be evaluated against what had been presented earlier. Yonga cited no cases, nor did the Court locate any, where a defendant had brought a motion for a new trial under Rule 4-331(c)(1) after having been convicted as a result of a guilty plea. The Court distinguished its remand in *State v. Matthews*, 415 Md. 286, 298, 999 A.2d 1050, from the instant case.

The Court examined the inherent differences between a trial and a guilty plea. While a trial contains witness testimony and determinations of credibility and admissibility of evidence, none of these facets are at issue when a defendant pleads guilty. When a defendant pleads guilty, the court's concern is that the plea is given "voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." *Bradshaw v. Stumpf*, 545 U.S. 175, 183, 125 S. Ct. 2398, 2405, 162 L. Ed. 2d 143, 153 (2005) (internal quotation omitted). A trial judge, in accepting a guilty plea, is primarily concerned with insuring its validity, not with the weight of the evidence. Thus, a guilty plea does not possess the requisite elements against which newly discovered evidence can be measured under the standard for Section 8-301(a)(1).

Montgomery County, Maryland v. Ajay Bhatt, No. 36, September Term 2015 filed January 22, 2016. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2016/36a15.pdf

RAILROADS – ADVERSE POSSESSION OF RIGHT-OF-WAY

RAILROADS – ABANDONMENT OF RIGHT-OF-WAY

Facts:

Respondent Ajay Bhatt owns a subdivided, single-family residential lot improved by a dwelling in Chevy Chase, Montgomery County, Maryland. The lot abuts the Georgetown Branch of the Baltimore & Ohio Railroad/Capital Crescent Trail. In 1890, the right-of-way that was the rail line (and is today a hiker/biker trail) was conveyed in a fee-simple deed from George Dunlop, grantor, to the Metropolitan Southern Railroad Company ("the Railroad"), grantee. The Deed conveyed a fee simple right-of-way 45 feet on either side of the center line of the tracks throughout the rail line. A freight-hauling operation was maintained on the rail line right-of-way until 1985. The right-of-way was obtained by the County via quitclaim deed in 1988 from the Railroad, for consideration of $10 million, pursuant to the federal Rails-to-Trails Act. Under a "Certificate of Interim Trail Use" pursuant to 49 CFR 1152.29, the County is allowed to preserve the land as a hiker/biker trail until the County chooses whether and when to restore a form of rail service within the right-of-way. The County's announced intent is to establish in the right-of-way commuter rail service (the so-called "Purple Line").

On 18 October 2013, Montgomery County issued to Bhatt a civil citation asserting a violation of § 49-10(b) of the Montgomery County Code, which prevents a property owner from erecting or placing "any structure, fence, post, rock, or other object in [a public] right-of-way." The factual predicate of the claimed violation was the placement and maintenance by Bhatt's predecessors-in-interest of a fence and shed within the former rail line (and current hiker/biker trail) right-of-way, without a permit.

On 21 January 2014 in the District Court of Maryland, sitting in Montgomery Count, the court found Bhatt guilty of a violation of § 49-10(b) and ordered him to remove the fence and shed encroaching upon the County's right-of-way. Bhatt appealed to the Circuit Court for Montgomery County. The parties stipulated that the fence and shed were beyond Bhatt's actual property line. Bhatt argued that he had gained title to the land on which the fence encroached through adverse possession. Bhatt argued that, because the fence had been located beyond his property line since at least 1963, the Railroad was obliged to take action to remove it prior to the maturation of the twenty year period for adverse possession. On 31 December 2014, the Circuit Court vacated the District Court's judgment and dismissed the violation citation issued by the County. The Circuit Court concluded that the County did not have a "right of way" easement over the former rail line, but rather had been conveyed a fee simple interest in 1988 and thus,

Bhatt could not be considered in violation of § 49-10(b), i.e., a right-of-way exists only as an easement and, thus, § 49-10(b) did not apply to a fee-simple interest. The Circuit Court concluded ultimately that Bhatt had a creditable claim for adverse possession.

On 17 June 2015, the Court of Appeals granted the County's Petition for a Writ of Certiorari, *Montgomery County v. Ajay Bhatt*, 443 Md. 234, 116 A.3d 474 (2015), to consider the following questions:

> 1) Did the lower court err in holding that the 1890 deed from George Dunlop to the Metropolitan Southern Railroad Company did not convey a right-of-way?
>
> 2) Did the County prove that the Respondent's fence and shed encroached upon the right-of-way that was originally purchased by the Metropolitan Southern Railroad Company and later conveyed to the county for the Georgetown Branch/Capital Crescent Trail?
>
> 3) Is a railroad right-of-way susceptible to a private claim for adverse possession via an adjacent landowner's encroachment when the right-of-way was actively used for a railway line and when there was no evidence of abandonment by the railroad?
>
> 4) Did the lower court err in holding that the Respondent acquired title to a former railroad right-of-way by adverse possession?

Held: Reversed.

The Court of Appeals determined that a private landowner adjacent to the rail line may not acquire by adverse possession a portion of the right-of-way through erection of a fence and installation of a shed that encroached for more than twenty years upon the railroad right-of-way because the right-of-way was not abandoned and had been maintained continuously for the public use.

The Maryland courts "have long considered a railroad line as analogous to a public highway," *see Chevy Chase Land Co. v. United States*, 355 Md. 110, 147, 733 A.2d 1055, 1075 (1999), and the Court found no compelling reason in the present case to reject that analogy. Because even a private owner of a railroad is a quasi-public corporation under established Maryland law, it follows, the Court held, that its real property is not subject to a claim of adverse possession under all but the most narrow circumstances. The Court of Appeals explained that because "time does not run against the state, or the public," public highways are not subject to a claim for adverse possession, except in the limited circumstances of a clear abandonment by the State. *See Ulman v. Charles St. Avenue Co.*, 83 Md. 130, 34 A. 366 (1896). By parity of reasoning applied to the present case, railway lines would also not be subject to a claim for adverse possession, without evidence of clear abandonment or a clear shift away from public use. The Court regarded as not material to the circumstances of the case whether the Railroad's or the County's interest in the right-of-way was held as easement or in fee simple.

There was no evidence adduced by Bhatt supporting a conclusion that the right-of-way was abandoned and was not being used by the public, even during the period from 1985 when the freight service ended and 1988 when the property was conveyed to the County and became a hiker/biker trail as an interim public use. The right-of-way granted to the Railroad (and Montgomery County subsequently) by the 1890 Dunlop Deed was a general conveyance that placed no restriction on its use. Thus, the transition from railway to interim hiker/biker trail under the federal Rails-to-Trails Act is a reasonable public use of the right-of-way and this transition from rail travel to a footpath did not constitute abandonment.

Because no evidence was presented by Bhatt to show that the current use of the right-of-way by Montgomery County is unreasonable or that the Railroad or the County abandoned the right-of-way, no claim for adverse possession was possible. The Court of Appeals held ultimately that Bhatt's encroachment upon the right-of-way was in violation of Montgomery County Code § 49-10(b).

Emerald Hills Homeowners' Association, Inc. v. William E. Peters, et ux., No. 32, September Term 2015, filed January 27, 2016. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2016/32a15.pdf

REAL PROPERTY – CREATION OF EASEMENT – SUBDIVISION PLAT AS EXPRESS EASEMENT

Facts:

In 1969, a corporation controlled by Victor Posner acquired a 64-acre parcel of land located near Bel Air, Maryland from William and Margaret Sheppard. This property was next to "Greenridge," a residential community developed by Posner. In the deed of conveyance, the Sheppards retained title to a parcel of a little less than an acre, which the Court of Special Appeals and the parties refer to as "Parcel 765." Parcel 765 does not front on a public road, so the Sheppards reserved a non-exclusive right of way over a 50-foot wide and 100-foot long strip of land (the "Right of Way Parcel"). The Right of Way Parcel provides access to Southview Road, a public street in the Greenridge subdivision.

In 2000, Posner obtained approval from Harford County to develop what is now called "Emerald Hills," a residential community adjacent to the Greenridge subdivision. Posner developed Emerald Hills in five phases and recorded a subdivision plat, which he signed, in the land records for each phase. As part of the development process, Posner constructed Streamview Court, a 50-foot wide public street partially aligned with Southview Road in the adjacent Greenridge subdivision. Streamview Court ends in a cul-de-sac so its terminus does not line up precisely with the Right of Way Parcel or Parcel 765. The cul-de-sac, however, shares points of intersection with each parcel. This area between the two parcels and the cul-de-sac is the "Triangular Parcel." Parcel 765, the Right of Way Parcel, and the Triangular Parcel are depicted on one of the five Emerald Hills subdivision plats (the "Emerald Hills Subdivision Plat," "Subdivision Plat," or the "Plat").

There are three relevant markings on the Plat: grey shading, forward slashes, and reversed slashes. The Right of Way Parcel and the Triangular Parcel are shaded in a grey tone. A note on the Plat indicates that this shading "denotes pedestrian and emergency vehicle right-of-way & drainage and utility easement." The Triangular Parcel is also marked with forward slashes, "////." A note states that these slash marks "denote[] ingress & egress easement for access to Parcel 765." Finally, the Right of Way Parcel is marked with reversed slashes, "\\\\." The third note on the Plat states that the reversed slash marks "denote[] existing ingress and egress easement for Parcel 765 as per [the Sheppard Deed]."

The Plat also designates the Right of Way Parcel and Triangular Parcel as "Passive Open Space" areas. The Plat was recorded in the land records of Harford County in 2000. In 2001, Posner, individually and on behalf of Posner, LLC, executed and recorded a Cross Easement Agreement

("Agreement"). The Agreement recited that Posner was the owner and developer of the Emerald Hills Subdivision and that Posner, LLC was the owner and developer of the Greenridge Subdivision. As a condition of preliminary plan approval for the Emerald Hills Subdivision, the Harford County Department of Planning and Zoning required that Posner and Posner, LLC create reciprocal easements to permit lot owners in both subdivisions to enjoy a common right to use and access the open space areas, including the "Passive Open Space" areas depicted on the Plat. The Cross Easement Agreement grants the owners of the lots in each subdivision reciprocal, but non-exclusive, rights of access and use of the recreational areas and passive open space areas designated on the Plat, as well as on the plats for other phases of the Greenridge and Emerald Hill Subdivisions.

In 2006, title to the passive open spaces, including the Triangular Parcel and the Right of Way Parcel, in the Emerald Hills subdivision, was conveyed to the Emerald Hills Homeowners' Association ("the Association"). The deed conveying the property to the Association did not contain a metes and bounds or other description of the land conveyed. Instead, the deed referred to the Plat and the other Emerald Hills subdivision plats. Specifically, the deed stated that it passed title to "[a]ll that property referred to as 'Passive Open Space' . . . as shown on [the various Emerald Hills subdivision plats] and recorded among the Land Records of Harford County."

In 2009, Mr. and Mrs. Peters purchased Parcel 765 from William Sheppard's estate "together with the rights, privileges, appurtenances and advantages thereto belonging or appertaining unto and to the proper use and benefit of [Mr. and Mrs. Peters]." Mr. and Mrs. Peters then applied for an access permit from Harford County for the installation of a paved driveway on the Triangular Parcel. The County approved the application and Mr. and Mrs. Peters began construction of a driveway on the Triangular Parcel that would enable them to access Streamview Court.

The Association filed suit seeking injunctive relief, compensatory damages, and a declaratory judgment that the Triangular Parcel was not subject to an easement for the benefit of Parcel 765. Mr. and Mrs. Peters filed an answer and a motion to dismiss or, in the alternative, for summary judgment. The Association then filed a cross-motion for summary judgment as to its claim for a declaratory judgment. The Circuit Court granted the Association's motion for summary judgment and declared that the Triangular Parcel was not subject to an easement for the benefit of Parcel 765.

The Court of Special Appeals reversed. The intermediate appellate court ruled that the Plat established an express easement over the Triangular Parcel in favor of Parcel 765 and that the Cross Easement Agreement had no effect on this easement. The Association appealed.

Held: Affirmed.

The Court first addressed petitioner's contention that the subdivision plat did not establish an express easement. The Court observed that express easements generally may be created only in

the mode and manner prescribed by the recording statutes. The Court, however, noted that this was only a general rule and cited two cases holding that a deed is not required to create an easement. The Court highlighted the tribunal's ruling in these two cases that a right of way, otherwise sufficiently described, could be created by a memorandum that complied with the Statute of Frauds. Guided by this long-standing precedent, the Court then analyzed whether the Plat complied with Maryland's Statute of Frauds and whether it sufficiently described the right of way.

The Court examined the Plat and concluded that it satisfied the Statute of Frauds because Victor Posner's name and signature appear twice on the Emerald Hills Subdivision Plat. Turning to the sufficient description requirement, the Court pointed to the Plat's clear identification of the dominant and servient parcels. The Court juxtaposed the Emerald Hills Subdivision Plat with the plat underlying a case in which the high court concluded that the document did not sufficiently describe the right of way because the dominant estate was not identifiable. The Court also pointed to a legend on the Emerald Hills Subdivision Plat authorizing "ingress & egress easement for access to Parcel 765" as support for the proposition that the Plat sufficiently described the right of way. The Court asserted that the legend's description of the easement as an access easement constitutes a sufficient description of the nature of the right of way. Because a deed is not required to create an easement and the Plat satisfied Maryland's Statute of Frauds as well as sufficiently described the easement, the Court affirmed the Court of Special Appeals' holding that the Plat established an express easement over the Triangular Parcel for the benefit of Parcel 765.

Next, the Court addressed the petitioner's claim that the Cross-Easement Agreement extinguished the easement over Parcel 765. The Court recognized that the owner of a servient estate cannot unilaterally extinguish an express easement and that it was undisputed that neither Mr. and Mrs. Peters nor their predecessors in interest of the dominant estate were signatories to the Cross Easement Agreement. Because Mr. and Mrs. Peters were not parties to the Cross-Easement Agreement, the Court stated that nothing contained therein could interfere with their express easement. Consequently, the Court held that the Cross-Easement Agreement did not extinguish the easement over Parcel 765.

Timothy Everett Beall v. Connie Holloway-Johnson, No. 17, September Term, 2015, filed January 21, 2015. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2016/17a15.pdf

MUNICIPAL CORPORATIONS – LIABILITY OF OFFICERS OR AGENTS

MUNICIPAL CORPORATIONS – DAMAGES

TORTS – PUNITIVE DAMAGES

Facts:

This case arose out of a fatal motor vehicle collision between a Baltimore City police cruiser operated by Petitioner, Officer Timothy Everett Beall, and a motorcycle operated by Haines E. Holloway-Lilliston. Respondent Connie Holloway-Johnson, on her own behalf and as the personal representative of the estate of her deceased son, initiated a wrongful death suit against Officer Beall in the Circuit Court for Baltimore City, alleging negligence, gross negligence, battery, and a violation of Article 24 of the Maryland Declaration of Rights. Compensatory and punitive damages were sought.

The collision occurred on 25 July 2010 in Baltimore County, Maryland. At the beginning, Officer Beall was on duty in a marked police car in Baltimore City and overheard a call on his radio about a car and a motorcycle "racing each other" up I-83 North in Baltimore City. After receiving a second transmission stating that the car had been stopped by other officers, Officer Beall merged onto I-83 North and noticed a motorcycle that was traveling at the time about 35 m.p.h. in a 50 m.p.h. zone. Officer Beall was following the motorcycle in an attempt to ascertain license plate information, when the motorcyclist "popped a wheelie" and sped away. In response, Officer Beall turned on his siren and lights to pursue the motorcycle, in violation of the Baltimore City Police Department's General Order regarding high-speed pursuits without justifiable exigent circumstances.

The pursuit continued, at speeds of 75 m.p.h., onto I-695 East into Baltimore County in the direction of Towson, after which the motorcyclist reduced his speed to the posted speed limit of 50 m.p.h. Officer Beall continued to follow the motorcycle, but acknowledged that his Shift Commander advised to disengage from the pursuit. Officer Beall turned off his siren and lights and called the State Police to inform them of his location. To return to Baltimore City, Officer Beall followed the motorcycle onto the exit ramp for Dulaney Valley Road where the police cruiser made contact with the motorcycle. The motorcyclist, later identified as Holloway-Lilliston, was ejected from the bike. His body made contact with the hood of Officer Beall's car and he died upon hitting the pavement. The accident reconstruction expert concluded that the collision occurred because Officer Beall failed to maintain a safe and proper following distance from the motorcycle. The case was tried to a jury between 24 July 2012 and 3 August 2012.

At the close of Ms. Holloway-Johnson's case-in-chief, Officer Beall made a motion for judgment on the basis that insufficient evidence was presented as to each of the claims. The presiding judge, Judge Marcus Shar granted the motion in part as to the battery, gross negligence, and Article 24 claims, as well as the prayer for punitive damages. The only claims that were allowed to go to the jury were the negligence claim and the prayer for compensatory damages. On 3 August 2012, the jury returned a verdict in favor of Ms. Holloway-Johnson and the estate of her son for $3,505,000, which was reduced on Officer Beall's motion to $200,000 to conform to the damages "cap" in the Local Government Tort Claims Act ("LGTCA").

Respondent appealed to the Court of Special Appeals, which reversed the judgment in a reported opinion and remanded the case for a new trial. *Holloway-Johnson v. Beall*, 220 Md. App. 195, 103 A.3d 720 (2014). The Court of Special Appeals held that there was sufficient evidence for each of Ms. Holloway-Johnson's claims to have been submitted to the jury and determined that the battery and Article 24 counts could qualify as "predicates for punitive damages" under a theory of "malice implicit" in the elements of those two causes of action. The intermediate appellate court upheld the application of the LGTCA's cap on damages. On 27 March 2015, we granted Officer Beall's Petition for a Writ of Certiorari, and Ms. Holloway-Johnson's Cross-Petition to consider the following questions, as re-framed by us:

> 1) Did the Court of Special Appeals modify improperly established standards to conclude that there was sufficient evidence to support the counts for gross negligence, battery, and a violation of Article 24?
>
> 2) Did the Court of Special Appeals err when it held that Respondent's counts could support an award of punitive damages, contrary to the long-established law that actual, not implied, malice was necessary and remanding the case for further proceedings which might result also in the award of duplicative compensatory damages?
>
> 3) Did Officer Beall waive the damages cap and judgment avoidance afforded by the Local Government Tort Claims Act, having failed to raise the defense until after trial and entry of judgment?

Held: Affirmed in part, reversed in part.

Viewing the evidence in the light most favorable to the non-moving party, the Court of Appeals held that Ms. Holloway-Johnson presented sufficient evidence to have her gross negligence, battery, and Article 24 claims considered by a jury, but determined that reversal and remand for a new trial to consider those claims, and possibly punitive damages, was unwarranted in the context of this case.

Relying on precedent that only minimal evidence was required from which a reasonable jury could find for a plaintiff, the Court concluded that the Circuit Court should have denied Officer Beall's motion for judgment on the issue of sufficiency of the evidence. Ms. Holloway-Johnson was able to adduce admissible facts as to the elements of each of her substantive claims. The evidence showed that Officer Beall commenced trailing the motorcycle surreptitiously, his

conduct was in violation of BCPD General Order 11-90, and his pursuit was in contravention of a directive from his Shift Commander to discontinue the pursuit.

This decision did not warrant, however, a new trial because Maryland law provides that a plaintiff is only entitled to one recovery for an injury, even if multiple claims are pled. The injuries must have arisen from separate, unique transactions; otherwise, the multiple "claims" are essentially different legal theories premised on a single set of facts. Here, Ms. Holloway-Johnson's multiple claims all arise from the same set of facts and, therefore, she would have been entitled to but one compensatory recovery, which she received in the jury's award of compensatory damages on the negligence count.

The Court of Appeals turned its discussion to the issue of punitive damages. The Court agreed with the Court of Special Appeals that negligence and gross negligence claims would not support submission of a prayer for punitive damages to the jury. The Court, however, disagreed with the decision of the Court of Special Appeals concluding that "malice implicit" in the foundational elements of the battery and Article 24 violation would be sufficient to allow a jury to consider an award of punitive damages, in the absence of additional proof of actual malice to a clear and convincing standard. It is possible for a plaintiff to establish the elements of a civil battery or Article 24 violation to a preponderance of the evidence standard without proving actual malice. Thus, the Court of Appeals determined that a standard of "malice implicit" would expose inappropriately defendants to punitive damages without requiring a plaintiff to prove actual malice by clear and convincing evidence. Here, no evidence was produced by Ms. Holloway-Johnson to establish directly or by reasonable inference that Officer Beall was acting with malicious intent during the pursuit or that he intended to harm Holloway-Lilliston on the exit ramp. Without evidence from which a reasonable jury could find or infer actual malice, even had the battery and Article 24 claims survived the close of Plaintiffs' case-in-chief, Ms. Holloway-Johnson would not be entitled to have punitive damages submitted to the jury and, therefore, a remand was unwarranted.

On the issue of the applicability of the LGTCA damages "cap," the Court of Appeals affirmed the Court of Special Appeals. The LGTCA provides Baltimore City police officers an "indirect statutory qualified immunity" when they are acting within the scope of their employment and not proven to have acted with actual malice. The Court of Appeals agreed with the analysis that the LGTCA protection could not be waived by Officer Beall because it was not his to waive. Because the evidence was not sufficient to prove that Officer Beall acted with actual malice (and he was operating within the scope of his employment), the LGTCA cap of $200,000 applied.

Gail B. Litz v. Maryland Department of the Environment, et al., No. 23, September Term, 2015, filed January 22, 2016. Opinion by Harrell, J.

Battaglia, McDonald and Watts, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2016/23a15.pdf

EMINENT DOMAIN – INVERSE CONDEMNATION

EMINENT DOMAIN – INVERSE CONDEMNATION – MARYLAND AND LOCAL GOVERNMENT TORT CLAIMS ACTS

TORTS – TRESPASS – LOCAL GOVERNMENT TORT CLAIMS ACT

Facts:

In this litigation, Ms. Litz makes a second appearance before the Court of Appeals regarding a parcel of real property (containing a lake known as Lake Bonnie) in the Town of Goldsboro in Caroline County, Maryland, that was contaminated allegedly by run-off from failed septic systems serving homes and businesses in the Town of Goldsboro. The Litz family operated a recreational campground business on the property, which had campsites, swimming, fishing, and boating, centered on the lake. Lake Bonnie receives its water from two local streams. The septic systems within the Town began to fail. The septic fields overflowed into the open drainage system, and contaminated the two streams, which led to the contamination of Lake Bonnie. By 1988, the Caroline County Health Department reported to the Maryland Department of the Environment ("MDE") that the shallow wells tested in Goldsboro contained pathogens found in human bodily waste. On 18 September 1995, the Caroline County Health Department concluded that the conditions in Goldsboro had gotten to "crisis proportions."

On 8 August 1996, MDE and Goldsboro's mayor entered into an administrative consent order which required Goldsboro to implement changes to the sewage system to reduce pollution. The Town did not comply allegedly with the provisions of the consent order. Because Lake Bonnie was being polluted continually by the pollutants in the water flowing through the drainage system into the two streams and then into Lake Bonnie, Ms. Litz alleged that her property had been devalued substantially, which resulted in a financial loss for her and the eventual foreclosure action by her lender on 14 May 2010.

Ms. Litz's original complaint, filed on 8 March 2010 in the Circuit Court for Caroline County, sought a permanent injunction and alleged counts of negligence, trespass, private and public nuisance, and inverse condemnation against the Town of Goldsboro and the Caroline County Health Department, acting as a state agency, and negligence and inverse condemnation against MDE. Ms. Litz's second amended complaint added the State Department of Health and Mental Hygiene ("DHMH") and the State of Maryland as defendants, seeking a permanent injunction

and alleging negligence, trespass, private and public nuisance, and inverse condemnation against the newly added defendants.

After a hearing and an additional amendment to her complaint, the Circuit Court dismissed all of Ms. Litz's claims on the basis of sovereign immunity and the failure to abide by the notice provisions of the Maryland Tort Claims Act ("MTCA") and the Local Government Tort Claims Act ("LGTCA"). Ms. Litz appealed to the Court of Special Appeals the dismissal of her inverse condemnation claim against all defendants and her tort claims against the Town. The intermediate appellate court affirmed, in an unreported opinion, the Circuit Court's dismissal based on its narrow conclusion that Ms. Litz's claims were barred by the relevant statutes of limitation. The Court of Appeals granted Ms. Litz's first Petition for Certiorari, *Litz v. Maryland Dep't of Env't*, 429 Md. 81, 54 A.3d 759 (2012) and remanded the case to the Court of Special Appeals after concluding that it was error to affirm the grant of a motion to dismiss on the basis of statute of limitations. *Litz v. Maryland Dep't of Env't*, 434 Md. 623, 642, 76 A.3d 1076, 1087 (2013). The dismissal of Ms. Litz's nuisance counts was affirmed.

On remand, the Court of Special Appeals reviewed the legal sufficiency of Ms. Litz's remaining tort and inverse condemnation claims, the applicability and satisfaction of the notice requirements under the tort claim acts, and the defense of governmental immunity. In an unreported opinion, the Court of Special Appeals held "that the circuit court properly dismissed the State and its agencies from the case," but that it was "error to dismiss the negligence, trespass and inverse condemnation claims against the Town." At the conclusion of the intermediate appellate court's second review, Ms. Litz's remaining causes of actions included only those three claims against the Town.

The Court of Appeals granted Ms. Litz's second Petition for a Writ of Certiorari to consider the following questions:

> 1) Whether the Court of Special Appeals erred when it held that Petitioner failed to state a cause of action for inverse condemnation against the State government Respondents?
>
> 2) Whether an inverse condemnation claim comes within the notice requirements of the Maryland Tort Claims Act and the Local Government Tort Claims Act?
>
> 3) Whether the Court of Special Appeals exceeded the scope of this Court's remand order when it considered an issue disavowed expressly by Respondents, to wit, Petitioner's claim for inverse condemnation against the State government Respondents was subject to the Maryland Tort Claims Act?
>
> 4) Whether a trespass claim is covered by the notice requirement of the Local Government Tort Claims Act?

Held: Affirmed in part and reversed in part.

The Court of Appeals held that Ms. Litz stated adequately in her Third Amended Complaint a facial claim for inverse condemnation against Respondents. Moreover, a claim for inverse

condemnation is not covered by the notice provisions of either tort claims act. The Court affirmed the intermediate appellate court's holding that the tort of trespass is covered by the notice requirement of the LGTCA.

An inverse condemnation claim is a taking of property without formal condemnation proceedings being instituted. A plaintiff must allege facts showing ordinarily that the government action constituted a taking. Because Ms. Litz's claim of a "taking" focused predominantly on the inaction of Respondents, rather than any affirmative action, and because there was no controlling Maryland law as to a distinction between action and inaction in pleading inverse condemnation, the Court of Appeals looked to other states for guidance. The Court of Appeals held it was appropriate (and, in this case, fair and equitable, at least at the pleading stage of litigation) to recognize an inverse condemnation claim based on alleged "inaction" when one or more of the defendants may have an affirmative duty to act under the circumstances.

Cases from Florida, Minnesota and California provided support for the conclusion that when governmental actors had knowledge of a risk and an affirmative duty to act, but failed to do so, inaction may support an inverse condemnation claim. Ms. Litz's Third Amended Complaint alleged that the Town and the State were aware of the failure of the community sewage systems, the contamination of the surface and groundwater, and the conveyance of the sewage to Lake Bonnie via the community drainage system. Although questions of which Respondents had statutory or legal duties with regard to abatement of the contamination are open in the proceeding as far as it has advanced, the Court of Appeals concluded that it was not frivolous to hypothesize that state, county, and municipal agencies may have duties to step in to protect the public health, as illustrated by the execution of the 1996 Consent Order.

Without discovery regarding the origins of and seeming failure to enforce the Consent Order and its terms, the Court of Appeals concluded that it was premature to resolve Ms. Litz's claim for inverse condemnation by the grant of the motions to dismiss. The Court cautioned that because of the current stage of these proceedings and given the Court's "novel" holding regarding governmental inaction as a basis for an inverse condemnation claim, the parties have not briefed or argued the applicable law under these circumstances.

With regard to the applicability of the respective tort claims acts notice requirements, because a claim for inverse condemnation is not a tort in a traditional sense, it is only logical that courts would treat eminent domain and inverse condemnation claims differently from common law or statutory torts because the remedy afforded to the respective plaintiff is different. Because the remedy afforded to a plaintiff in the case of a taking is fair market value, the damages "cap" associated with the LGTCA and the MTCA should not apply. By parity of reasoning, the Court of Appeals held the notice requirements of each tort claims act would not apply either.

On the trespass claim, the Court of Appeals affirmed the intermediate appellate court's conclusion that the claim was subject to the LGTCA and its notice requirements. To determine that a claim for trespass was covered by the LGTCA, the Court of Special Appeals relied on a case interpreting the MTCA (*see Lee v. Cline*, 384 Md. 245, 863 A.2d 297 (2004)). The Court of Appeals concluded that there was not a vast chasm between the language of the two statutory tort

claim schemes as to the tortious conduct covered. The LGTCA was enacted for a purpose similar to the MTCA and "applies to all torts without distinction, including intentional and constitutional torts." *Thomas v. City of Annapolis*, 113 Md. App. 440, 457, 688 A.2d 448, 456 (1997). Because the language of the LGTCA makes no different distinctions than the MTCA, the Court of Appeals concluded that Ms. Litz's trespass claim against the Town of Goldsboro would be subject to the LGTCA and its notice requirement.

Thus, the Court of Appeals held that Ms. Litz was entitled to continue to litigate her tort claims (negligence and trespass) against the Town, but must show compliance with the notice requirements of the LGTCA. Her inverse condemnation claims against the State Respondents and the Town may proceed, without regard to the notice provisions of the MTCA or the LGTCA. The Court did caution that this decision should not be seen by any party as either an unqualified victory or calamity because discovery may yet blur or clarify Ms. Litz's ability to meet the requirements entitling her to maintain further her complaint or to relief against any of the defendants.

Motor Vehicle Administration v. Jeffrey Thomas Gonce, No. 38, September Term 2015, filed January 22, 2016. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2016/38a15.pdf

MD. CODE ANN., TRANSP. (1977, 2012 REPL. VOL., 2015 SUPP.) § 16-205.1 –IMPLIED CONSENT, ADMINISTRATIVE PER SE LAW – AUTOMATIC DRIVER'S LICENSE SUSPENSION FOR REFUSAL TO TAKE TEST

Facts:

A Maryland State Police trooper issued to Jeffrey Thomas Gonce ("Gonce"), Respondent, an "Officer's Certification and Order of Suspension" that contained the following facts. Gonce was driving west on U.S. Route 50. The trooper stopped Gonce for failure to securely fasten a registration plate. Upon seeing Gonce, the trooper observed what he believed to be indications of impairment, and, thus, administered the three-part Standardized Field Sobriety Test. The "horizontal gaze nystagmus" test indicated zero out of a possible six clues of impairment. The "walk and turn" test indicated seven out of a possible eight clues of impairment. The "one-leg stand" test indicated three out of a possible four clues of impairment. The trooper asked to perform a preliminary breath test, to which Gonce consented. The preliminary breath test indicated a breath alcohol concentration of 0.003 grams of alcohol per 210 liters of breath. The trooper arrested Gonce and provided him with an Advice of Rights form. Gonce agreed to take an alcohol concentration test.

Gonce took a breath alcohol concentration test, which indicated a breath alcohol concentration of 0.000 grams of alcohol per 210 liters of breath. In other words, Gonce passed the alcohol concentration test. The trooper referred Gonce to a drug recognition expert. The drug recognition expert evaluated Gonce, stated that there were "reasonable grounds" to believe that Gonce had been driving under the influence of drugs, and asked Gonce to take a blood test for drugs or controlled dangerous substances. Gonce refused to take the drug test. Gonce's driver's license was confiscated and he was served an order of suspension and issued a temporary driver's license.

Gonce requested an administrative hearing to show cause why the Motor Vehicle Administration ("the MVA"), Petitioner, should not suspend his driver's license. An administrative law judge ("the ALJ") of the Office of Administrative Hearings conducted an administrative hearing, at which Gonce asserted that, under Md. Code Ann., Transp. (1977, 2012 Repl. Vol., 2015 Supp.) ("TR") § 16-205.1, he was not subject to an automatic license suspension for his refusal to take a drug test because he had taken and passed the alcohol concentration test. More broadly, Gonce argued that, under TR § 16-205.1, a driver is subject to an automatic license suspension for a refusal to take either an alcohol concentration test or a drug test, but not for a refusal to take a second test after the driver took one test. The ALJ rejected Gonce's contention; concluded that

Gonce violated TR § 16-205.1 by refusing to take the drug test; and ordered that Gonce's driver's license be suspended for one hundred and twenty days.

Gonce petitioned for judicial review. The Circuit Court for Baltimore County reversed the ALJ's decision. The MVA filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Reversed and remanded.

The Court of Appeals held that, based on TR § 16-205.1's plain language, a law enforcement officer with reasonable grounds to suspect impairment may request that a driver take both an alcohol test and a drug test, and a driver is subject to automatic license suspension for failure to take the second test. As used in TR § 16-205.1(b)(2) and (3), the word "test" includes the plural of the word—i.e., "tests"—and means both an alcohol concentration test and a drug test. TR § 16-205.1(a)(1)(iii)(3) specifically defines the word "test" as "[b]oth: A. A test of a person's breath or a test of [one] specimen of a person's blood, to determine alcohol concentration; and B. A test or tests of [one] specimen of a person's blood to determine the drug or controlled dangerous substance content of the person's blood." TR § 16-205.1(a)(1)(iii)(3) unambiguously establishes that, as used in TR § 16-205.1(b)(2) and (3), the word "test" does not mean only one test.

The Court's conclusion was based not only on TR § 16-205.1(a)(1)(iii)(3)'s plain language, but also on Md. Code Ann., Gen. Prov. (2014) ("GP") § 1-202, which states in its entirety: "The singular includes the plural and the plural includes the singular." Applying GP § 1-202 conclusively demonstrates that, as used in TR § 16-205.1(b)(2) and (3), the word "test" means "test or tests."

The Court examined TR § 16-205.1's legislative history, and, in doing so, found even greater support for its conclusion. In amending Md. Code Ann., Transp. (1987 Repl. Vol., 1989 Supp.) § 16-205.1—in particular, in defining the word "test" to include "[b]oth" an alcohol concentration test and a drug test—the General Assembly made clear that the word "test" was intended to include both tests. TR § 16-205.1's legislative history makes evident that its purpose is to protect the public by deterring both drunk driving and drugged driving. The need to fulfill TR § 16-205.1's purpose to protect the public led the Court to conclude that, under TR § 16-205.1(b)(2) and (3), a driver is subject to an automatic license suspension for a refusal to take a drug test where the driver has taken an alcohol concentration test and a law enforcement officer has reasonable grounds to believe that the driver was driving while impaired by drugs or a combination of drugs and alcohol.

COURT OF SPECIAL APPEALS

Sutasinee Thana, et al., v. Board of License Commissioners for Charles County, No. 1981, September Term 2014, filed January 29, 2016. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2016/1981s14.pdf

ADMINISTRATIVE LAW – MOOTNESS – EXPIRATION OF LICENSE

ADMINISTRATIVE LAW – SUBSTANTIAL EVIDENCE

ADMINISTRATIVE LAW – PRESERVATION OF ISSUES

CONSTITUTIONAL LAW – FIRST AMENDMENT

Facts:

In 2007, following numerous reports of fights, disorderly behavior, controlled-dangerous substance violations, and concealed weapon violations at Thai Palace, a restaurant and bar in Waldorf (Appellant), Thai Palace's liquor license was revoked after it hosted entertainment that featured nudity—a violation of the Alcoholic Beverages Article, Article 2B of the Maryland Code (1957, 2011 Repl. Vol.). From 2007 to 2009, Thai Palace did not serve alcohol, but still held regular go-go events hosted by promoters, and, during this time, the Charles County Sheriff's Office continued to receive numerous reports of criminal activity.

In 2009, Appellee, the Board of License Commissioners for Charles County (the "Board") considered Thai Palace's application for a Class B, beer, wine, and liquor license, and issued a consent order (the "first consent order"), which granted Thai Palace a new liquor license but restricted it from providing live entertainment. After several years without incident, in 2012, Thai Palace proposed and consented to new restrictions on the use of promoters and on providing go-go entertainment in exchange for the ability to present other live entertainment at the restaurant as reflected in a consent agreement with the Board (the "second consent order"). Soon after, the Charles County Sheriff's Office received information that Thai Palace was using promoters and playing go-go music. The Board brought an enforcement proceeding against Thai Palace, and after a hearing, found that it had violated the consent order. Significantly, Thai Palace raised no constitutional objection at the hearing before the Board. The Board revoked Thai Palace's liquor license and its ability to host live entertainment.

Thai Palace petitioned the Circuit Court for Charles County to review the Board's decision, arguing, *inter alia*, for the first time that the restrictions in the second consent order violated the Due Process and Equal Protection Clauses of the Fourteen Amendment to the U.S. Constitution. After a hearing held on June 23, 2014, the circuit court denied Thai Palace's petition in part in an order and memorandum opinion entered on October 15, 2014. In holding against the Board in part, the court found that the Board did not make the requisite findings that a violation of a 2009 consent order occurred and found that the Board had not given proper notice of its intent to revoke Thai Palace's liquor license. Thai Palace appealed the court's decision; the Board did not.

Thai Palace, for the first time on appeal, raised a First Amendment challenge to the restrictions on hosting go-go entertainment and contended that substantial evidence did not exist to support the finding that it violated the restriction on utilizing promoters. The Board responded that, because the second consent order had expired during the proceedings, the appeal should be dismissed as moot. The Board also argued that, if the case was not moot, substantial evidence existed to support a finding that Thai Palace had violated the second consent order and that Thai Palace had waived any constitutional claims because it had proposed and consented to the conditions and had failed to raise its constitutional arguments before the Board.

Held: Affirmed.

The Court rejected the Board's argument that the case was moot because Thai Palace had expressed its intention to petition the Board again to allow the restaurant to provide live entertainment and the Board could use the existence of the violations against Thai Palace in future proceedings.

The Court next considered whether substantial evidence existed to support the Board's finding that Thai Palace let promoters exercise control over the entertainment advertising and presentation. The Court noted that:

> The Board received testimony of witnesses who reported that they observed go-go entertainment at Thai Palace on multiple occasions, in contradiction to [the licensee]'s insistence that go-go music was not performed. From this testimony, the Board was allowed to draw an inference that [the licensee]'s testimony was not credible and that Thai Palace was not in control of the entertainment. The clear implication of the content of the advertisements—which used language such as "This event is brought to you by [third party promoter]"—was that some third party was promoting and supplying the entertainment at Thai Palace. The Board was not required to disregard this evidence and instead credit [the licensee]'s contrary testimony. Finally, the advertisements and [the licensee] stated that patrons could book "VIP" tables by calling the bands or promoters.

The Court determined that "a reasoning mind could have concluded that the licensee had violated the consent order's prohibition on the use of promoters[,]" and held that substantial evidence supported the decision of the Board.

Finally, after reviewing First Amendment jurisprudence, the Court cautioned that a liquor board may risk a possible First Amendment challenge by a licensee if it adopts, as an affirmative policy, restrictions on certain forms of dancing or music. However, the Court that Thai Palace had waived its First Amendment argument in this case because it had proposed and consented to the restrictions go-go music and did not seek judicial review until after enforcement. Further, Thai Palace did not raise a First Amendment issue before the Board or before the circuit court, and thus, it failed to preserve the issue for appellate review.

Boston Scientific Corporation, et al. v. Mirowski Family Ventures, LLC, No. 1988, September Term 2014, filed January 29, 2016. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2016/1988s14.pdf

CONTRACT LAW – PATENT ROYALTIES

Facts:

Appellants Boston Scientific Corporation ("BSC") own the exclusive license to appellees Mirowski Family Ventures' ("MFV") patents to make and distribute heart defibrillators that are capable of performing, among other things, a patented cardioversion. BSC and MFV had executed a Royalty Agreement (the "2004 Royalty Agreement") where MFV was allocated 3% of royalties earned during 2003-04. The parties were co-plaintiffs in a series of lawsuits in different jurisdictions against St. Jude Hospital for infringement of these patents. Following private negotiations, BSC settled with St. Jude Hospital, creating an agreement in which St. Jude Hospital dismissed other lawsuits it had against BSC in exchange for BSC dropping certain damages in its lawsuit alongside MFV. As a co-plaintiff, MFV had to accept the terms of the settlement after it was already made.

As a result of the settlement between BSC and St. Jude Hospital, MFV claimed that it lost millions of dollars in damages and owed royalties. MFV asserted that BSC, by entering into the agreement with St. Jude Hospital, breached particular provisions of its contract with MFV, including "right to participate" and "mutual agreement" provisions. MFV brought a suit against BSC in Indiana federal court, and subsequently filed suit in Montgomery County Circuit Court. The claims went to the jury, which found in favor of MFV on all counts, awarding it millions of dollars in damages. On appeal, BSC raised many questions about the actions of the circuit court.

Held: Affirmed.

The circuit court properly granted summary judgement in favor of MFV regarding the "right to participate" provision because no genuine dispute of material facts existed as to whether MFV had a meaningful opportunity to participate in the BSC-St. Jude Hospital negotiations.

The circuit court did not err in denying BSC's motion for summary judgement on the issue of "mutual agreement" and properly sent the question to the jury. The circuit court found the term "mutual agreement" to be unambiguous and appropriately instructed the jury as to its meaning. The jury appropriately considered the question because there was sufficient evidence presented to generate a jury question.

The jury appropriately found "causation" in the breach of contract claim between MFV and BSC because MFV's "choice" regarding whether to accept the St. Jude Hospital settlement was not

meaningful. BSC's actions were a cause to MFV's damages, and the jury did not err in making that determination.

The jury properly made the determination that BSC breached the 2004 Royalties Agreement Claim because MFV did not present any legally erroneous claim theories; rather, it presented three evidentiary reasons for its breach of contract claim regarding the 2004 Royalties Agreement. The circuit court did not err in not instructing the jury on the patent law that may have been involved in MFV's reasons because the jury had sufficient information to make a determination on the breach of contract claim.

The circuit court did not err in deciding that overseas sales during the time period covered by the 2004 Royalties Agreement were owed by BSC. Despite a subsequent change in law dictating that such sales were not covered, the overseas royalties were due because the law governing a contract is the law existing at the time the contract was entered into, which required the payment of overseas royalties.

Albert Oliveira, et al. v. Jay Sugarman, et al., No. 1980, September Term 2014, filed January 28, 2016. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2016/1980s14.pdf

CORPORATIONS – DERIVATIVE LAWSUITS – STANDARD OF REVIEW OF A MOTION TO DISMISS – BUSINESS JUDGMENT RULE – DEMAND REFUSAL LETTER – DIRECT VERSUS DERIVATIVE CLAIMS

Facts:

In May of 2013, shareholders Albert F. Oliveira and Lena M. Oliveira, Trustees for the Oliveira Family Trust, appellants ("the Shareholders"), sent letters to iStar Financial Inc.'s ("iStar") Board of Directors, demanding that the Board investigate and institute certain claims relating to alleged wrongdoing by the Board. The alleged wrongdoing related to a 2011 modification of restricted stock unit performance awards granted to iStar executives in 2008.

Following an investigation, the Board refused the Shareholders' demand. Thereafter, the Shareholders filed suit in the Circuit Court for Baltimore City. The circuit court dismissed the Shareholders' lawsuit for failure to state a claim, concluding that the Board was entitled to the protection of the business judgment rule. The Shareholders filed a timely appeal.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err by granting iStar's motion to dismiss.

The Shareholders asserted that the circuit court erred by granting iStar's motion to dismiss because, according to the Shareholders, the Board is required to present evidence that it acted in good faith and with reasonable procedures when investigating the Shareholders' demand. The Shareholders further averred that they were entitled to discovery regarding the good faith and reasonableness of the Board's investigation. The Shareholders asserted that their position was supported by the Court of Appeals' decision in *Boland v. Boland*, 423 Md. 296 (2011). In *Boland*, the Court of Appeals held that a special litigation committee's "substantive conclusions are entitled to judicial deference, provided the SLC was independent, acted in good faith, and made a reasonable investigation and principled, factually supported conclusions" but that the special litigation committee is "entitled to no presumption regarding the above requirements." Id. at 296. The Board responded that the Boland exception is inapplicable to the present case because in this case demand was refused by a majority-independent and majority-disinterested board of directors.

The Court of Special Appeals agreed with the Board and held that when demand is refused by a majority-disinterested and majority-independent board of directors, the business judgment rule applies. Accordingly, the Court of Special Appeals explained that the Board's decision to refuse demand was presumed to have been made in good faith and in the honest belief that the action was taken in the best interests of the company.

With respect to purportedly direct claims filed by the Shareholders, the Court of Special Appeals held that the claims were actually derivative. The Court commented that whether a claim is derivative or direct is not a function of the label given to the claim by the plaintiff, but rather, the nature of the action is determined from the body of the complaint. The Court explained that a shareholder may sue directly rather than derivatively only when the shareholder suffers harm directly or a duty is owed directly to the shareholder. The Court held that, in the present case, the Shareholders did not suffer an injury separate and distinct from any injury suffered by the corporation. Accordingly, the Court held that the purportedly direct claims were actually derivative and were properly subject to dismissal.

Bayani Libit v. Baltimore City Board of School Commissioners, No. 2539, September Term 2014, filed January 29, 2015. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2016/2539s14.pdf

EDUCATION – PUBLIC PRIMARY AND SECONDARY SCHOOLS – TEACHERS AND EDUCATION PROFESSIONALS – TENURE – CONTINUING CONTRACT STATUS

Facts:

Bayani Libit ("Libit") is a citizen of the Phillippines who was hired as a teacher in the Baltimore City Public School System in 2005. Libit possessed an H-1B visa which enabled him to teach in the United States for a duration of time so long as he was sponsored by his employer. In 2013, Libit was a party to an individual consultation with the school system's human capital staff, all of which were designees of the school system's Chief Executive Officer ("CEO"). At the consultation, Libit was informed that he would not be retained for the 2013-2014 school year.

Subsequent to his termination, Libit appealed his termination to the Baltimore City Board of School Commissioners (the "Commissioners"). Libit's appeal was argued before a hearing examiner. Libit argued that he was inappropriately terminated without a hearing which he was entitled to under Md. Code (1978, 2014 Repl. Vol.) § 6-202(a) of the Education Article ("ED"). The hearing examiner determined that due to his status as an H-1B visa holder, Libit was not subject to the provisions of ED § 6-202(a), and that Libit's termination was a proper exercise of the CEO's authority under ED § 4-205(c). Accordingly, the hearing examiner recommended that the Commissioners affirm Libit's termination.

Thereafter, the Commissioners adopted the hearing examiner's recommendation and affirmed Libit's termination in a five-to-three vote. Libit appealed the Commissioner's decision to the Maryland State Board of Education (the "State Board"). The State Board affirmed Libit's termination. Thereafter, Libit filed a petition for judicial review in the Circuit Court for Baltimore City. The circuit court found that Libit was an employee at-will, and therefore affirmed his termination.

Held: Reversed.

The Court of Special Appeals held that the CEO's termination pursuant to ED § 4-205(c), was contrary to the provisions of ED § 6-202(a). Section 6-202(a) vests the authority to terminate teachers with the Commissioners in the first instance, not the CEO. In so holding, the Court of Special Appeals relied on the its holding in *Venter v. Bd. of Educ.*, 185 Md. App. 648, 671 (2009), for the general rule that "[u]nder Ed. 6-202(a), the county board, not the [CEO], makes the ultimate decision on suspension or dismissal" of teachers. The Court observed that many

decisions regarding the hiring and termination of school personnel fall within the purview of the CEO's authority under ED § 4-205(c). If, however, the CEO seeks to terminate a "teacher," it must do so pursuant the provisions of ED § 6-202(a). Section 6-202(a) grants teachers certain pre-termination rights, including a hearing before the Commissioners prior to termination. Libit's termination did not comply with ED § 6-202(a), and therefore he was improperly terminated.

The Court of Special Appeals further held that the federal statutes and regulations with respect to the federal H-1B program do not preempt the pre-termination procedures mandated under ED § 6-202(a). The Commissioners argued that "the finate nature of [Libit]'s visa necessarily limited his employment expectations," and therefore Libit was necessarily an employee at-will. The Court construed the Commissioner's position as arguing that the federal H-1B program preempts ED 6-202(a). The Court of Special Appeals observed that Maryland laws with respect to whether Libit's initial termination was proper do not conflict with the federal regulations that impose certain obligations on an employer upon the termination of an H-1B visa holder. Accordingly, because the federal regulations and ED § 6-202(a) are applied simultaneously without conflict, the federal law does not preempt ED § 6-202(a), and the Commissioners are bound to comply with both. The Court of Appeals, therefore, reversed the decision of the State Board that affirmed Libit's termination.

Maryland Office of People's Counsel, et al. v. Maryland Public Service Commission, et al., No. 2173, September Term 2014, filed December 15, 2015. Opinion by Graeff, J.

Friedman, J., concurs.

http://www.mdcourts.gov/opinions/cosa/2015/2173s14.pdf

REGULATION OF PUBLIC UTILITIES – 'JUST AND REASONABLE' RATE – ARBITRARINESS AND CAPRICIOUSNESS – SUBSTANTIAL EVIDENCE – PRESERVATION/WAIVER OF ISSUES NOT RAISED BEFORE AN ADMINISTRATIVE AGENCY

Facts:

In 2011, the Maryland General Assembly passed the Maryland Electricity Service Quality and Reliability Act—Safety Violations, requiring the Maryland Public Service Commission ("the Commission") to adopt stricter regulations regarding utility performance. In 2012, in response to the continuing problem of acute power outages caused by several recent storms, including the Derecho and Superstorm Sandy, the Governor established the Grid Resiliency Task Force, which was charged with evaluating methods for improving the resiliency and reliability of Maryland's electric distribution system and assessing "what steps can be taken to strengthen Maryland's electric distribution to better withstand the stresses that come with severe weather events." The Task Force issued its report, recommending, *inter alia*, that Maryland's electric utilities "temporarily go above and beyond their [statutory reliability] requirements . . . in order to jumpstart the improvements and enable Marylanders to see real results in a compressed time frame." Recognizing that acceleration of reliability improvements would place a financial burden on utilities, the Task Force also recommended that the Commission "authorize contemporaneous cost recovery through a tracker-like mechanism" to permit electric utilities to recover costs "exclusively for these accelerated and incremental investments and expenses."

On November 30, 2012, Potomac Electric Power Company ("Pepco"), a public service company that provides electric distribution services to approximately 530,000 customers in Montgomery and Prince George's counties, filed an Application for Adjustments to its Retail Rates for the Distribution of Electric Energy. Pepco requested a rate increase of $60,827,000, with an increase in its return on equity ("ROE") from 9.31% to 10.25%. Pepco also sought authorization to establish a surcharge tracker, the GRC, for three grid resiliency projects which would "enable Pepco to accelerate investment in infrastructure in a condensed time frame consistent with Recommendation Two of the Grid Resiliency Task Force."

On July 12, 2013, the Commission issued Order No. 85724, granting, *inter alia*, Pepco's request to impose the GRC for one of the three proposed projects and setting its ROE at 9.36%. The Maryland Office of People's Counsel and AARP Maryland filed separate petitions in the Circuit

Court for Baltimore City challenging the Commission's decision to authorize the GRC, arguing that the decision was arbitrary and capricious and without substantial evidence. Pepco also filed a petition in the circuit court for judicial review of the Commission's decision on the ROE. On November 14, 2014, the circuit court affirmed the Commission's decision to fund the GRC, but it reversed the Commission's decision on the ROE and remanded for further proceedings. This appeal followed.

Held: Judgment affirmed in part and reversed in part.

An agency action may be "'arbitrary or capricious' if it is irrationally inconsistent with previous agency decisions." Although the Commission previously has rejected requests from public utilities for authorization to impose surcharges on its customers, and it typically has denied recovery for estimated costs that are not "known and measureable," the Commission's decision to grant Pepco's request for permission to impose a Grid Resiliency Charge was not arbitrary, for a couple of reasons.

First, the Commission's prior decisions were based on the specific facts of those cases, not a hard-and-fast rule that surcharges based on estimated expenses could never be approved. Second, a change in circumstances occurred. In 2012, the Derecho and Superstorm Sandy, and the power outages that ensued, revealed weaknesses in the electric grid infrastructure and the need to make accelerated repairs to achieve a more reliable system. One of the recommendations issued by the Grid Resiliency Task Force, a group established by the Governor to evaluate methods for improving the resiliency and reliability of Maryland's electric distribution system, was to "allow a tracker cost recovery mechanism for accelerated and incremental investments" which would "provide more contemporaneous cost recovery for these additional expenses."

The Commission explained the reasons why it departed from its prior practice of denying recovery of estimated costs that were not "known and measurable." In light of the circumstances, including "the need for accelerated reliability work" as well as the mechanism to monitor the cost-effectiveness of the tracker, which the Commission, carefully considered, the Commission did not act arbitrarily and capriciously in approving the GRC.

Moreover, the Commission found that, with the appropriate monitoring and regulatory mechanisms in place, it was just and reasonable to compensate Pepco for the financial burden of accelerating reliability projects in accordance with the recommendations in the Task Force report. There was substantial evidence in the record to find that the GRC was a just and reasonable charge.

With respect to our review of the Commission's decision to set Pepco's return on equity ("ROE") at 9.36%, our focus is whether the rate order is "just and reasonable." As long as the ROE is within "the zone of reasonableness," judicial scrutiny in the ratemaking process ends. Here, appellants have failed to show that the 9.36% ROE awarded was not just and reasonable based on this evidence presented to the Commissioner.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated January 6, 2016, the following attorney has been indefinitely suspended by consent:

APRIL JUANITA SANDS

*

By an Order of the Court of Appeals dated December 16, 2015, the following attorney has been disbarred by consent, effective January 15, 2016:

RONALD L. BRIGGS, JR.

*

By an Order of the Court of Appeals dated January 26, 2016, the following attorney has been disbarred by consent:

MATTHEW RANDALL GIGOT

*

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JUDICIAL APPOINTMENTS

*

On December 17, 2015, the Governor announced the appointment of the **STACY WIEDERLE McCORMACK** to the Circuit Court for Anne Arundel County. Judge McCormack was sworn in on December 29, 2015 and fills the vacancy created by the retirement of the Hon. Philip T. Caroom.

*

On December 1, 2015, the Governor announced the appointment of **KEVIN JOSEPH MAHONEY** to the Circuit Court for Harford County. Judge Mahoney was sworn in on January 5, 2016 and fills the vacancy created by the retirement of the Hon. Stephen M. Waldron.

*

On December 17, 2015, the Governor announced the appointment of **HARRY CARL STORM** to the Circuit Court for Montgomery County. Judge Storm was sworn in on January 8, 2016 and fills the vacancy created by the resignation of the Hon. Audrey A. Creighton.

*

On December 17, 2015, the Governor announced the appointment of **LISA LOUISE BROTEN** to the District Court of Maryland – Howard County. Judge Broten was sworn in on January 8, 2016 and fills the vacancy created by the retirement of the Hon. Sue-Ellen Hantman.

*

On December 29, 2015, the Governor announced the appointment of **MAGISTRATE WILLIAM MICHAEL DUNN** to the District Court of Maryland – Baltimore City. Judge Dunn was sworn in on January 11, 2016 and fills the vacancy created by the retirement of the Hon. Askew W. Gatewood, Jr.

*

On December 17, 2015, the Governor announced the appointment of **DONNA McCABE SCHAEFFER** to the Circuit Court for Anne Arundel County. Judge Schaeffer was sworn in on January 12, 2016 and fills the vacancy created by the retirement created by the retirement of the Hon. Paul A. Hackner.

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On December 29, 2015, the Governor announced the appointment of **KENT JOSEPH BOLES, JR.** to the District Court of Maryland – Baltimore City. Judge Boles was sworn in on January 19, 2016 and fills the vacancy created by the retirement of the Hon. John R. Hargrove.

*

On January 27, 2016, the Governor announced the appointment of **RICHARD ROGER TITUS** to the Circuit Court for Carroll County. Judge Titus was sworn in on January 27, 2016 and fills the vacancy created by the retirement of the Hon. Michael M. Galloway.

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UNREPORTED OPINIONS

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Abbasi, Athar A. v. Abbasi	2580 *	January 15, 2016
B.		
Bell, Edward Hall v. State	0970 *	January 7, 2016
Bellamy, Reginald v. State	2765 *	January 12, 2016
Black, Marcus Lamar v. State	2106 *	January 19, 2016
Boger, Richard Wayne, Sr. v. State	1791 *	January 15, 2016
Bond, Paul Andrew v. State	0066	January 7, 2016
Breck, Sheila v. Md. State Police	1661 *	January 5, 2016
Brumbley, Timothy R. v. State	1106 *	January 15, 2016
Burks, John v. State	1386 *	January 15, 2016
C.		
Chase, Capone v. State	0074	January 22, 2016
Cole, Ronnell v. State	0551	January 13, 2016
Crusoe, Anthony v. State	2407 *	January 26, 2016
Cummings, Jasper v. Cohn	0087 *	December 31, 2015
D.		
Diamond Tool & Fasteners v. Fitzgerald	2659 *	January 8, 2016
E.		
Eastern Shore Title v. Ochse	0999 **	December 31, 2015
F.		
Feaster, Isaiah Timothy v. State	1967 *	December 30, 2015

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Ferraro, Peter M. v. Comptroller of the Treasury	0003	January 11, 2016
Finnerty, Dylan James v. State	2205 *	January 26, 2016
Freedman, Jael v. Wright	0049	January 27, 2016
G.		
Gear, Joseph Russell v. State	0295	January 4, 2016
Gemmill, Charles W., Jr. v. Fisher	2084 *	January 8, 2016
Goldberg, David B. v. State	2535 *	January 7, 2016
Gonchigar, Mruthyunjaya v. Omais	2502 *	January 22, 2016
Grade, Jaron Tyree v. State	0803 *	January 8, 2016
Gregg, David Lamont v. State	1618 *	January 8, 2016
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H.		
Hanlon, Tamara Lee v. State	1115 *	January 11, 2016
Hannon, Sean v. Mercy Medical Center	2348 *	January 11, 2016
Hargrave, Roger B. v. Schretlin	3087 †	January 27, 2016
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Howard, Erik Tyrone v. State	2405 *	January 27, 2016
Hunt, Kareem Eugene v. State	0481	January 15, 2016
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In re: A.C.	1181	January 28, 2016
In re: Adoption/G'ship of Maria W.	0321	January 7, 2016
In re: Adoption/Guardianship of B.R.	0910	January 11, 2016
In re: Akia B.	0827	January 19, 2016
In re: Malachi M.	0616	December 30, 2015
Ings, Akil Darnell v. State	1188 *	January 28, 2016
J.		
Jackson, Brandon Corey v. State	0204	January 26, 2016
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Jones, Michael A. v. State	0711 *	January 19, 2016

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K.

Karkenny, Moses H. v. Glen Waye Gardens Condo.	2665 *	January 22, 2016
Kessler, Windsor W., III v. State	0804 *	January 8, 2016
King, Bernard, Jr. v. State	1906 *	January 8, 2016

L.

Lagna, William v. People's Counsel for Balt. Co.	0036	January 27, 2016
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Lee, Travis v. State	1502 *	January 19, 2016

M.

Mackoul, Paul J. v. State Bd. Of Physicians	2607 *	January 20, 2016
Martin, Jajuan v. State	1678 *	January 12, 2016
McCleary, Richard Royden v. State	0270	December 30, 2015
McNeil, Devante R. v. State	1629 *	January 15, 2016
Miller, Russell Scott v. State	0083	January 8, 2016
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Mundi Enterprises v. Service Energy	1978 *	January 7, 2016
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N.

Negussie, Sentayehu v. State	2422 *	January 20, 2016
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O.

Oregon, LLC v. Falls Road Comm. Ass'n.	1234 *	January 29, 2016
Overby, Gordon v. State	1730 **	January 27, 2016

P.

Pfisterer, Sherri v. Md. General Hospital	2616 *	January 22, 2016

R.

Reese, Tuson v. State	0432 *	January 29, 2016
Rich, Steven, Jr. v. State	0081	January 8, 2016
Rivera, Manuel D. v. Uno Restaurants	0277 *	January 13, 2016

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Rogers, Nathan C. v. State	0234	January 26, 2016
Royal, Thomas v. State	0368 **	January 7, 2016
S.		
Sams, Joyce H. v. Henderson	0628 *	January 13, 2016
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Silver, Hilton v. Silverman, Thompson, etc., LLC	0390 *	January 27, 2016
Smith, Yvonne v. The Chimes	2121 *	January 5, 2016
Spears, William v. State	0335	January 20, 2016
Steinberg, Steve v. Rand	1807 *	December 31, 2015
Stevenson-Perez, Henry v. Pauls	2020 *	January 27, 2016
T.		
Taylor, Wilbert Lee v. Budget Rent A Car	1890 *	January 19, 2016
Travelocity.com v. Comptroller of the Treasury	0306	December 31, 2015
Turner, Alonzo Eugene v. State	1315 *	January 4, 2016
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W.		
Warshanna, Moataz v. Hickory Hollow Comm.	2056 *	January 12, 2016
Welling, Sherry v. Balt. Bd. Of School Comm'rs.	0097	January 13, 2016
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Williams, Paulette v. Ward	2261 *	January 26, 2016
Y.		
Yong, Hwan v. Bd. Of Liquor Licence Comm'rs	2306 *	January 7, 2016
Z.		
Zeigler, Linda Sue v. Zeigler	0099	January 27, 2016

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