Amicus Curiarum

VOLUME 23
ISSUE 2 February 2006

a publication of the office of the state reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

ATTORNEYS - MISCONDUCT - RECIPROCAL DISCIPLINE - APPROPRIATE SANCTIONS - IN CASES WHERE AN ATTORNEY IS DISCIPLINED IN ANOTHER STATE, THE COURT OF APPEALS WILL IMPOSE A SANCTION CONSISTENT WITH THAT IMPOSED UPON ATTORNEYS DISCIPLINED IN THIS STATE FOR SIMILAR MISCONDUCT.

Facts: H. Allen Whitehead was admitted to the Maryland Bar on December 1, 1973. He practiced in Maryland and the District of Columbia until 1999, when he moved to New York. Before leaving for New York, He was appointed as the Conservator of funds from a medical malpractice suit. He was subsequently removed from this position upon allegations that he had paid legal fees to himself without prior court approval. As a result, he was disbarred by consent in the District of Columbia. His disbarment was based upon an affidavit in which he admitted to paying the funds to himself without prior court approval. The Attorney Grievance Commission, through Bar Counsel, recommended disbarment based upon the sanction imposed in the District of Columbia.

Held: Indefinite suspension with the right to reapply after eighteen months. Maryland Rule 16-773 governs the imposition of sanctions upon attorneys admitted to the Maryland Bar who have been found in violation of another state's ethical rules. The Rule states that the Court of Appeals shall not impose reciprocal discipline if the attorney's misconduct "warrants substantially different discipline in this State." Rule 16-773(e)(4). As a result, the Court must look at its own cases and impose a sanction consistent with that imposed in cases arising in this State.

Attorney Grievance Commission v. H. Allen Whitehead, Misc. Docket No 17, September Term, 2005, filed January 20, 2006. Opinion by Cathell, J.

***

CRIMINAL LAW - EVIDENCE - OPINION EVIDENCE - POLICE OFFICERS - REASONABLE SUSPICION - SUPPRESSION HEARINGS

Facts: Petitioner was the passenger in the back seat of a vehicle driven by a friend. Two Baltimore City police officers stopped the vehicle for exceeding the speed limit. Based on his observations of petitioner, one of the officers ordered petitioner out of the vehicle and frisked him. The officer discovered a handgun in petitioner's back pocket. The Circuit Court for Baltimore City denied petitioner's Motion to Suppress. At the hearing on the Motion, neither officer was qualified as an expert witness before testifying as to the basis for reasonable articulable suspicion to conduct a *Terry* frisk. In a bench trial, petitioner was convicted of the offense of possession of a handgun by a person previously convicted of a crime of violence. The Court of Special Appeals affirmed. *Matoumba v. State,* 162 Md. App. 39, 873 A.2d 386 (2005). The Court of Appeals granted certiorari to consider whether a police officer is required to be qualified as an expert when testifying at a suppression hearing as to the basis for conducting a Terry frisk.

Held: Affirmed. The Court of Appeals concluded that neither *Terry* nor Maryland law requires that a police officer be qualified as an expert before rendering an opinion as the basis for reasonable articulable suspicion to conduct a *Terry* frisk.

The Court's decision was based on a construction of the Maryland Rules of Evidence. Prior to the adoption of the Maryland Rules of Evidence, evidentiary rules did not apply strictly in suppression hearings. Rule 5-101 provides that the Rules do not apply, inter alia, to any proceeding in which, prior to the adoption of the evidentiary rules, the court was traditionally not bound by the common law rules of evidence. The Court noted that because the common-law rules of evidence did not apply to suppression hearings before the adoption of Maryland Rules of Evidence in 1994, it follows that pursuant to Md. Rule 5-101(b)(12), the Maryland Rules of Evidence are inapplicable to suppression hearings. In addition, the Court pointed out that trial courts have broad discretion under Rule 5-101(c)(1) to decline to apply the Rules of Evidence in order to determine questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 5-104(a). Because suppression hearings involve the determination of preliminary questions of fact concerning the admissibility of evidence, trial courts are not required to apply the Rules of Evidence.

Finally, the Court rejected petitioner's argument that the

officers were incompetent to testify under Rule 5-104(a) because they were not qualified as experts. "Competency" in Rule 5-104(a) refers to the traditional notion of competency, *i.e.*, that the witness has sufficient mental capacity to understand the obligation of an oath and is possessed of sufficient mind and memory to observe and narrate the things he or she has seen or heard, and not whether the witness has sufficient knowledge to enable him or her to testify concerning a specified matter.

Kobie Matoumba v. State of Maryland, No. 47, September Term, 2005, filed January 12, 2006. Opinion by Raker, J.

***

EASEMENTS - CREATION, EXISTENCE, AND TERMINATION - IMPLICATION - WAYS OF NECESSITY - IN GENERAL - THERE ARE THREE PREREQUISITES FOR AN EASEMENT BY NECESSITY TO ARISE: (1) INITIAL UNITY OF TITLE OF THE PARCELS OF REAL PROPERTY IN QUESTION; (2) SEVERANCE OF THE UNITY OF TITLE BY CONVEYANCE OF ONE OF THE PARCELS; AND (3) THE EASEMENT MUST BE NECESSARY IN ORDER FOR THE GRANTOR OR GRANTEE OF THE PROPERTY IN QUESTION TO BE ABLE TO ACCESS HIS OR HER LAND, WITH THE NECESSITY EXISTING BOTH AT THE TIME OF THE SEVERANCE OF TITLE AND AT THE TIME OF THE EXERCISE OF THE EASEMENT.

EASEMENTS - CREATION, EXISTENCE, AND TERMINATION - IMPLICATION - WAYS OF NECESSITY - ACCESS BY WATERWAY - AN EASEMENT BY NECESSITY MAY EXIST OVER THE LAND OF THE GRANTOR EVEN THOUGH THE GRANTEE'S LAND BORDERS A NAVIGABLE WATERWAY, IF THE WATER ROUTE IS NOT AVAILABLE OR SUITABLE TO MEET THE REQUIREMENTS OF THE USES TO WHICH THE PROPERTY WOULD REASONABLY BE PUT.

Facts: This case concerns property located in the Pleasant Plains subdivision in Anne Arundel County, Maryland. The property in question consists of four lots: 9A, 10A, 178, and 179. The lots are situated in checkerboard fashion, with lots 178 and 179 sharing a common border and lots 9A and 10A sharing a common border. Lots 178 and 179 are separated from lots 9A and 10A by a channel of

water. Lot 179 is catty-cornered to Lot 9A and vice-a-versa, Lot 178 is catty-cornered to Lot 10A. Lot 10A is bordered on three sides by water: the channel, Pleasant Lake, and the Chesapeake Bay. Lot 178 is accessible via a public highway.

Ms. Stansbury and her brother, James Elijah Stansbury, were left the property in question upon the death of their father. The lots were initially deeded to them as tenants-in-common. On December 30, 1986, Ms. Stansbury, who had resided on Lot 179 since 1983, executed a deed transferring her interest in lots 178 and 10A to her brother, and he executed a deed transferring his interest in lots 179 and 9A to her. On February 22, 1988, James Elijah Stansbury mortgaged his two lots, 178 and 10A, to secure a $200,000 note to Francis C. and Shirley C. Cole. He defaulted on the note, and, in 1995, the property was acquired at a foreclosure sale by David L. and Charlotte Caldwell and James L. and Margaret F. Thrift (hereinafter collectively "Caldwell").

In 1997, Caldwell obtained a variance from Anne Arundel County to construct a residence on Lot 178. On April 20, 1998, Caldwell entered into an agreement with the County to treat lots 178 and 10A as one lot for certain purposes. On October 13, 1998, in a document entitled Declaration of Easement Conditions and Restrictions, which was recorded in the land records of Anne Arundel County, Caldwell agreed not to construct any structure on Lot 10A, with the exception of a footbridge after obtaining all necessary Federal, State, and local permits for its construction. As proposed, the footbridge would extend across the channel from Lot 178 directly to Lot 10A.

In 1999, after attempting to reach an agreement with Ms. Stansbury to build the footbridge across her property, Caldwell initiated a two-count complaint against Ms. Stansbury, asserting entitlement to an easement across a portion of lot 9A in order to gain access to 10A. The complaint sought declaratory relief in addition to monetary damages in the amount of $100,000. Michael D. Reisinger, sole owner of MDR, had first visited lots 178 and 10A in 1996 or 1997. MDR purchased the lots from Caldwell on October 15, 2001. On October 25, 2001, MDR was substituted as the party plaintiff.

Trial was held on September 27, 2002, and November 1, 2002 in the Circuit Court for Anne Arundel County. On August 19, 2003, in a memorandum opinion and order, the Circuit Court determined that: "[MDR] is not entitled to the declaration of an easement over [Ms. Stansbury's] property to facilitate pedestrian travel between Lots 178 and 10A. [MDR] is entitled to construct a footbridge- subject to all Federal, State and local regualtions [sic]- between Lots 178

and 10A free from any unsubstantiated claim by [Ms. Stansbury] that said footbridge will interfere with her property rights to a portion of land submerged beneath the water in the channel." Ms. Stansbury noted a timely appeal and MDR cross-appealed.

The Court of Special Appeals vacated the Circuit Court for Anne Arundel County's judgment, finding that "MDR is entitled to a declaration establishing an easement by necessity, subject to government regulation, for a pedestrian walkway in order to reasonably use and enjoy Lot 10A . . . ." *Stansbury v. MDR Dev., L.L.C.*, 161 Md. App. 594, 619, 871 A.2d 612, 627 (2005).

On May 17, 2005, Ms. Stansbury filed a petition for a writ of certiorari and MDR filed a conditional cross-petition; the Court of Appeals granted certiorari as to both on July 18, 2005. *Stansbury v. MDR Dev., L.L.C.*, 388 Md. 97, 879 A.2d 42 (2005).

Held: Affirmed. The Court found that under the particular facts of the case, an easement by necessity exists for the purpose of providing access to Lot 10A even though Lot 178 is accessible via a public highway, Lot 10A's access to navigable water notwithstanding. Thus, the Court of Appeals affirmed the Court of Special Appeals' judgment that MDR is entitled to a declaration recognizing that an easement by necessity exists over either lot 179 or 9A, or both, subject to government regulation. This includes the right to maintain pedestrian access via a footbridge between lots 178 and 10A, in order to reasonably use and enjoy Lot 10A.

Nancy R. Stansbury v. MDR Development, L.L.C., No. 38 September Term, 2005, filed January 9, 2006. Opinion by Cathell, J.

***

FAMILY LAW - CHILD SUPPORT - AMOUNT AND INCIDENTS OF AWARD - APPLICABILITY OF GUIDELINES - THE MARYLAND CHILD SUPPORT GUIDELINES, CODIFIED IN MD. CODE (1984, 1999 REPL. VOL., 2004

SUPP.), §§ 12-101 *ET SEQ.* OF THE FAMILY LAW ARTICLE, MAY BE APPLIED BY A JUVENILE COURT EXERCISING JURISDICTION IN A CINA CASE TO CALCULATE THE CHILD SUPPORT AMOUNT, WHERE A CHILD IS IN THE CUSTODY OF A GOVERNMENT AGENCY.

NOTICE - PROCESS - NATURE, ISSUANCE, REQUISITES, AND VALIDITY - STATEMENT AS TO NATURE, FORM, OR CAUSE OF ACTION - COURTS MUST PROVIDE ADEQUATE PRIOR NOTICE OF A HEARING'S PARTICULAR SUBJECT MATTER TO THE INVOLVED PARTIES. THE FAILURE TO NOTIFY A PARTY THAT A PARTICULAR SUBJECT MATTER, SUCH AS CHILD SUPPORT, WILL BE ADDRESSED AT A HEARING CONSTITUTES A VIOLATION OF DUE PROCESS PROTECTIONS. IN ORDER FOR DUE PROCESS OF LAW TO BE SATISFIED, THE SUBJECT MATTER OF A HEARING MUST BE REASONABLY ASCERTAINABLE FROM THE NOTICE PROVIDED AND THE SURROUNDING CIRCUMSTANCES OF THE ACTION.

Facts: This case arises from the use of the Maryland Child Support Guidelines (the "Guidelines") by the Circuit Court for Montgomery County, while sitting as a juvenile court in a permanency plan review hearing for Katherine C. The court initially established a child support obligation at a July 22, 2004, hearing in response to the father, Robert C.'s, Motion to Determine (and Allocate) Child Support. The resulting order relieved the mother, Victoria C. (hereinafter appellant), of any child support obligation. On March 21, 2005, the Circuit Court held another permanency plan review hearing at which, without prior notice to the parties that the hearing would concern issues of support, it re-evaluated the child support situation of Katherine C., applied the child support guidelines under Md. Code (1984, 1999 Repl. Vol., 2004 Supp.), § 12-204 of the Family Law Article, and entered an order providing that appellant "shall pay $282 per month in child support . . . to begin on May 1, 2005 . . . ." On March 24, 2005, appellant filed a Motion for Reconsideration of the order to pay child support stating that she was a destitute parent as defined in Md. Code (1984, 1999 Repl. Vol.), § 13-101(c) of the Family Law Article. On April 13, 2005, the Circuit Court entered an order denying appellant's Motion for Reconsideration. On July 7, 2005, appellant noted an appeal to the Court of Special Appeals. The Court of Appeals, on its own initiative and prior to any proceedings in the intermediate appellate court, granted certiorari. *In re Katherine C.*, 388 Md. 97, 879 A.2d 42 (2005).

Held: Vacated. The Court found that the notice in the case *sub judice* was not adequate to notify appellant that the Circuit Court would be addressing the matter of child support at the March 21, 2005, hearing. Parties are entitled to adequate notice of the subject matter of a hearing, so that they may prepare to address the issues. The Circuit Court for Montgomery County, however, did

not err in its application of the Guidelines in calculating child support, where the child is in the custody of a government agency except that in the use of such guidelines, the amount established may not exceed actual costs incurred by the State.

In re Katherine C., No. 32 September Term, 2005, filed January 17, 2006. Opinion by Cathell, J.

***

FAMILY LAW - DIVORCE - DISPOSITION OF PROPERTY - JUDGMENT OR DECREE - IN GENERAL

Facts: Appellants, Elmer Dennis and Edmund Lubinski, are retired Baltimore City police officers. They were divorced in 1993 and 1990, respectively. Their consent divorce judgments divided their interests in pension benefits they were entitled to receive from the Baltimore City Fire & Police Employees' Retirement System ("the Retirement System") between themselves and their spouses. The language of the divorce judgments expressly provided that the judgments were intended to be "qualified domestic relations orders" ("QDROs"), that the pension that was the subject of the QDROs was the Baltimore City Fire & Police Employees' Retirement System, and that all payments from the Retirement System to the appellants were subject to division between the appellants' spouses according to the terms of the QDROs "if, as, and when paid."

In 1996, the Retirement System adopted the deferred retirement option plan ("DROP"). Retirement System members with at least twenty years of service may elect to participate in the DROP for a period of three years. DROP participants do not earn service credit while participating in the DROP. Rather, the ordinary retirement benefit they would have received and the mandatory employee contribution are paid into the member's DROP account. The funds in the DROP account earn interest until the member retires. Once the member retires, he becomes eligible to receive the funds in his DROP account, along with various forms of additional service credits and a bonus accrual if the member remains in service after the member ceases participating in the DROP. Appellants both began

participating in the DROP on August 1, 1996, and ceased participation on July 31, 1999.

After the Retirement System decided to treat appellants' DROP benefit payments as subject to division under their divorce judgments, appellants filed a claim with the Retirement System's Board of Trustees ("the Board") challenging this decision. The Board upheld the Retirement System's decision. Appellants then sought review of the Board's decision in the Circuit Court for Baltimore City. The Circuit Court upheld the Board's determination, and appellants noted an appeal to the Court of Special Appeals. The Court of Appeals then granted a writ of certiorari on its own initiative prior to decision in the Court of Special Appeals.

Held: Affirmed. As consent judgments, the divorce judgments of the parties are interpreted in accordance with ordinary principles of contract interpretation. Interpreting the judgments, the Court held their plain language evidenced an intent to subject all payments from the Retirement System pension to the appellants to division with the appellants' spouses. The Court further held that, since the judgments were QDROs, the requirements for a judgment to be a QDRO are specified in the Internal Revenue Code, and these requirements must be met for a transfer of pension benefits in a divorce judgment to be effective under the Internal Revenue Code and related federal statutory provisions, the plain language of the divorce judgments evidenced an intent to give the language in the judgments identifying the pension the same meaning it has under the Internal Revenue Code. Thus, as the IRS had previously issued a determination letter concluding that the Retirement System pension plan, inclusive of the DROP, was a tax-qualified pension trust, and the appellants did not challenge this determination, the Court deferred to the IRS determination that the DROP was part of the Retirement System's pension plan.

Elmer Dennis, et al. v. Fire & Police Employees' Retirement System, et al., No. 27, September Term, 2005, filed January 18, 2006. Opinion by Raker, J.

***

INSURANCE – DUTY TO DEFEND – DUTY TO INDEMNIFY – TOTAL POLLUTION EXCLUSION – MANGANESE WELDING FUMES

Facts: Through a certified question from the United States District Court for the District of Maryland, the Court of Appeals was asked to determine whether a total pollution exclusion provision in a commercial general liability insurance policy relieves the policy issuer from its duty to defend and/or indemnify the policy holder where the alleged harm was caused by localized, workplace manganese welding fumes. Specifically, the District Court certified the following question: "Whether an insurance company has a duty to defend and/or indemnify its insured in underlying actions alleging injury from exposure to localized welding fumes a) Where the insurance policy contains a total pollution exclusion that denies coverage for 'bodily injury' or 'property damage' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants at any time, b) Where pollutants are defined as 'any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste,' and c) Where waste is defined as 'materials to be recycled, reconditioned or reclaimed.'" This question presented an issue of first impression in Maryland.

Held: The total pollution exclusion did not relieve the insurer of its duties to defend and indemnify the insureds in the underlying tort action. Guided by Maryland's rules for interpreting insurance contracts, the Court concluded that the language of the pollution exclusion in the present case is ambiguous in the context of manganese welding fumes. A reasonably prudent person could construe the pollution exclusion clause as both including and not including manganese welding fumes. The Court considered the only state or federal case to date addressing the scope of a pollution exclusion in the specific context of manganese welding fumes. Applying the law of the District of Columbia, the United States Court of Appeals for the Fourth Circuit determined that it "need look no further than the exclusion's plain language to conclude that it explicitly applies to the underlying actions." The Maryland Court of Appeals, however, determined that a reasonable and prudent person could conclude, considering the character and purpose of the insurance policy and the facts and circumstances surrounding its execution, that the language of the present total pollution exclusion is ambiguous in the context of manganese welding fumes. Moreover, the Court determined that the current construction of the total pollution exclusion clause drafted by the insurer was not intended to bar coverage where the insureds' alleged liability may be caused by non-environmental,

localized workplace fumes.

Clendenin Brothers, Inc. v. United States Fire Insurance Company, Misc. No. 2, September Term, 2005, filed January 6, 2006. Opinion by Harrell, J.

***

COURT OF SPECIAL APPEALS

CRIMINAL LAW - MANSLAUGHTER BY MOTOR VEHICLE - Md. Code (2002), Criminal Law Article, § 2-209 provides that "[a] person may not cause the death of another as a result of the person's driving, operating, or controlling a vehicle...in a grossly negligent manner."

CRIMINAL LAW - MANSLAUGHTER BY MOTOR VEHICLE - Gross negligence has been defined as a wanton or reckless disregard for human life. Gross negligence may be proved by evidence of such a lack of control over one's vehicle that there is a constant potentiality of fatal injury as a result of the lack of control.

CRIMINAL LAW - MANSLAUGHTER BY MOTOR VEHICLE - Evidence that a driver continued to drive in conscious disregard of warning signs of imminently falling asleep at the wheel was sufficient to support the trier of fact's conclusion that driver was guilty of operating or controlling his vehicle in a grossly negligent manner.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Harford County. Anthony Skidmore was involved in a motor vehicle accident which resulted in the death of Kelsey Guckert. Witnesses to the accident testified that they observed Skidmore's vehicle swerving, cross the center line into oncoming traffic and hit Guckert's vehicle. Evidence at trial also included a statement made by Skidmore that he had reported to work at 7 a.m. the morning of the accident. He dismissed his crew later that morning, went on to a restaurant for lunch, and then headed home. As he was driving home, he became drowsy and did not feel like he should be driving. He pulled over at a park-and-ride lot, and took a nap, but he was awakened by a phone call from one of his crew members. Once he was awakened, he continued his drive home. According to his statement, Skidmore again caught himself "nodding off behind the wheel a few times," but figured he would be all right because he was close to home. He was about seven miles from home when he fell asleep and the fatal collision occurred. In a bench trial, Skidmore was found guilty of manslaughter by motor vehicle. Skidmore appealed, contending that the evidence was insufficient to support his conviction.

Held: Judgment affirmed. Judge Meredith wrote:

> Skidmore admitted not only that he dozed off at the wheel, but also that he recognized his extreme drowsiness and made a deliberate decision to ignore the risk of

falling asleep at the wheel as he continued driving. The evidence of such deliberate conduct was sufficient to permit a rational trier of fact to conclude that Skidmore acted in a grossly negligent manner.

Anthony Joseph Skidmore v. State of Maryland, No. 1733 September Term, 2004, filed December 2, 2005. Opinion by Meredith, J.

***

CRIMINAL LAW - SEARCH AND SEIZURE - WARRANTLESS SEARCH OF VEHICLE - ODOR OF MARIJUANA - Odor of marijuana alone is sufficient to give police officer probable cause to suspect vehicle is carrying contraband.

CRIMINAL PROCEDURE - WARRANTLESS SEARCH OF VEHICLE - PROBABLE CAUSE - AIR BAG COMPARTMENT - A police officer having probable cause to suspect a vehicle is carrying concealed contraband can conduct a warrantless search of the entire vehicle, including hidden compartments such as an air bag compartment. The officer may conduct as thorough and extensive a search as would have been permitted if a warrant had been issued to search the vehicle for the contraband which the officer suspects is concealed within the vehicle.

CRIMINAL PROCEDURE - WARRANTLESS SEARCH OF VEHICLE - TIME AND PLACE - A police officer having probable cause to suspect a vehicle is carrying contraband may have the vehicle towed to the police station for search at a later time.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Prince George's County. Defendant, Anthony Harding, was stopped by the State Police for speeding. During the stop, the police officer immediately detected a strong odor of burnt marijuana coming from the vehicle. Based upon the odor, the

officer conducted a search of Harding's vehicle. After searching for approximately ten minutes, the officer pried open the cover to the air bag compartment on the passenger side of the dash, and found a pistol, a plastic bag containing marijuana, and a partially smoked marijuana cigarette inside the modified air bag compartment. Harding was placed under arrest and charged with illegal possession of narcotics and the handgun. Harding moved to suppress the evidence, arguing that there was no probable cause to open the air bag compartment. The Prince George's County motions judge granted the motion to suppress the evidence recovered from Harding's vehicle. The State appealed this decision.

Held: Ruling reversed. Judge Meredith wrote:

> The initial traffic stop was clearly justified by Harding's speeding. After making the traffic stop, as soon as the police officer detected a strong odor of marijuana coming from inside the pickup truck, there was probable cause to search the vehicle, including any hidden compartments, for concealed marijuana. When the officer then discovered contraband hidden in the air bag compartment, there was additional probable cause to take Harding into custody and tow the vehicle to the police station for the continued searching that led to the discovery of the drugs hidden in the spare tire. Harding's motion to suppress should have been denied.

State of Maryland v Donovan Harding, No. 637 September Term, 2005, filed December 7, 2005. Opinion by Meredith, J.

***

ENVIRONMENTAL LAW - MARYLAND RADIATION ACT - ENVIRONMENT ARTICLE; MARYLAND DEPARTMENT OF ENVIRONMENT - SANCTIONS - VAGUENESS - EVIDENCE - REMAND.

Facts: Neutron Products, Inc. ("Neutron" or "NPI"), appellant, challenged the administrative penalty assessed by the Maryland Department of the Environment ("MDE"), appellee, for violations of various State regulations pertaining to the control of ionizing radiation and licenses. In particular, following an administrative hearing, NPI was found to have committed approximately 3,600 violations of license conditions and regulations, for which MDE imposed a penalty totaling $40,700.

The Maryland Radiation Act, §§ 8-101 to 8-601 of the Environment Article ("Envir.") of the Maryland Code (1996 Repl. Vol., 2004 Supp.), and Title 26 of the Code of Maryland Regulations ("COMAR"), provide authority to MDE to assure compliance with radiation laws and regulations. The penalty was imposed pursuant to Envir. § 8-510(b), which permits a penalty of up to $1,000 for each day of violation, not to exceed a total of $50,000.

Neutron sought review of the agency's decision in the Circuit Court for Montgomery County. That court affirmed in part and remanded solely to verify that the penalty did not exceed the statutory maximum of $1,000 for a single violation.

Held: Affirmed. The Court observed that the assessment of a penalty is within the discretion of the administrative agency. Therefore, the agency has broad latitude in fashioning sanctions within legislatively designated limits. It rejected Neutron's contention that the penalty was improper because it "impose[d] an aggregate penalty without providing a per violation breakdown." The Court explained the MDE was not required to assign a particular dollar amount for each category of violation or individual violations, so long as it did not impose a fine of more than $1,000 per violation, and the total fine did not exceed the statutory cap of $50,000. However, the Court agreed with the circuit court that a remand was necessary to assure that MDE did not impose a fine of more than $1,000 for a single violation.

Neutron Products, Inc. v. Department of the Environment, No. 00074, September Term, 2004, filed January 27, 2006. Opinion by Hollander, J.

***

FAMILY LAW - DIVORCE - MONETARY AWARD - FAMILY LAW §8-205 - ALIMONY - F.L. - §11-106 - COUNSEL FEES - F.L. §8-214

Facts: After 16 years of marriage, the parties filed for divorce. At the time of separation, appellant husband earned approximately $100,000 as a federal government employee. Appellee wife, a former federal employee, was disabled and received approximately $36,000 per year in disability and workers' compensation benefits. No children were born of the marriage.

Following a trial, the Circuit Court for Montgomery County granted wife's counter complaint for absolute divorce, reserved jurisdiction as to alimony, and provided a monetary award, and other relief, including counsel fees.

Held: Affirmed. The trial court's decision to reserve wife's right to seek alimony in the future was not an abuse of discretion because of husband's continuing earning capacity, wife's disability, the uncertainty of her future pension and other benefits, and evidence that revealed more than a vague future expectation of need.

Monetary award was proper because the trial court neither erred nor abused its discretion in applying the statutory criteria for the monetary award and in ruling that commingling of marital and non-marital funds did not preclude tracing on the facts before it. The court's ruling that wife's late mother's funds, which had been placed into a joint account with the parties, were for the accommodation of the management of the mother's financial affairs and not a gift to husband was similarly proper.

The trial court adequately followed the statutory guidelines set forth in §8-214 and, thus, did not abuse its discretion in awarding wife counsel fees.

Richards v. Richards, No. 491, September Term, 2004, filed December, 22, 2005. Opinion by Sharer, J.

***

INSURANCE - PROPERTY INSURANCE - INSURABLE INTEREST DOCTRINE - SECTION 12-301 OF THE INSURANCE ARTICLE.

Facts: According to the appellant, Robert Berrett, his mother Charlotte granted him a vested, indefeasible remainder interest in certain real property, reserving a life estate to herself. The deed that purportedly granted that interest was delivered in 1973, but was not recorded. In 1999, Berrett obtained a homeowner's insurance policy on the property from the appellee, The Standard Fire Insurance Company.

In 2000, Berrett filed an action in the Circuit Court for Prince George's County seeking appointment of a guardian of the person and property of Charlotte. The appointed guardian of Charlotte's property proposed and eventually obtained court approval for the sale of the property at issue in this case. Berrett did not assert any ownership interest in the property during the guardianship proceedings.

After the court approved the sale, but before settlement, the property was substantially damaged by fire. Berrett made a claim on the insurance policy, but Standard denied payment because it believed the court-approved contract of sale had extinguished Berrett's insurable interest in the property before the fire occurred.

In 2003, in the Circuit Court for Baltimore City, Berrett filed suit against Standard for breach of contract. Standard filed a motion for summary judgment, arguing that Berrett had no insurable interest in the property and, alternatively, that collateral estoppel and judicial estoppel prevented him from arguing that he did. It was assumed for purposes of the motion that the 1973 deed was valid. The court granted summary judgment to Standard on the grounds of collateral estoppel and judicial estoppel.

Held: Reversed. Maryland Code (1995, 2003 Repl Vol.), section 12-301 of the Insurance Article sets forth the insurable interest doctrine as it pertains to property insurance: "[An insurable interest is] an actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance against loss, destruction, or pecuniary damage or impairment to the property." A remainderman has an insurable interest in property to the extent of his remainder interest, that is, the total value of the property minus the value of the preceding life estate.

Whether Berrett had an insurable interest on the day of the

fire depended upon whether he had an interest in the proceeds of the upcoming sale that, once consummated, would extinguish both the guardianship estate's life tenancy and his remainder interest.

Although an unrecorded deed is ineffective as against third parties, it is effective as a contract between the parties to the deed. Therefore, even after the property was sold to a third party, Berrett would have a chose in action against Charlotte's guardianship estate for the value of his remainder interest. Regardless of whether he would have succeeded in that action, it had value to him on the date of the fire. Berrett, therefore, had an insurable interest in the property.

Collateral estoppel did not bar litigation of Berrett's insurable interest because the nature of his interest in the property was not adjudicated and was not essential in the guardianship proceedings. Likewise, the doctrine of judicial estoppel, which prohibits a litigant from taking a position that is accepted by one court and advocating a completely contrary position in another court, did not apply because Berrett never took a position about his interest in the guardianship court.

Berrett v. Standard Fire Insurance Co., No. 9, September Term, 2005, filed December 23, 2005. Opinion by Eyler, Deborah S., J.

***

JUDGMENTS - SUMMARY JUDGMENT - MARYLAND RULE 2-501; *METROPOLITAN MORTGAGE FUND, INC. V. BASILIKO*, 288 MD. 25 (1980); WHERE TRIAL JUDGE RESERVES RULING ON A MOTION FOR SUMMARY JUDGMENT UNTIL AFTER CONCLUSION OF ALL OF THE EVIDENCE, SUCH RESERVATION IS TREATED ON APPEAL AS A DENIAL OF THE MOTION FOR SUMMARY JUDGMENT AND WILL NOT BE DISTURBED EXCEPT UNDER LIMITED CIRCUMSTANCES; APPELLATE COURT WILL ONLY REVERSE TRIAL COURT'S DENIAL OF A MOTION FOR SUMMARY JUDGMENT WHEN IT WAS PRESENTED ONLY WITH A PURE QUESTION OF LAW.

Facts: Appellee sued his former employer, Jerry Mathis, Prudential Mathis Realtors and Mathis Realty, Inc., appellants,

under Count I, Replevin, Trespass, and Conversion, for appellants' refusal to permit appellee to retrieve his furniture and files from the office; under Count II, Breach of Contract, Breach of Fiduciary Duty and Fraud, for appellants' failure to render a full accounting and remit commissions due to appellee; under Count III, Breach of Partnership Agreement and Fraud, for the alleged termination of the partnership agreement and reduction of ownership. Appellee, after having been employed by appellant as a real-estate agent, entered into an oral partnership agreement to expand the business by opening a new office. The oral agreement provided that appellee would manage the new office, pay fifty percent of the initial opening expenses, fifty percent of all subsequent operating expenses, and retain fifty percent of all the profits. After opening the new office, according to the terms of the agreement, appellee was informed by appellant that he would no longer be permitted to manage the new office, that the partnership agreement was being terminated, and his fifty percent ownership was being reduced. Appellee then notified appellant that he intended to transfer his licence to another broker. Appellant filed a motion for summary judgment. The trial court reserved ruling on that motion and proceeded to trial on the merits, wherein appellee prevailed.

Held: Affirmed. The trial court did not abuse its discretion by reserving its ruling on appellants' motion for summary judgment in favor of a full trial on the merits. Generally, a trial court is vested with the discretion to reserve ruling or forego ruling on a motion for summary judgment even where the technical requirements entitling a party to summary judgment have been met. Appellants' stipulation to the authenticity of a letter from appellants' attorney to appellee's attorney, did not violate appellants' due process rights. Documentary evidence, along with appellee's testimony was legally sufficient to sustain the jury's verdict. Evidence adduced at trial was also sufficient to sustain the jury's award of punitive damages. Evidence showed that appellant knowingly induced appellee to turn over commission checks to appellant, and promise of fifty percent ownership induced appellee to enter into partnership agreement.

Jerry J. Mathis et al. v. Aaron Hargrove, No. 2604, September Term, 2004, decided December 22, 2005. Opinion by Davis, J.

***

TORTS - NEGLIGENCE - MARYLAND CODE ANNO. (2002 REPL. VOL., 2005 SUPP.), INSURANCE ARTICLE, § 19-509; WHERE UNDISPUTED FACTS ESTABLISHED THAT SMALL, RUSTED PIECE OF METAL, APPARENTLY DISLODGED FROM A VEHICLE ONTO THE HIGHWAY, BECAME EMBEDDED IN TIRE OF MOTORCYCLE UPON WHICH APPELLANT WAS A PASSENGER CAUSING REAR WHEEL TO "LOCK UP," THROWING APPELLANT AND DRIVER FROM MOTORCYCLE, ISSUE FOR RESOLUTION UNDER UNIDENTIFIED MOTORISTS STATUTE, ON MOTION FOR SUMMARY JUDGMENT WAS WHETHER A FACT FINDER COULD CONCLUDE, EITHER DIRECTLY OR INFERENTIALLY, THAT RUSTED METAL DISLODGED FROM THE UNIDENTIFIED MOTOR VEHICLE, BECAUSE OF THE NEGLIGENT FAILURE OF THE OWNER OR OPERATOR TO PROPERLY MAINTAIN THE VEHICLE IN PROPER CONDITION; TRIAL COURT PROPERLY FOUND THAT THERE WAS NO EVIDENCE TO ESTABLISH THAT PIECE OF METAL DISLODGED FROM UNIDENTIFIED VEHICLE WAS A RESULT OF NEGLIGENCE.

Facts: Shafer, appellant, was a passenger on a motorcycle operated by Clarence Koontz, when a piece of metal became embedded in the motorcycle's rear tire. Upon the tire "locking up," appellant and operator were thrown from the motorcycle and suffered injuries. Appellant filed claims for uninsured motorist coverage with Interstate Automobile Insurance Company, Koontz' insurance carrier, and her carrier, Nationwide Insurance Company because she argued the accident and her injuries were the result of the negligence of an unidentified operator/owner after the piece of metal was discovered to consist of automotive sheet metal. Appellee insurance companies denied the claims. Appellant filed a complaint in Circuit Court for Washington County against appellee insurance companies seeking payment under uninsured motorist coverage of the two policies and partial summary judgment as to liability. Appellee insurance companies moved for summary judgment arguing appellant failed to present a *prima facie* case that the accident was result of negligence by an owner or operator of an unidentified vehicle. The court granted judgment in favor of appellee insurance companies and denied appellant's motion as to liability.

Held: An action for negligence, by alleging the negligent acts of an unidentified owner or operator of motor vehicle, will not lie where complainant failed to present evidence that would demonstrate to the fact finder a reasonable inference that injuries suffered were direct and proximate result of unidentified owner or operator's negligence. Thus, appellee insurance companies were entitled to judgment as a matter of law.

Dana Shafer v. Interstate Automobile Insurance Company et al., No. 279, September Term, 2005, decided December 23, 2005. Opinion by Davis, J.

***

TORTS - NEGLIGENCE - EVIDENCE - The doctrine of *res ipsa loquitur* is not available to prove negligence in a case that involves a complex issue requiring expert testimony, such as the typical medical malpractice case.

NEGLIGENCE - MEDICAL MALPRACTICE - EXPERT TESTIMONY ON STANDARD OF CARE - In a medical malpractice case, when a qualified expert testifies that the health care provider has breached the applicable standard of care, and bases that opinion on the expert's conclusion that the patient's injury is one that ordinarily would not have occurred in the absence of negligence, such testimony is sufficient to create a jury issue even though the expert cannot identify the specific negligent conduct. The expert is permitted to draw reasonable inferences from the facts in evidence, and may testify to opinions based upon such inferences.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Baltimore City. Judy Lynch, a 53 year old woman, was admitted to University Specialty Hospital ("Hospital") for wound care and rehabilitation after surgery at another facility. During her stay, she was administered multiple medications, including Oxycontin, a pain medication. On March 24, 2002, a nurse entered Lynch's room and found her blue with frothy secretions coming from her mouth. A "code blue" was called for Lynch, and she was transferred to the University of Maryland Medical Center, where she was pronounced dead. The cause of death was determined to be a toxic overdose of Oxycontin. The surviving family of Lynch sued the Hospital, alleging negligence.

The Hospital moved for summary judgment. In response to the motion for summary judgment, deposition testimony of expert witnesses was submitted on behalf of the Lynch family, expressing the opinion that Lynch's death should not have occurred in the absence of negligence on the part of the Hospital. The Hospital argued that the expert testimony was insufficient to make out a prima facie case of negligence. The motion judge granted the motion and entered summary judgment for the hospital. An appeal was noted.

Held: Judgment Vacated. Case remanded for further proceedings. Judge Meredith wrote:

> The appellants [Lynch family] presented expert testimony that Mrs. Lynch's death resulted from negligence on the part of the hospital staff. The expert testimony, which was based upon reasonable inferences drawn from the available evidence, was sufficient to establish that the hospital was not entitled to judgment in its favor as a

matter of law. The weight to be given to that testimony is for the jury.

Steven B. Tucker, Sr., et al. v. University Specialty Hospital, Inc., No. 1396 September Term, 2004, filed December 1, 2005. Opinion by Meredith, J.

***

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated January 18, 2005, the following attorney has been placed on inactive status and his name has been stricken from the register of attorneys in this Court:

JAMES EATON MALARO

*

By an Opinion and an Order of the Court of Appeals of Maryland dated January 20, 2006, the following attorney has been indefinitely suspended from the further practice of law in this State:

H. ALLEN WHITEHEAD

*

JUDICIAL APPOINTMENTS

On November 29, 2005, the Governor announced the appointment of JOHN P. MORRISSEY to the District Court of Maryland for Prince George's County. Judge Morrissey was sworn in on January 6, 2006 and fills one of the new judgeships established by the General Assembly.

*

On December 22, 2005, the Governor announced the appointment of ROBERT A. GREENBERG to the Circuit Court for Montgomery County. Judge Greenberg was sworn in on January 11, 2006 and fills the vacancy created by the retirement of the Hon. D. Warren Donohue.

*

On November 23, 2005, the Governor announced the appointment of GERALD V. PURNELL to the District Court of Maryland for Worcester County. Judge Purnell was sworn in on January 12, 2006 and fills the vacancy created by the elevation of the Hon. Richard Bloxom.

*

On December 16, 2005, the Governor announced the appointment of MICHAEL JOHN STAMM to the Circuit Court for St. Mary's County. Judge Stamm was sworn in on January 13, 2006 and fills the vacancy created by the retirement of the Hon. Marvin S. Kaminetz.

*

On December 15, 2005, the Governor announced the appointment of DANIELLE M. MOSLEY to the District Court of Maryland for Anne Arundel County. Judge Mosley was sworn in on January 17, 2006 and fills the vacancy created by the retirement of the Hon. Martha F. Rasin.

*

On December 15, 2005, the Governor announced the appointment of THOMAS J. PRYAL to the District Court of Maryland for Anne Arundel County. Judge Pryal was sworn in on January 17, 2006 and fills one of the new judgeships established by the General Assembly.

*

On December 15, 2005, the Governor announced the appointment of WILLIAM C. MULFORD, II to the Circuit Court for Anne Arundel County. Judge Mulford fills one of the new judgeships established by the General Assembly.

*