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Facts: On July 3, 1997, Mr. Jenkins filed a complaint to quiet title in the Circuit Court for Prince George's County for a property he claimed to own by adverse possession. Jenkins named the following as defendants in that complaint: the successors and assigns of Fillmore Beall and James C. Rogers, trustees; the heirs, successors, personal representatives, devisees and assigns of Francis Shanabrook; and any and all persons claiming an interest in the specified property. Jenkins did not name the City of College Park (the City) as a party. Jenkins asserted that the whereabouts of the defendants named in the suit were unknown and that no other persons claimed a right to the property. Jenkins then served process by publication and, after no response was filed, a default judgment was entered on December 10, 1997.

Jenkins filed a second complaint to quiet title in the Circuit Court for Prince George's County on April 17, 1998 concerning a parcel of property contiguous to the parcel subject to the 1997 action. The City was not named as a defendant. Jenkins again claimed title through adverse possession and he named the same defendants as in his 1997 action. After receiving no response to Jenkins's service by publication within the appropriate time period, a default judgment was entered on May 13, 1998. The parcels of property involved in these two complaints are located adjacent to property that Jenkins had previously acquired by deed.

The City disputes Jenkins's assertions regarding title in the property. The City alleges that the parcels involved in this case overlap with the railway right of way owned by the City. The City allegedly acquired its interest in the property by quitclaim deed from The Bank of New York which was recorded on April 21, 1997, prior to Jenkins filing any complaint to quiet title. The full

record of conveying instruments of this alleged chain of title are absent from the record in this case. The City alleges, however, that a problem occurred within title lines of the property when Francis Shanabrook, who previously owned both properties, conveyed a parcel of property to both Horace Miller and the Columbia and Maryland Railway.

On June 15, 2001, the City filed a Motion to Intervene and to Amend Judgment in both of Jenkins's quiet title actions. Along with this intervention request, the City argued that all three actions be consolidated. The Circuit Court consolidated the two actions initiated by Jenkins but denied the motion to consolidate Jenkins's actions with the one initiated by the City. The trial court also denied the City's motion to intervene and amend judgment, stating that they were untimely.

Held: The Court of Appeals held that the trial court abused its discretion in denying the City's motion to consolidate its quiet title action with the two actions filed by Jenkins as all three actions might involve the same parcel of property. The Court of Appeals vacated the trial court's denial of the City's motion to consolidate and motion to intervene because the record was silent as to pertinent facts necessary for the proper examination of those issues. Because of the incomplete record before it, the Court of Appeals did not reach the specific questions presented on appeal. It did, however, state that if the City has valid title to the property and was entitled to be named a defendant to Jenkins's quiet title actions pursuant to § 14-108 of the Real Property Article, then Jenkins's affidavits causing the trial court to order notice by publication, and the subsequently obtained default judgments in his favor, may have been invalid. The Court of Appeals directed the trier of fact to resolve these and other issues involving the chain of title of the property on remand.

Jenkins v. City of College Park, No. 37, September Term, 2003, filed December 19, 2003. Opinion by Cathell, J.

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CRIMINAL LAW - JURY COMMUNICATIONS

Facts: After pleading guilty on several counts of robbery, petitioner, while awaiting sentencing, allegedly solicited a fellow cellmate to have the judge and the prosecutor in his case killed. The cellmate disclosed the arrangements to the authorities and petitioner was charged by criminal information with two counts of solicitation to commit murder. Neither count identified the victim, and throughout the trial there were different references as to which victims the counts of solicitation applied to. During trial, four notes were received from the jury, the third of which, asked for a definition of solicitation. The note appeared in the record and was labeled as a court exhibit yet the record revealed no mention of or response to it. It was not time-stamped and counsel were unaware of it until after the verdict had been taken, sentence had been imposed, and appellate counsel discovered it in the record. The jury returned a guilty verdict on both counts and the judge imposed sentences for two counts of solicitation, one as to the judge and the other as to the prosecutor. After pronouncement of the sentence, defense counsel advised that the two solicitations related only to the judge. The trial judge then corrected the sentences to refer only to the judge and not to the prosecutor. Petitioner appealed to the Court of Special Appeals, complaining that the criminal information was defective because it failed to name the victims and was confusing and that the court erred in receiving a note from the jury without disclosing it to counsel or petitioner. The Court of Special Appeals held that the first complaint was not preserved for appellate review and that with respect to the jury note, because the record was silent, that petitioner failed to establish that error had been committed.

Held: Reversed. Counsel must be informed of jury communications and the State must show that error regarding jury communications was harmless beyond a reasonable doubt. A silent record cannot support a harmless error analysis because the record must affirmatively show that the communication (or response or lack of response) was not prejudicial. In this case, the note, which was clear to have been received and to which petitioner was not informed of, asked for a definition of solicitation, which was not a collateral or peripheral issue.

Denicolis v. State, No.4 September Term, 2003, filed December 10, 2003. Opinion by Wilner, J.

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FAMILY LAW - CHILD - CUSTODY- CONDITIONS ON CUSTODY- THIRD PARTY VISITATION

Facts: Petitioner Deborah Frase, was the mother of three children when she was incarcerated in the Talbot County Detention Center. During her incarceration, Ms. Frase's son, Brett Michael, was cared for by Mr. and Mrs. Barnhart. After serving eight weeks in prison, Frase was released and sought to regain custody of her children. Soon after, the Barnharts filed a complaint for custody of Brett Michael. Frase filed a *pro se* answer and counterclaim for custody. After contacting a number of legal service agencies, Frase was unable to obtain counsel. After an evidentiary hearing before a master, Frase was awarded custody of Brett provided that she apply for and obtain housing at a shelter, that she grant the Barnhart's weekend visitation with Brett, and that she cooperate in further review hearings. Frase, claiming that her right to counsel had been denied, filed exceptions complaining about the conditions attached to the custody award. The Circuit Court for Caroline County however, permitted the visitation, interpreting it as "sibling" visitation rather than third-party visitation. Furthermore, the Circuit Court only required Frase to apply for housing at the shelter. Frase filed an emergency motion to have the conditions attached to the custody order stricken arguing that: the conditions violated her fundamental right to direct the care and upbringing of her children, the master should have been recused due to a previously undisclosed conflict, that she had been unfairly denied legal representation, and that any further hearings be postponed due to her pending pregnancy. The Circuit Court denied the request for postponement but made no express rulings on the other requests included in the emergency motion. Frase filed an appeal from that order and the Court of Appeals granted *certiorari* prior to any proceedings in the Court of Special Appeals.

Held: Reversed. An order declining to strike conditions on custody does constitute an order that deprives a parent of part of the care and custody of the child and is therefore immediately appealable under CJP §12-303(3)(x). After making a finding of fitness and awarding custody to a parent, the trial court could not impose conditions on custody such as requiring the parent to move to a particular place or awarding third-party visitation with the child, in opposition of that parent's wishes. Because the conditions on custody were ordered to be vacated, the issues of recusal and right to court-appointed counsel were rendered moot.

Frase v. Barnhart, No. 6, Sept. Term 2003, filed December 11, 2003. Opinion by Wilner, J.

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UTITLIES - ELECTRICITY — SERVICE AREAS; COMPETITION — MODIFICATION OF EXISTING ELECTRICAL SERVICE AREA TERRITORIES BECAUSE OF ANNEXATION IS ALLOWED ONLY IF THE PUBLIC SERVICE COMMISSION OF MARYLAND FINDS THAT SUCH A MODIFICATION IS IN THE "PUBLIC INTEREST."

Facts: On March 5, 2001, pursuant to Md. Code (1998), § 7-210(d) of the Public Utility Companies Article, the Town of Easton ("Easton") filed a petition seeking authority from the Public Service Commission of Maryland ("Commission") to exclusively supply electricity to an area Easton had annexed in 1993. The 217.1 acres of land annexed is currently being developed into a subdivision. At the time of the annexation in 1993, portions of the area in question were situated in the electric service areas of two electric companies: the Easton Utilities Commission, which is Easton's municipal electric utility, and Choptank Electric Cooperative, Inc. ("Choptank").

In a 1966 Order by the Commission, the electrical service areas of Talbot County were demarked, including those of Choptank and the Easton Utilities Commission. Pursuant to this 1966 Order, approximately 90% of the 217.1 acres annexed by Easton was located within Choptank's electrical service territory boundaries.

Easton gave various reasons in its 2001 petition to the Commission as to why the electrical service boundaries affecting the annexed area should be modified. On January 18, 2002, a Proposed Order of the Hearing Examiner was issued, an Order that analyzed the Commission's practices with respect to electric service area disputes. The Hearing Examiner found that the service areas established by the Commission in the 1966 Order should only be modified if such an action would be "in the public interest." The Hearing Examiner found that Easton had not sufficiently shown

that a change in the electrical service area boundaries would be in the public interest and recommended denial of Easton's request.

On February 11, 2002, Easton noted an "appeal" from the Hearing Examiner's Proposed Order. After consideration on this "appeal," the Commission adopted the Proposed Order. Easton then appealed to the Circuit Court for Talbot County. By a judgment dated January 14, 2003, Judge Horne, sitting for the Circuit Court of Talbot County, affirmed the Commission's Order. Thereafter, Easton appealed the Circuit Court's judgment to the Court of Special Appeals. Prior to consideration by the Court of Special Appeals, the Court of Appeals issued a Writ of Certiorari.

Held: The Court of Appeals held that Easton must abide by the decision of the Commission and not extend its electrical service area beyond that allocated to it by the Commission without the Commission's approval. The Court found no compelling reason to find that the Commission's decision regarding the territorial service areas of the annexed land was erroneous under the limited standard of review that the Court has over Commission decisions. Because the Commission did not find that the modification of existing service areas was in the "public interest," as is required under § 7-210(d) of the Public Utility Companies Article, the Court held that Choptank shall retain its present territorial service area within the 217.1 acres of annexed land.

The Court of Appeals further held that the Commission's decision to maintain the electrical service boundaries as established by the 1966 Order does not violate the Equal Protection rights of future residents of the subdivision, nor does there exist any fundamental right for these residents to receive electrical service exclusively from Easton or from any specific provider for that matter. The Court found that Choptank has lawfully been granted the right to serve a majority of the annexed area, and this includes the right to provide electrical service to those Easton residents who reside within Choptank's service area boundaries.

Town of Easton v. Public Service Commission of Maryland. No. 28, September Term, 2003, filed December 19, 2003. Opinion by Cathell, J.

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COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - EXHAUSTION OF ADMINISTRATIVE REMEDIES - PRISONER LITIGATION ACT - PUBLIC INFORMATION ACT.

Facts: Appellant, Richard L. Massey, Jr., an inmate in the custody of the Division of Correction ("DOC") of the Department of Public Safety and Correctional Services, filed a pro se "Complaint Under [the] Public Information Act and Request For Expedited Hearing" in the Circuit Court for Allegany County. The complaint alleged that the warden of Massey's facility, appellee, Jon P. Galley, failed to respond to a number of Massey's Maryland Public Information Act ("MPIA") requests to inspect certain documents purportedly in the possession of the DOC. These requests sought inspection of documents pertaining to WCI's health services, commissary, and photocopiers. In response, Warden Galley moved to dismiss Massey's complaint on the ground that Massey had failed to exhaust his administrative remedies before filing suit in the circuit court. Granting that motion on the ground advanced by Warden Galley, the circuit court dismissed Massey's complaint.

Held: Judgment Affirmed. The circuit court properly dismissed Massey's suit because he failed to exhaust his administrative remedies, as required by the Prisoner Litigation Act ("PLA").

The MPIA provides that a person does not need to exhaust administrative remedies under the MPIA before filing suit in the circuit court. Nevertheless, the PLA creates a statutory scheme for civil actions brought by prisoners, which are defined as any "legal action[s] seeking money damages, injunctive relief, declaratory relief, or any appeal filed in any court in the State that relates to or involves a prisoner's conditions of confinement." And under the PLA, "[a] prisoner may not maintain a civil action until the prisoner has fully exhausted all administrative remedies for resolving the complaint or grievance."

In this case, Massey, an inmate, has a grievance against Warden Galley, an official of the DOC. Moreover, he seeks to inspect documents that relate to the conditions of his confinement, including documents pertaining to the prison's health services, commissary, and photocopiers. His claim therefore falls within the purview of the PLA, as it relates to his "conditions of confinement." Consequently, under the PLA, Massey was required to first exhaust administrative remedies before filing suit in the circuit court.

Richard L. Massey, Jr. v. Jon P. Galley, No. 2147, September Term, 2002, filed December 30, 2003. Opinion by Krauser, J.

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CIVIL PROCEDURE - SUMMARY JUDGMENT - MD. CODE (1999 REPL. VOL., 2003 SUPP.), CORPS. & ASS'NS (C.A.) §§ 9-101 *ET SEQ.*, 9-603 TO 9-612; *STRICKLER ENG'G CORP.*, 210 MD. 93 (1956); C.A. §§ 3-102 TO 3-103, 3-202 TO 3-213; *ASH v. CITIZENS BUILDING AND LOAN ASS'N OF MONTGOMERY COUNTY, INC.*, 225 MD. 395 (1961); CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT WAS IMPROPER WHEN GENUINE DISPUTES OF MATERIAL FACTS EXISTED IN COMPETING AFFIDAVITS FILED BY THE PARTIES; WHEN AN OBJECTING STOCKHOLDER CHOSE TO PURSUE AN EQUITABLE REMEDY SUBSEQUENT TO MERGER, CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT WAS PROPER BECAUSE OBJECTING STOCKHOLDER'S COMPLAINT FAILED TO PROPERLY PLEAD ANY ALLEGATION OF WRONGDOING ON THE PART OF THE CORPORATION OR ITS DIRECTORS DURING THE MERGER.

Facts: Appellant Richard T. Ross and appellee Philip Savopoulos formed a partnership – Inwood Associates – in 1986. Ross and Savopoulos were also shareholders and served as directors and officers of appellee American Iron Works, Inc. (AIW), which was involved in the business of metal products fabrication and installation. Upon formation, Inwood Associates acquired several pieces of real property and equipment and executed a Commercial Lease for one of its properties with AIW.

In late 1995, Ross was removed as an officer and director from AIW by Savopoulos and other AIW shareholders. In January 1996, Ross and Savopoulos were unable to reach an agreement on the payment of past due amounts on a property owned by Inwood Associates. Only after foreclosure proceedings were commenced in February 1996 did Ross, Savopoulos, and Inwood Associates reach an agreement with the bank to pay off the entire amount of the loan.

In August 1999, the Board of Directors of AIW approved a cash for stock merger between AIW and AIW Holdings, Inc., a Delaware corporation. In September 1999, the shareholders approved the merger by a two-thirds vote. While Savopoulos voted in favor of the merger, Ross voted against it and, to no avail, objected to the merger at the shareholders' meeting. Under the terms of the Merger Agreement approved by the shareholders, any owner of capital stock was entitled to $2,583.33 per share. Thus, Ross, the owner of 670 shares of capital stock, was entitled to a total of $679,499.10 for his shares. The Merger Agreement additionally provided that stockholders receiving compensation would be paid in ten equal installments over ten years without interest.

On August 27, 2001, Ross filed an action against Savopoulos and Inwood Associates requesting that the partnership be dissolved and its assets be distributed accordingly. On the same day, Ross also filed a complaint against AIW, challenging the terms of the Merger Agreement regarding the ten-year payout of his compensation and requested that he receive immediate payment of the full value of his shares. The two cases were consolidated and specially assigned to the trial judge. After the parties filed respective motions for summary judgment, the trial judge, without stating any grounds, granted summary judgment in favor of Savopoulos, Inwood Associates, and AIW. By virtue of his grant of summary judgment, the trial judge dissolved Inwood Associates in Savopoulos's favor.

Held: The trial judge's failure to state any basis for a grant of summary judgment is not reversible *per se* but requires a reviewing court, in its discretion, to analyze each count of the complaint to determine whether there exists "a legally correct and factually sufficient basis" for a grant of summary judgment on one or all of the counts. *Magee v. Dansources Technical Svcs., Inc.*, 137 Md. App. 527, 548 (2001).

Section 9-603(a) of the Corporations and Associations article permits a judicial dissolution of a partnership upon a showing, *inter alia*, that the carrying on of partnership affairs is not reasonably practicable due to one partner's wrongful or more culpable conduct. The partner who has not wrongfully dissolved the partnership is permitted to wind up the partnership's affairs and receive the full value of his or her portion of the partnership assets. Md. Code (1999 Repl. Vol., 2003 Supp.), Corps. & Ass'ns (C.A.), § 9-608. By granting summary judgment in Savopoulos's favor, the trial judge necessarily implied that Ross's conduct was more wrongful than Savopoulos's conduct. However, both parties filed competing affidavits that contained allegations and counter-allegations of wrongful conduct and demonstrated several genuine disputes of material fact. For this reason, the trial judge's

implication that Savopoulos's affidavit was more credible than Ross's on the issue of which partner had wrongfully dissolved the partnership was improper. If competing affidavits demonstrate the existence of genuine disputes of material fact, then the trial court is obligated to deny summary judgment. *Stickler Eng'g Corp. v. Seminar, Inc.*, 210 Md. 93, 100 (1956). Therefore, the trial judge erred in granting summary judgment in favor of Savopoulos and Inwood Associates.

Stockholders who object to a merger of two corporations are entitled to certain rights under C.A. §§ 3-202 to 3-213. In order to preserve those rights and remedies, the objecting stockholder is required to strictly adhere to the procedures in §§ 3-203(a)(1)-(3) and 3-208(a). The failure to meet any one of the requirements of the statutes precludes any remedy under the objecting stockholders statutes. *Ash v. Citizens Building and Loan Ass'n of Montgomery County, Inc.*, 225 Md. 395, 401-402 (1961). However, in limited circumstances, an action in equity may be available to the objecting stockholder if the complaint properly pleads allegations of fraud or other wrongful conduct on the part of the majority during the merger. *Homer v. Crown Cork and Seal Co.*, 155 Md. 66, 85-86 (1927). Here, Ross filed a written objection, voted against the merger, and made a timely demand for payment on AIW. *See* C.A. §§ 3-203(a)(1)-(3). There was no dispute, however, that Ross failed to timely file a petition for appraisal with the State Department of Assessments and Taxation as required by C.A. § 3-208. As a result, his statutory remedies are foreclosed. Ross's complaint requests an equitable remedy of the full value of his shares. Yet, his complaint fails to plead any allegations of fraud or wrongful conduct on the part of the majority. Ross's failure to properly plead any such allegations demonstrates that no genuine dispute as to a material fact exists on this issue. Thus, the trial court did not err in granting summary judgment in favor of AIW.

Richard T. Ross v. American Iron Works, et al., No. 2611, September Term, 2002, decided October 30, 2003. Opinion by Davis, J.

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CONSTITUTIONAL LAW – RIGHT TO SPEEDY TRIAL – NINETEEN-MONTH DELAY WAS OF CONSTITUTIONAL DIMENSION, BUT DEFENDANT WAS NOT ENTITLED TO DISMISSAL.
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CRIMINAL PROCEDURE – SENTENCING – RUNNING SENTENCE FOR HANDGUN CONVICTION CONSECUTIVE TO SENTENCE FOR SECOND DEGREE MURDER CONSTITUTED ILLEGAL ENHANCEMENT OF SENTENCE.

Facts: Makea Stewart, Keith Brown's pregnant girlfriend, was found dead in an alleyway off the Gwynns Falls Parkway in Baltimore on September 10, 1995. She had been shot eight times. After Stewart was shot, a witness saw an African-American male run from the scene and drive away in a two-door Mazda with a faulty muffler. Brown owned a car that matched this description. Police seized from Brown's car a gun that tests showed fired the bullets that killed Stewart. Stewart's blood and tissue, along with Brown's fingerprints, were also found on Brown's gun. Stewart's pager was found near her body; phone records showed that a call had been made to that pager from Brown's cell phone about one-half hour before the murder.

Brown was tried in the Circuit Court for Baltimore City. Brown's defense was that, out of jealousy, his wife had killed Stewart with his gun. Brown's wife testified that Brown had told her that he killed Ms. Stewart. Brown was convicted of first degree murder and use of a handgun in the commission of a felony. He was sentenced to life without the possibility of parole for murder and five years without parole for the unlawful use of a handgun to run with the life sentence.

The convictions were overturned in 2000 by the Court of Appeals. The Court held that Brown's wife's testimony that Brown confessed to her that he killed Stewart was a privileged communication pursuant to section 9-105 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland and was therefore inadmissible. The Court's mandate reversing the conviction was filed on July 30, 2000.

Brown's second trial began nineteen months later on February 11, 2002. The major differences between the two trials were that, during the second trial, Brown's wife did not testify regarding Brown's confession; Brown's videotaped testimony from the first trial was introduced by the State; Brown did not testify; and

bullets and bullet casings found at the scene were not available to be introduced into evidence. At the second trial, Brown was convicted of second degree murder and use of a handgun in the commission of a felony. He was sentenced to thirty years for second degree murder and five years without the possibility of parole for the handgun conviction to run consecutive to the murder sentence.

On appeal, Brown argued that the nineteen-month delay between the date of the Court of Appeals' decision and his second trial violated his right to a speedy trial; that the trial judge should have granted his motion for a mistrial because the jurors learned at the second trial that there had been a prior trial; the trial court should have suppressed evidence uncovered as a result of a search warrant executed by police officers in a venue where they had no jurisdiction; the trial judge erred in allowing the prosecution to a play a videotape of Brown's testimony from the first trial; and the trial judge erroneously enhanced Brown's sentence for the handgun conviction by making the sentence consecutive to the second degree murder sentence, rather than concurrent.

Held: The nineteen-month delay between the Court of Appeals' mandate and Brown's second trial was of constitutional dimension, but weighing the four *Barker v. Wingo*, 407 U.S. 514 (1972), factors, especially Brown's failure to show that his defense was prejudiced by the delay, the Court concluded that appellant was not entitled to a dismissal of the case. Brown failed to show that his defense was prejudiced by the delay.

Brown's arguments regarding the denial of his mistrial motion incorrectly assume that a criminal defendant is entitled to a mistrial any time the jury learns that the defendant has previously stood trial for the same offense. The distinction between evidence that the defendant had previously been tried for the same crime and evidence that he had been convicted was deemed to be crucial. *Rainville v. State*, 325 Md. 398 (1992), relied on by Brown, was distinguished on the ground that the defendant in *Rainville* was prejudiced by evidence of other crimes, which he (allegedly) had committed. No such evidence was introduced against Brown.

The presence of the federal marshals in Baltimore County when Baltimore City police officers executed a valid search warrant made the seizure lawful.

The Court rejected appellant's contention that because his testimony in the first trial was compelled by his wife's inadmissible testimony, the Court erred in allowing the jury to

consider appellant's prior testimony. Relying on *Michigan v. Armentero*, 384 N.W. 2d 98 (Mich. App. 1986), the Court held that the evidence that impelled Brown's testimony (i.e., his wife's testimony that he had confessed to Stewart's murder) did not infringe upon basic constitutional values and therefore his testimonial response to his wife's testimony was not compelled.

Running the sentence for the handgun charge consecutive to the second degree murder sentence constituted an illegal enhancement of sentence inasmuch as initially the sentence was to run concurrently with the sentence for murder.

Keith Alexander Brown v. State of Maryland, No. 617, September Term, 2002, filed December 8, 2003. Opinion by Salmon, J.

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CONSTITUTIONAL LAW - SELF-INCRIMINATION - MOTHER COULD INVOKE FIFTH AMENDMENT PRIVILEGE, WITHOUT BEING IN CONTEMPT, WHEN DECLINING TO ANSWER WHEN ASKED WHERE SHE WAS WHEN SHE LAST SAW HER SON.

Facts: Ariel G., who was born on January 28, 1991, is the son of Teresa Brock and, on September 18, 2000, was found to be a child in need of assistance by the Circuit Court for Baltimore City. He was placed in the custody of the Baltimore City Department of Social Services (BCDSS), who put him in a Carroll County foster home.

On January 9, 2001, Ariel G. left the foster home without permission. Police could not locate Ariel's mother and, therefore, came to believe that Ms. Brock had absconded with Ariel.

Ms. Brock had been charged in the Circuit Court for Baltimore City with constructive contempt for other (unrelated) misconduct involving Ariel. A hearing was held to discover the whereabouts of Ariel. Ms. Brock objected to the hearing, on the ground that neither she nor her counsel had received adequate notice of the hearing. During the hearing, when Ms. Brock was asked whether she

knew the whereabouts of Ariel, she declined to answer the question on Fifth Amendment grounds. The court immediately found her in contempt and ordered her to remain in jail until she purged herself by revealing the whereabouts of Ariel. No appeal was filed from this August 6, 2001, order.

On January 16, 2002, a purge review hearing was held and, when she refused again to answer the question as to Ariel's whereabouts, Ms. Brock was imprisoned again.

During another purge review hearing, on June 5, 2002, Ms. Brock was asked if she knew the whereabouts of Ariel, and she responded that she did not because she had not seen him for ten months. When asked where she was when she saw him ten months ago, Ms. Brock refused to answer on Fifth Amendment grounds because she had pending criminal charges in Carroll County for allegedly absconding with Ariel from the foster home. The court ruled that Ms. Brock had not purged herself and, therefore, was to return to jail. A written order was issued on June 26, 2002, from which Ms. Brock appealed.

Another purge review hearing was held on September 26, 2002, at which Ms. Brock again refused to divulge Ariel's whereabouts and was therefore found to be in contempt. Ms. Brock did not appeal this order.

After September 29, 2002, Ariel G. was located and placed with relatives. Ms. Brock was released from custody on the contempt charges.

Held: Reversed. The Court of Special Appeals first held that the appeal of the June 26, 2002, order was timely filed because it was filed within thirty days of the order.

The Court of Special Appeals also held that, because Ms. Brock faced charges of absconding with Ariel G. from foster care in Carroll County, she had a Fifth Amendment right to decline to answer the question about Ariel's whereabouts. Therefore, the Circuit Court for Baltimore City erred when it found Ms. Brock in contempt for not answering that question.

Because the Court of Special Appeals held that the contempt finding was in error, it did not need to reach the final question of whether the circuit court failed to follow the requirements of the Maryland Rules prior to entering a contempt finding.

In re: Ariel G., No. 1570, September Term, 2002, filed December 10, 2003. Opinion by Salmon, J.

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CRIMINAL LAW - BREAKING AND ENTERING; CONSTRUCTIVE BREAKING; DISCOVERY VIOLATION; PROBABLE CAUSE; MOTION TO SUPPRESS.

Facts: In September 2002, Samuel Marcel Holland, appellant, was convicted of first degree burglary, attempted robbery, and attempted theft under five hundred dollars after a bench trial in the Circuit Court for Caroline County.

On March 3, 2002, eighty-one year old James William Carter visited a nearby convenience store. Upon returning to his home, Carter closed the screen door but did not lock it. He also left the wooden door to his home ajar, about twelve to fourteen inches. After Carter sat down to watch television, he heard a knock at the door. Thinking that it was one of the neighborhood boys, Carter responded, "come in." At that point, appellant opened the screen door and stood in the area between the wooden door and the screen door.

Appellant made several demands for Carter's money but Carter refused to comply. Instead, he called for his roommate, Edward Taylor. Just as Taylor entered from the back room, appellant turned around, opened the screen door, and fled. Although Carter did not know whether the suspect had a gun, he thought he had "something."

During the investigation, Carter described his assailant as wearing a fur lined hooded jacket, which partially blocked the assailant's face. Taylor and Carter were unable to identify appellant in a photo array. However, shortly after the incident, Taylor saw appellant in the neighborhood, and recognized him as the assailant based on appellant's "lazy" walk. Both Taylor and Carter identified appellant at trial. During the investigation, the police conducted a search of appellant's home and recovered a jacket with a fur hood that matched the description of the jacket worn by the suspect.

Patrolman Daniel Franklin testified that when he served appellant with the arrest warrant, appellant said, "assault, I didn't assault that man." Appellant's counsel moved to strike this statement, claiming the State failed to disclose it in discovery, but the court denied the motion to strike.

At trial, appellant's lawyer moved for acquittal as to the burglary charge, claiming that there was insufficient evidence of a breaking to support a burglary conviction.

Held: Judgment reversed as to the burglary conviction but affirmed in all other respects. The Court held that there was insufficient evidence to support a conviction for burglary, whether based on an actual or constructive break. The Court recognized that there is no actual breaking when a person enters with the consent of the owner. Therefore, appellant's entrance was not trespassory, because Carter told appellant to "Come in." Additionally, the Court noted that the evidence did not show that appellant gained entry by artifice, fraud, or threats, so as to constitute a constructive breaking. For example, he did not fail to respond to an inquiry, nor did he provide false information at the door. Rather, he merely knocked and was silent. The Court declined to find that appellant's silence when he knocked amounted to the kind of trickery that would support a finding of a constructive breaking.

The Court was also satisfied that the trial court did not err in admitting appellant's statement, even though it was not produced in discovery. The Court noted that the trial court found that the statement was made to appellant's mother, who happened to be in the presence of a State agent, and a statement made to a non-state agent is not within the scope of Maryland Rule 4-263(b)(2).

Alternatively, appellant argued that his statement was exculpatory and therefore should have been disclosed even without his request, pursuant to Maryland Rule 4-263(a)(1). The Court was satisfied with the trial court's determination that appellant's statement was an admission of his involvement in the Carter burglary, and therefore the statement was not exculpatory.

Samuel Marcel Holland v. State of Maryland, No. 2045, September Term, 2002, filed December 23, 2003.

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EVIDENCE - EXPERT TESTIMONY; MARYLAND RULE 5-702; TRIAL JUDGE PROPERLY DENIED MOTION *IN LIMINE* MADE TO PREVENT ORTHOPAEDIST FROM RENDERING OPINION THAT SLIP AND FALL IN APPELLANT'S RESTROOM ON AUGUST 1, 1998 WAS THE CAUSE OF ERECTILE DYSFUNCTION, DESPITE THE FACT THAT APPELLEE WAS REFERRED BY ORTHOPAEDIST TO UROLOGIST WHO CONCLUDED, IN NOVEMBER 2000, THAT ANY ONE OF FIVE POSSIBLE CONDITIONS, INCLUDING INJURY TO LOWER BACK RESULTING FROM FALL, COULD HAVE CAUSED ERECTILE DYSFUNCTION; FACT OF REFERRAL, FACT THAT REPORT OF UROLOGIST WAS MISSING FROM ORTHOPAEDIST'S FILE; AND FACT THAT ORTHOPAEDIST DID NOT CONDUCT TEST TO DETERMINE WHICH OF FIVE POSSIBLE CONDITIONS CAUSED APPELLEE'S ERECTILE DYSFUNCTION WERE MATTERS PROPERLY SUBMITTED TO THE FACT FINDER IN DETERMINING THE WEIGHT OF THE EVIDENCE RATHER THAN THE SUFFICIENCY OF THE EVIDENCE AS TO CAUSATION.

Facts: On March 21, 2000, Jeffrey Bennett, appellee, suffered a slip and fall accident on a gas station restroom floor, sustaining injuries to his lower back. Subsequently, appellee filed a negligence claim against appellant Samsun Corporation – owner of the gas station – in the Circuit Court for Harford County, seeking damages, in part, for an erectile dysfunction condition, which he claimed recently developed as a result of the accident. A trial was conducted on December 3 and 4, 2002, at which appellee presented the testimony of an orthopaedic expert witness, Dr. Vincent Osteria, who testified that appellee's erectile dysfunction resulted from the accident. Appellant challenged Dr. Osteria's expertise on the grounds that he specialized in orthopaedics and not in urology and, therefore, lacked the requisite knowledge to render an opinion concerning causation between appellee's accident and his erectile dysfunction. Additionally, appellant argued that even if Dr. Osteria qualified as an expert, his testimony failed to establish causation. The lower court, however, permitted Dr. Osteria to testify and the jury returned a verdict in favor of appellee.

Held: Affirmed. Regardless of whether an offered expert opinion establishes that a defendant physician did not comport with the correct standard of care or whether it establishes causation, it is in the discretion of the trial court to determine whether a testifying expert has the knowledge, skill, experience, training, and education necessary to offer an opinion as a medical expert in

the area. Dr. Osteria's medical field involves the study of spinal injury and related symptoms of spinal injury, including erectile dysfunction and, therefore, Dr. Osteria's opinion was consistent with his experience and training. Furthermore, Dr. Osteria's testimony was sufficient to establish causation. His opinion was not grounded in mere speculation or guess but instead was based on credible medical sources.

Samsun Corporation t/a Singer Exxon v. Jeffrey G. Bennett, No. 2705, September Term, 2002, decided December 11, 2003. Opinion by Davis, J.

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EVIDENCE - NOLLE PROSEQUI - ADMISSION OF DISPOSITION OF CRIMINAL CASE AT SUBSEQUENT CIVIL TRIAL

Facts: Appellee, Damon Carter, brought a contract claim against appellant, State Farm Fire & Casualty Co., to recover insurance proceeds following the alleged theft of his automobile in September 2000. After investigating the claim, State Farm refused to pay the claim under the insurance policy. Among other things, State Farm cited Carter's refusal to cooperate when he failed to provide a stereo faceplate and the key to the vehicle. State Farm also questioned the claim because of its inability to find the store that allegedly sold Carter the stereo equipment that he claimed was in the vehicle. In addition, State Farm discovered that it had previously insured the same vehicle and had declared it a total loss following a mudslide in California; there were discrepancies in Carter's explanation of how he came to purchase the vehicle; it had concerns about the inspection of the vehicle; and Carter refused to produce information to show how he could afford to pay cash for the vehicle.

A criminal action was brought against Carter for insurance fraud. However, the prosecutor entered a *nolle prosequi* ("*nol pros*") on the matter. Appellee then sued appellant under his insurance policy, claiming breach of contract.

Prior to the commencement of the civil jury trial in October 2002, the insurer moved *in limine* to bar appellee from testifying that the criminal charges had been *nol prossed.* That motion was denied. Thereafter, Carter was the first witness. Appellant objected when Carter's lawyer asked Carter about the disposition of the criminal matter. The objection was overruled. Carter then testified that he was arrested in connection with the theft of his vehicle but the charges were dismissed. The jury found in favor of Carter, awarding him damages of $22,749.18.

Held: Judgment vacated and case remanded for a new trial.

The Court noted that, although there are many cases in Maryland concerning the inadmissibility of criminal convictions, the issue of the admissibility of a *nol pros* at a subsequent civil trial involving the same underlying matter had never been litigated in Maryland. The Court observed that criminal convictions are ordinarily precluded from admission in subsequent civil cases because of the different standards of proof, different parties, different rules of evidence, and different purposes for the introduction of evidence in criminal as opposed to civil cases. Additionally, the Court noted that other jurisdictions have barred the introduction of a *nol pros* in a related civil proceeding.

The Court adopted the reasoning of the other jurisdictions that had considered the issue, and concluded that appellant was prejudiced by evidence of the *nol pros*. The issue in the civil case required the jurors to decide whether State Farm breached the insurance contract when it denied appellee's claim. In the Court's view, evidence of the *nol pros* could have led the jury to disbelieve the insurer's defense -- that Carter submitted a bogus claim -- even though the standards of proof differ in criminal and civil cases. Evidence of the *nol pros* may well have led the jurors to believe, incorrectly, that appellee was exonerated of any wrongdoing in connection with his insurance claim, and therefore State Farm breached the insurance policy by denying appellee's claim.

State Farm Fire & Casualty Co. v. Damon Alfonzo Carter, No. 02384, September Term, 2002. filed December 29, 2003, Hollander, J.

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FAMILY LAW - CHILD SUPPORT; ADULT DESTITUTE CHILD; EFFECT OF UNREPORTED DECISION UPON SUBSEQUENT ACTS

Facts: Bonnie Corby, appellant and cross-appellee, and Daniel P. McCarthy, appellee and cross-appellant, are the divorced parents of Kelly McCarthy, who was born in January 1980. Appellee has paid child support for Kelly since the parties' divorce in 1982.

Both parties agree that Kelly is developmentally disabled. She has an IQ of 61 and relies upon her mother for all daily activities, including brushing her hair, getting dressed, and preparing meals. Appellant is also disabled, with income of about $560 a month. Appellee earns about $75,000 per year.

Appellant filed for an extension of child support benefits as Kelly approached the age of majority. After a hearing, the master issued his Report and Recommendations, in which he recommended the extension of parental support for Kelly beyond her eighteenth birthday. The master stated that support should continue because Kelly is a "mildly mentally retarded woman who functions at a 4th or 5th grade level." Further, the master found that Kelly "does not have the mental capacity to seek out, obtain and maintain continuous long term employment generating sufficient income to cover her reasonable needs," and that "Kelly cannot claim even the expectation of permanent employment."

On November 23, 1998, Corby filed a petition to modify and increase child support, claiming that appellee's income had increased and that the Social Security Administration had found her disabled on July 25, 1998. On June 18, 1999, McCarthy filed a motion to terminate support, claiming that, since the hearing in February 1998, Kelly had obtained full-time employment with the Department of Veterans Affairs, and her annual income had increased from $8700 to $16,600.

The master issued a Report and Recommendation on November 15, 1999, in which he found that Kelly's monthly needs continued to be $1,017.00 per month, and Kelly could meet most of her reasonable monthly expenses, which included half the rent for the apartment that she then shared with her mother. The master applied the Child Support Guidelines, but recommended a downward deviation in support from $681 to $100 per month. Both parties filed exceptions, which were heard by the circuit court on March 27, 2000. The circuit court concluded that the child support guidelines were not

applicable to an adult destitute child, but otherwise upheld the master. Both parties then appealed to this Court. In an unreported opinion, filed in August 2001, the Court of Special Appeals held that the Child Support Guidelines are applicable to an adult destitute child. Therefore, the Court vacated the circuit court's decision and remanded. Upon remand, the circuit court reinstated the child support award pursuant to the guidelines.

Thereafter, on June 6, 2002, appellant filed a "Supplemental Motion To Modify Child Support," seeking an increase in appellee's child support obligation. In response, appellee sought a termination of his entire child support obligation, or, in the alternative, a reduction in the amount of child support.

At the time of the hearing, Kelly and appellant lived in separate apartments in the same federally subsidized apartment building for "low income people." Although Kelly by then had her own apartment, appellant continued to provide all of Kelly's care, including preparation of meals, waking her up in the morning, buying her clothes and food, and paying her bills. Kelly also had her driver's license, although she cannot park the car on her own.

At the time of the hearing, Kelly worked for the Department of Veteran's Affairs, netting income of $1337.00 per month. Her job, stamping incoming mail, does not include the opportunity for advancement. Any increase in her salary is due to automatic cost of living increases.

Following an evidentiary hearing in February 2003, the court concluded that Kelly is a destitute adult child and appellee is obligated to contribute to Kelly's support. However, in its Modification Order of February 24, 2003, the court reduced appellee's support obligation to $150 per month ($5 per day), commencing from August 1, 2002. In reaching its decision, the court found that Kelly's expenses for a car and her own apartment were not reasonable because she is not capable of living alone. Moreover it said that appellant would have to live with Kelly. Therefore, the court did not consider any housing expenses for Kelly in calculating appellee's child support obligation. Nor did the court attribute to Kelly any costs that appellant would incur to house Kelly.

Held: For purposes of law of the case, child support modification proceedings constitute a continuation of the previous child support proceedings, as evidenced by the need of the parties to show a material change in circumstances. However, because the previous appellate opinion was unpublished, and because of the importance of the issue, the Court decided to revisit the issue

concerning the question of whether the guidelines apply in a case involving a destitute adult child.

The Court relied on *Presley v. Presley,* 65 Md. App. 265 (1985), in analyzing whether a disabled adult child who earns $20,000 per year constitutes an "adult destitute child." The Court observed that every party and judicial officer involved in the case agreed that Kelly is disabled. In its view, Kelly's employment income did not necessarily defeat the claim that Kelly is an adult destitute child.

The Court also determined that the Child Support Guidelines apply when calculating support for an adult destitute child. But, relying upon *Drummond v. State,* 350 Md. 502 (1998), the Court concluded the trial court was entitled to depart from the guidelines, because Kelly does have an independent source of income that meets many, but not all, of her expenses. Nevertheless, the Court reversed the circuit court's child support award because the trial court failed to include as part of Kelly's expenses any cost for suitable housing for her. In addition, the circuit court erroneously stated that appellant must live with Kelly.

Bonnie L. Corby v. Daniel P. McCarthy, No. 00037, September Term, 2003, filed December 30, 2003, Hollander, J.

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FAMILY LAW - CHILD SUPPORT – DESTITUTE ADULT CHILDREN – CHILD SUPPORT GUIDELINES.

Facts: The circuit court granted appellant, John A. Goshorn, a judgment of absolute divorce from appellee, Edna D. Goshorn. The parties had three children: two minor children, and one handicapped adult child - Sarah, who was eighteen years old at the time. The court further granted custody of the parties' two minor children to Mr. Goshorn. In calculating the child support obligation, the circuit court excluded Sarah from that award. Although the circuit court found, by agreement of the parties, that

the eighteen year old Sarah was a "destitute adult child" under Md. Code (1984, 1999 Repl. Vol.), § 11-106(b) of the Family Law Article ("FL"), the circuit court excluded Sarah because she was temporarily receiving Social Security Income benefits, and therefore, it considered her to be self-supporting.

Held: Vacated in part and affirmed in part. The circuit court should have included Sarah in determining the parties' support obligation. In doing so, it should also have applied the child support guidelines to determine that obligation.

To designate a child as both self-supporting and a destitute adult child is a contradiction in terms. Sarah cannot be both because a destitute adult child is by definition "an adult child who has no means of subsistence." Because parents have a duty to support destitute adult children, the court erred in excluding her support in the parties' total support obligation.

Once the court determined that Sarah was a destitute adult child, its next step should have been to apply the child support guidelines in FL § 12-204 to determine the support obligation for Sarah. The legislature intended to place the failure to support a destitute adult child on equal footing with failure to support a minor child; therefore, it follows that the procedure and remedies for the enforcement of that right must also be on equal footing. For this reason, the child support guidelines are applicable to destitute adult children as they are to minor children.

Additionally, SSI benefits are not an automatic credit or necessarily a dollar for dollar set off against a child support obligation. There is a rebuttable presumption that the amount of child support that the child support guidelines provide is the correct amount of child support to be awarded. But the court may deviate from the guidelines if their application would be "unjust or inappropriate."

John A. Goshorn v. Edna D. Goshorn, No. 1424, September Term, 2002, filed December 19, 2002. Opinion by Krauser, J.

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FAMILY LAW - GRANDPARENT VISITATION - FOURTEENTH AMENDMENT AND PARENTAL RIGHTS - MD. CODE. ANN., FAM. LAW § 9-102 - CONSTITUTIONALITY OF FAM. LAW § 9-102; REBUTTABLE PRESUMPTION IN FAVOR OF PARENTAL PREFERENCE IN GRANDPARENT VISITATION

Facts: Scott M. Herrick ("Herrick"), appealed from a Visitation Order of the Circuit Court for Montgomery County granting visitation with his two minor children to their grandmother, Kay Wain ("Wain"). Wain's daughter and Herrick had been divorced, and subsequently, Wain's daughter passed away from a terminal illness.

Wain filed a Complaint for Reasonable Visitation pursuant to Md. Code Ann., Fam. Law § 9-102 (2003), and was awarded specific visitation following a *pendente lite* hearing held before a family law master. No exceptions were filed to the master's findings and a *pendente lite* order was entered by the court allowing Wain some visitation. At a hearing on the merits, the circuit court ordered that visits with Wain were not in the best interests of the grandchildren at that time, but allowed some visitation, to commence after Herrick and Wain met with the children's therapist.

The importance in the children's lives of the Japanese heritage of their mother, and the Jewish heritage of their father in future plans for visitation was stressed by both sides. Herrick argued that the trial court erred in awarding Wain visitation with his children over his direct objections to such visitation, thus failing to consider his due process right to make decisions concerning the care and custody of his children protected under the Fourteenth Amendment of the United States Constitution, and contrary to the Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57 (2000). Further, Herrick argued that the trial court erred in failing to apply a presumption in favor of his decision to limit Wain's visitation with the children.

Held: Affirmed. The trial court did not violate Herrick's due process rights by awarding visitation to Wain and properly held the facts of the instant case to be inapposite to those in *Troxel*. Further, the trial court considered more than just the best interests of the children, and addressed additional factors to ensure a proper analysis of a grandparent visitation case beyond that which impermissibly occurred in *Troxel*.

A presumption in favor of a parent's decision concerning visitation with a third party should be given special weight, but

no more than that. If parental visitation preference was absolute, the need for a grandparent visitation statute would be obviated. The trial court gave due consideration to Herrick's concerns about visitation, but sufficient evidence was presented to support the trial court's decision to allow visitation, including the therapist's testimony that it was in the children's best interests that the conflict between the parties subside; and that they maintain contact with their grandmother.

Herrick v. Wain, No. 15, September Term, 2003, filed December 19, 2003 Opinion by Sharer, J.

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INSURANCE- UNINSURED MOTORIST COVERAGE

Facts: Crystal Crespo suffered physical injuries when a moped, on which she was a passenger, collided with a motor vehicle. Crespo was covered under an insurance policy issued by Allstate Insurance Company ("Allstate"). After Allstate denied Crespo's claim for uninsured motorist benefits, Crespo filed a complaint, alleging, in part, a breach of contract by Allstate.

Allstate moved to dismiss the count, arguing that Crespo was not entitled to uninsured motorist coverage because a moped was not a "motor vehicle" under Md. Code (1995, 2002 Repl. Vol.), § 19-509 of the Insurance Article ("Ins."). Allstate relied upon Md. Code (1977, 2002 Repl. Vol.), § 11-134.1 of the Transportation Article, which defines a moped, in pertinent part, as a "bicycle that: (1) Is designed to be operated by human power with the assistance of a motor." Because Ins. § 19-501(b)(1) defines a motor vehicle as a "vehicle ... that is operated or designed for operation ... by any power other than ... muscular power," Allstate contended that a moped was not a motor vehicle. The circuit court dismissed the count for failure to state a claim.

Held: Judgment affirmed. Reading the Insurance and Transportation Articles together, a moped is not a motor vehicle

under Ins. § 19-509. Under the Transportation Article, a moped is not included as a motor vehicle, is not required to be registered, and is not required to have statutory minimum insurance coverages. The purpose of uninsured motorist coverage is to assure that an insured person has available the statutory minimum coverage as would have been available had the tortfeasor complied with the minimum requirements of the financial responsibility law. In the case of a moped, compliance requires neither registration nor insurance.

Crespo v. Topi, et al., No. 2200, September Term 2002, filed December 29, 2003. Opinion by Kenney, J.

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MARYLAND MORTGAGE LENDER LAW - PENALTIES

Facts: Walter Thrasher executed and delivered a junior deed of trust to Homecomings Financial Network, Inc. ("Network") securing a loan with his property. In a complaint, Thrasher averred that the loan documents were executed at his home and that, in violation of Md. Code (2003 Repl. Vol.), § 11-505(e) of the Financial Institutions Article ("FI"), Homecomings did not have a license to act as a mortgage lender at that location. Thrasher sought penalties for the violation under FI § 11-523(b). Homecomings filed a motion to dismiss, arguing that there was no private right of action under FI § 11-523(b). According to Homecomings, that provision of the statute only penalized an "unlicensed" person who made or assisted a borrower in obtaining a mortgage loan and not a "licensed" person who violated a provision of the Maryland Mortgage Lender Law (the "MMLL"). The circuit court granted the motion.

Held: Affirmed. There is no private cause of action under FI § 11-523(b) against a licensed mortgage lender who allows a mortgage to be executed at a place for which the person does not have a license to conduct business. The MMLL does not automatically transform a licensee who allows loan documents to be executed at a location other than at the person's "licensed place

of business" into an "unlicensed person." Although a violation of FI § 11-517(a)(4) may result in the suspension or revocation of a license, the licensee remains licensed until the license is actually suspended or revoked by the Commissioner.

Walter Thrasher v. Homecomings Financial Network, Inc., No. 2712, September Term, 2002, filed December 11, 2003. Opinion by Kenney, J.

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PRISONER LITIGATION ACT - WAIVER OF FILING FEES - TRIAL COURT WAS NOT REQUIRED TO EXPLAIN REASONS FOR DENIAL OF MOTION TO WAIVE FILING FEES THAT ACCOMPANIED INMATE'S PETITION FOR JUDICIAL REVIEW OF INMATE GRIEVANCE OFFICE'S DISMISSAL OF GRIEVANCE, WHERE INMATE FAILED TO MAKE REQUIRED WRITTEN SHOWING UNDER OATH THAT: HE WAS INDIGENT AND WOULD BE UNLIKELY TO ACCUMULATE FUNDS FOR FILING FEE WITHIN REASONABLE TIME; HIS PETITION PRESENTED AN ISSUE OF SERIOUS CONCERN, CONSIDERATION OF THE CLAIM WOULD BE PREJUDICED BY DELAY; AND THERE WAS REASONABLE LIKELIHOOD OF SUCCESS ON MERITS.

Facts: The petitioner, Richard L. Massey, Jr., filed a petition for judicial review in the Circuit Court for Allegany County, seeking review of the Inmate Grievance Office's dismissal of his grievance. Massey attached to his petition a "Motion to Proceed Without Payment of Costs," his own unnotarized statement, and a print-out of his inmate bank account. Massey alleged that: he was indigent; he was not likely to accumulate sufficient funds to pay the filing fee; his petition was "meritorious"; and the waiver of filing fees "would serve the interest of justice."

The trial court declined to waive filing fees but reduced the amount of the fees to $10.00. The court gave no explanation for its decision. Massey argued in his petition that, under *Torbit v. State*, 102 Md. App. 530, 650 A.2d 311 (1994), the court was required to explain the reasons for denying his request for a waiver.

HELD: Judgment affirmed.

The Court of Special Appeals explained that § 5-1002(c) of the Prisoner Litigation Act specifically requires an inmate who seeks the waiver of filing fees in a civil action to provide a written showing under oath that:

> (1) The prisoner is indigent;
>
> (2) The issue presented is of serious concern;
>
> (3) Delay in the consideration of the issues presented will prejudice the consideration of the claim;
>
> (4) The prisoner is not likely to accumulate sufficient funds to pay the required filing fee within a reasonable period of time; and
>
> (5) The prisoner possesses a reasonable likelihood of success on the merits of the claim.

Md. Code (1974, 2002 Repl. Vol.), § 5-1002(c) of the Cts. & Jud. Proc. Art.

Massey's motion for waiver of filing fees, and the accompanying statement, did not satisfy the requirements of the statute. Massey's statement was not made under oath. Massey provided no information regarding the basis of his grievance that would have permitted the trial court to assess whether he had a reasonable likelihood of success on the merits. He did not address whether the matter was of serious concern, or whether a delay in the consideration of the matter would be prejudicial.

Because Massey failed to make the required showing, the trial court was not required to explain its reasons for denying the motion to waive filing fees. The Court of Special Appeals distinguished the case from *Torbit*, which was decided prior to the enactment of the Prisoner Litigation Act. *See* 1997 Laws of Maryland, Chapter 495. *Torbit* was decided under Code (1974, 2002 Repl. Vol.), § 7-201 of the Cts. & Jud. Proc. Art., in conjunction with Md. Rule 1-325(a), which set forth less stringent requirements for civil plaintiffs seeking the waiver of filing fees than does § 5-1002(c) of the Prisoner Litigation Act. Unlike Massey, the inmate petitioner in *Torbit* had satisfied the requirements of the

applicable statute and rule.

Richard L. Massey, Jr. v. Inmate Grievance Office, No. 2229, September Term, 2002, filed December 9, 2003. Opinion by Smith, J. (retired, specially assigned).

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WORKERS' COMPENSATION - COVERED EMPLOYEE - MD. CODE (1999 REPL. VOL.), LAB. & EMPL. (L.E.) § 9-203; *McELROY TRUCK LINES, INC. v. POHOPEK*, 375 MD. 574 (2003); TRIAL COURT PROPERLY RULED THAT, BECAUSE APPELLANT'S ASSIGNMENTS AS A TRACTOR-TRAILER DRIVER WERE RANDOM, DID NOT BEGIN AND END IN MARYLAND, WERE SENT TO HIM VIA SATELLITE RADIO ANYWHERE IN THE UNITED STATES – LOCATION WHERE THE ASSIGNMENT WAS RECEIVED CONSTITUTING THE NEW POINT OF ORIGIN, APPELLANT'S EMPLOYMENT DID NOT COMPORT WITH L. E. § 9-203(a)(2) IN THAT HE WAS NOT EMPLOYED "OUTSIDE OF THIS STATE ON A CAUSAL, INCIDENTAL, OR OCCASIONAL BASIS IF THE EMPLOYER REGULARLY EMPLOYS THE INDIVIDUAL WITHIN THIS STATE" AND, HENCE, APPELLANT WAS NOT A "COVERED EMPLOYEE" ENTITLED TO SEEK WORKERS' COMPENSATION BENEFITS IN MARYLAND; APPELLANT'S CASE IS GOVERNED BY *DIXON v. ABLE EQUIPMENT COMPANY*, 107 MD. APP. 541 (1995).

Facts: Larry T. Fitzgerald, appellant, is a Maryland resident but he applied for and obtained employment with appellee R & R Trucking, Inc., a trucking company based in Joplin, Missouri, with no offices in Maryland. For six months, appellant drove a tractor-trailer for appellee throughout the United States, with a semi-regular route between Landover, Maryland, and Oklahoma City, Oklahoma. During his employment, however, appellant rarely visited his Maryland residence but instead usually slept in his truck. Appellant's assignments were dispatched using a satellite radio, allowing him to receive driving assignments anywhere in the country. Therefore, he did not begin or end his trips in Maryland.

On August 24, 2001, appellant filed a claim with the Maryland Workers' Compensation Commission (Commission) for a work-related injury he sustained at a truck stop in Pennsylvania. Appellee

contended that Maryland had no jurisdiction over appellant's claim because he was not a "covered employee" under Md. Code (1999 Repl. Vol.), Lab & Empl. (L.E.) § 9-203(a)(2). The Commission conducted a hearing on March 22, 2002 and ruled that appellant was a covered employee and that Maryland had jurisdiction over the claim. Appellee appealed to the Circuit Court for Wicomico County on May 2, 2002, which reversed the Commission.

Held: Affirmed. Maryland has no jurisdiction over appellant's claim. Appellant was not a covered employee under L.E. § 9-203(a)(2) because he was not regularly employed within Maryland. Under *Dixon v. Able Equipment Co.*, 107 Md. App. 541 (1995), regular employment "implies a uniform course of conduct" which appellant did not demonstrate. Appellant was not based in Maryland, spent little time working or visiting Maryland, and had no consistency in his work schedule. His duties in Maryland were "more a matter of chance than of regularity."

Larry T. Fitzgerald v. R & R Trucking, Inc., et al., No. 58, September Term, 2003, decided December 11, 2003. Opinion by Davis, J.

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ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals of Maryland dated December 19, 2003, the following attorney has been disbarred from the further practice of law in this State:

MAHMOUD ALSAFTY
*

By an Opinion and Order of the Court of Appeals of Maryland dated December 22, 2003, the following attorney has been suspended for three (3) years, concurrent with a suspension in Delaware, from the further practice of law in this State:

CAROLINE PATRICIA AYRES-FOUNTAIN
a/k/a Carolyn Patricia Ayres
*

By an Opinion and Order of the Court of Appeals of Maryland dated December 23, 2003, the following attorney has been disbarred from the further practice of law in this State:

ALAN FRANKLYN POST
*

By an Order of the Court of Appeals of Maryland dated January 22, 2004, the following attorney has been suspended for ninety (90) days by consent, from the further practice of law in this State:

MARY D. BRENNAN
*

JUDICIAL APPOINTMENTS

On December 16, 2003, the Governor announced the appointment of **DAVID A. BOYNTON** to the Circuit Court for Montgomery County. Judge Boynton was sworn in on December 18, 2003 and fills the vacancy created by the retirement of the Hon. Paul A. Weinstein.

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On December 16, 2003, the Governor announced the appointment of **CATHY HOLLENBERG SERRETTE** to the Circuit Court for Prince George's County. Judge Serrette was sworn in on December 19, 2003 and fills the vacancy created by the retirement of the Hon. Robert J. Woods.

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On December 17, 2003, the Governor announced the appointment of **SYLVESTER B. COX, JR.** to the Circuit Court for Baltimore City. Judge Cox was sworn in on January 7, 2004 and fills the vacancy created by the appointment of the Hon. William D. Quarles to the United States District Court.

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On December 16, 2003, the Governor announced the appointment of **THERESA M. ADAMS** to the Circuit Court for Frederick County. Judge Adams was sworn in on January 9, 2004 and fills the vacancy created by the retirement of the Hon. Mary Ann Stepler.

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On December 17, 2003, the Governor announced the appointment of **THOMAS G. ROSS** to the Circuit Court for Queen Anne's County. Judge Ross was sworn in on January 9, 2004 and fills the vacancy created by the retirement of the Hon. John W. Sause, Jr.

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On December 17, 2003, the Governor announced the appointment of **W. MICHEL PIERSON** to the Circuit Court for Baltimore City. Judge Pierson was sworn in on January 14, 2004 and fills the vacancy created by the retirement of the Hon. Ellen M. Heller.

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On December 19, 2003, the Governor announced the appointment of **W. NEWTON JACKSON, III** to the Circuit Court for Wicomico County. Judge Jackson was sworn in on January 16, 2004 and fills the vacancy created by the retirement of the Hon. D. William Simpson.

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On January 8, 2004, the Governor announced the appointment of the **HON. CLAYTON GREENE, JR.** to the Court of Appeals. Judge Greene was sworn in on January 22, 2004 and fills the vacancy created by the retirement of the Hon. John C. Eldridge.

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