Amicus curiarum

VOLUME 22
ISSUE 5 MAY 2005

a publication of the office of the state reporter

Table of Contents

COURT OF APPEALS

COURT OF APPEALS

APPEALS - EXCEPTION TO FINAL JUDGMENT RULE - Md. Rules 2-602(b) and 8-602(e)

Facts: Seven minor plaintiffs from four separate families filed, through their parents, a fifteen-count complaint in the Circuit Court for Baltimore City against twenty-one defendants to recover for injuries they sustained from exposure to lead in gasoline or paint. The court separated the action into four separate trials with separate discovery schedules and trial dates, but the action remained a unitary one. The court reassigned Counts I through III to the preliminary portion of the complaint. A short time later, the court granted summary judgment and partial summary judgment in favor of two defendants (Lasting Paints, Inc. & American Cyanamid Company) as to six plaintiffs (Shatavia Smith intervened at a later date). In February 2002, the court ruled upon various defendants' motions to dismiss, leaving only eight counts pending against ten paint manufacturing defendants and five counts pending against one trade association. On November 15, 2002, the court granted summary judgment on the eight counts in favor of nine of the ten defendants, but only as to the Smith plaintiffs. On November 21, the court granted summary judgment as to the tenth defendant on those counts, and that judgment presumably went to all plaintiffs. All plaintiffs appealed. The Court of Special Appeals recognized that there was no final judgment in the case, since many of the counts were still unresolved as to many of the plaintiffs. Assuming that all claims had been resolved as to the Smith plaintiffs, however, the Court entered final judgment as to those claims pursuant to Md. Rule 8-602(e)(1)(C) and addressed the substantive issues presented in the appeal.

Held: Judgment vacated; case remanded to the Court of Special Appeals with instructions to dismiss appeal. The Court of Special Appeals abused its discretion in entering final judgment on the Smith claims pursuant to Md. Rule 8-602(e)(1)(C). The orders entered by the Circuit Court did not constitute a final judgment, and could only be appealable if the Circuit Court ordered the entry of a final judgment pursuant to Md. Rule 2-602(b). The Circuit Court, however, was never asked to do this and did not do so. Md. Rule 8-602(e)(1) permits the Court of Appeals or the Court of Special Appeals to enter a final judgment if it concludes that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602(b). Here, however, the Circuit Court could not have entered a final judgment as to the Smith plaintiffs

because to do so, it would have had to split a single claim against the trade association (against which five counts remained pending pursuant to a bankruptcy stay), which is not allowed. Furthermore, the orders granting summary judgment to Lasting Paints, Inc. and American Cyanamid Company were only as to two of the three Smith plaintiffs, and the order as to Lasting Paints was never docketed. Irrespective of the Smith claims, the appellate court's discretion to enter a final judgment under Rule 8-602 is narrower than the trial court's already limited discretion to enter a final judgment under Rule 2-602. The appellate court should be reluctant to act under Rule 8-602(e) when, as here, the trial court was never asked to act under Rule 2-602(b). If a party believes that an immediate appeal is warranted, it should ordinarily make a request first to the trial court, except in the most extraordinary circumstance, such as when the problem of an open claim is a more or less technical one that was overlooked when the appeal was noted and which, if spotted then, would likely have been corrected. By entering judgment on its own initiative, the Court of Special Appeals only increased the prospect of confusion, delay and hardship in the action and, ultimately, abused its discretion.

Reginald Smith, Jr., et. al. v. Lead Industries Association, Inc., et. al., No. 68, Sept. Term 2004, filed April 4, 2005, Opinion by Wilner, J.

***

ATTORNEYS – MISCONDUCT - INTENTIONAL MISAPPROPRIATION OF FUNDS - FAILURE TO PROMPTLY DELIVER CLIENT FUNDS - FAILURE TO PROVIDE COMPETENT LEGAL REPRESENTATION; FAILURE TO RESPOND TO BAR COUNSEL

Facts: The disciplinary action against James arose out of two separate complaints by clients. As to the first complaint, James failed to maintain his client's settlement funds in trust when he wrote several checks that caused the account to be overdrawn and had used his trust account for personal and business expenses. As to the second complaint, James failed to deposit his client's retainer and investigative money into his trust account and also

failed to adequately research and advise his client that the client did not have a viable cause of action. James also repeatedly failed to respond to lawful demands by Bar Counsel for information concerning the complaints.

Held: Disbarred. As to the clients' complaints, James violated MRPC 1.1 by failing to provide legal knowledge, skill, thoroughness and preparation in researching his client's cause of action and to properly maintain his client's settlement monies in his escrow account. James violated MRPC 1.3 and 1.4 requiring diligent representation and communication with clients when he pursued a cause of action with no legal basis, did not inform his client about the status of the case, and failed to respond to his client's attempts to contact him. He also commingled funds in violation of Maryland Rule 16-607 when he began using his escrow account for business and personal expenses, and Maryland Code, Section 10-306 of the Business Occupations and Professions Article (1989, 2000 Repl. Vol.) when he wrote checks for his own benefit that were drawn from funds held in trust. Such a misuse of James's escrow account also constituted a willful violation of Sections 10-304 and 10-306 of the Business Occupations and Professions Article. This same behavior as well as James's failure to deposit client retainer and investigative fees violated MRPC 1.15(d) and 8.4(d) as funds to delivered in whole or in part to a client or third person, and Maryland Rules 16-604 and 16-609, and Section 10-304 of the Business Occupations and Professions Article for failing to expeditiously deposit trust money into his attorney trust account. In addition, James violated MRPC Rule 8.4(c) for dishonestly taking trust monies and Rule 8.4(d) for engaging in conduct prejudicial to the administration of justice. By willfully and repeatedly failing to respond to communications from Bar Counsel, James also violated MRPC 8.1.

As the Court explained, disbarment ordinarily follows any unmitigated misappropriation of funds. The Court also emphasized that, when an attorney uses client funds for personal purposes and fails to place client funds in escrow, such conduct is an intentional misappropriation of funds that reflects adversely on his honesty and fitness to practice law. Because no compelling extenuating circumstances existed for an exception to be made in his case, the Court imposed the sanction of disbarment.

Attorney Grievance Commission v. Charles M. James, Misc. Docket, AG No. 1, Sept. Term 2004, filed March 16, 2005. Opinion by Battaglia, J.

***

CORPORATIONS - INVOLUNTARY DISSOLUTION - DEFINING DIRECTOR DEADLOCK

Facts: A dispute among the directors of Custom Holding, Incorporated (Custom), a closely held Maryland corporation, led to the filing of a petition for involuntary dissolution by Michael Renbaum, the majority shareholder (53.8%) of Custom's capital stock. The petition for involuntary dissolution was granted ultimately by the Circuit Court for Baltimore County based on a division among the directors over the retention of general counsel for Custom.

Custom is a holding company created in 1993 with the principal purpose of investing the proceeds from the sale of Custom Savings Bank. The approximately $40 million in proceeds from the sale of Custom Savings is invested in marketable securities. Michael and Barry Renbaum, brothers, were the sole shareholders of Custom Savings, the sole officers and employees of Custom (President and Vice-President, Secretary, and Treasurer, respectively) and the principal opposing parties in the petition for involuntary dissolution proceedings.

Custom had two classes of capital stock with identical rights to dividends and distributions per share, Class B for Barry Renbaum and Class M for Michael Renbaum. Each class of stock had the right to elect two directors for a total of four- two Class B Directors (which were Barry and his wife) and two Class M directors (Michael and his wife).

In late 2001, Barry and Michael could not agree over the annual dividend for 2001 (to be paid in January 2002), after paying annual dividends ranging from $2.5 million to $4 million every year since 1995. Barry refused to support any dividend amount and Michael desired at least a $3 million dividend. Despite the dispute over dividends, Barry and Michael were able to agree on a professional management agent for Custom's investments and worked together with that agent concerning Custom's asset allocation and investment strategy during the instant litigation.

Barry disagreed with the retention of Custom's corporate counsel, Shale Stiller, Esq., who was also Michael's personal attorney. Custom's by-laws expressly granted the board of directors the authority to hire or replace its general counsel. Barry, as Custom's Treasurer, sent Mr. Stiller a letter requesting that he step down and stating that Barry no longer would pay any billings received from Mr. Stiller's law firm.

On 3 June 2002, Michael filed a petition for involuntary dissolution of Custom under § 3-413 (a) (1) of the Corporations and

Associations Article of the Maryland Code, (1975, 1999 Repl. Vol.), stating that a sufficient director deadlock existed for involuntary dissolution because of the dispute over dividends and whether Barry possessed authority as Treasurer of Custom to act unilaterally regarding corporate counsel. Michael also requested that counsel be appointed for Custom for the purposes of the litigation because Custom's corporate counsel had a conflict of interest. The Circuit Court granted this *ex parte* motion and named Jeffrey Forman, Esq., as Custom's counsel. Barry moved to intervene and contested Mr. Forman's appointment, asserting Custom's right to choose its own counsel in the litigation. After a hearing, Barry's intervention was allowed and the court re-affirmed its choice of counsel for Custom because Barry and Michael could not agree on an appropriate counsel.

Prior to a hearing on the merits, Barry and Michael presented competing proposals at a special meeting of the board of directors on 21 November 2002, regarding a dividend. Barry and his wife, the Class B Directors, refused to approve Michael's proposed $3 million dividend because of an accompanying condition that would have granted the Class M Directors unilateral power to approve dividend distributions in the future. Michael and his wife refused to approve an unconditional $4 million dividend proposed by Barry.

At a bench trial on the merits on 25 and 27 March 2003, Barry stated that he had no objection to Mr. Stiller as corporate counsel for Custom. He also stated that he and his wife would approve an unconditional $4 million dividend proposal, like the one he submitted in November 2002. Faced with this situation, the Circuit Court held that "the facts convince me that the directors are not so divided respecting the management of corporate affairs that they cannot operate" and denied Michael's petition.

After the hearing, but before judgment was entered, Barry declined to sign an unconditional $4 million dividend proposed by Michael, refusing to attend a special meeting of the board of directors to accomplish that purpose or to sign a director consent form for the dividend. On 7 May 2003, the Circuit Court entered its judgment.

Michael, pursuant to Md. Rule 2-534, filed on 19 May 2003 in the Circuit Court a motion to alter or amend judgment. The motion asserted that the deadlock that existed between the directors persisted despite Barry's earlier in-court testimony that he would vote for an unconditional dividend distribution. At a motions hearing on 12 August 2003, the Circuit Court opened the original judgment and granted Michael's request to present additional evidence regarding facts occurring after the March 2003 hearings.

A new hearing on the merits was ordered for 23 September 2003.

Before that hearing, Barry and his wife submitted an executed director consent form agreeing unconditionally to a $4 million dividend. At the 23 September hearing, however, Michael alleged that the executed director consent form came "much too late to accomplish its desired purpose." Barry, contrary to his most recent earlier pronouncement, maintained that he continued to take "great issue" with the Mr. Stiller as general counsel for Custom and "if the court can construe that as a deadlock issue, we will concede that issue."

The Circuit Court, in an oral opinion and subsequent judgment entered on 4 November 2003, granted Michael's petition for involuntary dissolution. It stated that the impasse over appointment of a general counsel for Custom was a "material decision to be made in the operation" of Custom. With that impasse, the court stated, "you can assume that the issue with dividends would never come to a resolution. Therefore, I'm going to grant the motion for reconsideration and grant dissolution."

Barry appealed to the Court of Special Appeals, requesting relief from the alleged abuse of discretion by the Circuit Court in granting the motion to alter or amend judgment and involuntary dissolution, and the prejudicial error in appointing trial counsel on Custom's behalf. Forman filed a reply brief on Custom's behalf supporting Barry's position that involuntary dissolution was ordered wrongfully and that the motion to alter or amend judgment was improvidently granted. The Court of Special Appeals stayed the pending liquidation of Custom to consider this appeal.

In an unreported opinion, the intermediate appellate court affirmed the Circuit Court. It stated that Custom, as a holding company, was deadlocked regarding the issue of dividends, which was sufficient to order involuntary dissolution under § 3-413 (a) (1) of the Corporations and Associations Article. It considered the impasse over corporate counsel as a lesser issue impacting Custom's ability to function. The intermediate appellate court held that granting the motion to alter or amend judgment was not an abuse of the court's discretion and concluded that the appointment of trial counsel for Custom for the present litigation was not error because the board of directors could not agree on the selection of counsel.

Barry's petition for a writ of certiorari was granted and the liquidation of Custom was stayed by the Court of Appeals pending a decision in this case. Forman, once again, filed a reply brief on Custom's behalf essentially supporting Barry's positions, albeit for different reasons.

Held: Court of Special Appeals's judgment reversed in part and affirmed in part. Case remanded to the Circuit Court for Baltimore County to vacate the order for involuntary dissolution of Custom Holding, Incorporated. The Circuit Court's appointment of Forman as trial counsel for Custom affirmed.

In order for a Circuit Court to grant a petition for involuntary dissolution under § 3-413 (a) (1) of the Corporations and Associations Article of the Maryland Code, a division must exist among the directors, at the time the court rules, that rises to the level of deadlock. A deadlocked corporation is one which, because of the decision or indecision of the directors that cannot be remedied by the shareholders, the corporation cannot perform its corporate powers.

This deadlock standard maintains a proper balance among several factors essential to the statutory protection granted to corporations by the General Assembly and extended by the Court of Appeals. Corporations in Maryland are granted the potential of perpetual life. Maryland courts do not have equity jurisdiction to grant involuntary dissolution. The legislative history of § 3-413 of the Corporations and Associations Article reflects a general reluctance for the courts to arbitrate personal disputes regarding corporate management and a necessary separation between these personal disputes and court-ordered involuntary dissolution in the case of truly deadlocked corporations where the shareholders cannot resolve the dispute. In more trivial matters, dissension between corporate management is best resolved by the corporate officers, within the powers enumerated by its Articles of Incorporation or corporate by-laws, and the General Corporation Title regulating corporate management.

On the record of this case, the ordered involuntary dissolution was an abuse of discretion by the Circuit Court. There could not be deadlock over dividends because Barry and the Class B directors, prior to the merits hearing regarding the additional evidence, approved the dividend proposal without conditions–essentially capitulating to Michael regarding the alleged division over dividends. Thus, the Circuit Court's reasoning that the issue over dividends would never be resolved did not reflect a current division among the board of directors.

Moreover, a division among the directors in the approval of corporate counsel alone was insufficient to rise to the level of deadlock. The dispute over corporate counsel did not impact necessarily on Custom's principal corporate function of managing investment securities through a professional management company. Moreover, the appointment of corporate counsel, according to the

corporate by-laws, was a discretionary act vested in the board of directors, not the corporate Treasurer.

As a matter of civil procedure, the Circuit Court did not abuse its discretion in considering the motion to alter or amend judgment. Maryland Rule 2-534 permits a judge to retain almost its full measure of its discretion regarding a motion filed within ten days following the entry of judgment. Michael's timely motion brought to light additional evidence that allowed the judge the opportunity to re-consider the earlier judgment.

When Custom's board of directors could not agree upon trial counsel in the involuntary dissolution proceedings, the Circuit Court did not err in appointing counsel for Custom.

Renbaum v. Custom Holding, Incorporated, No. 78, September Term, 2004, filed 4 April 2005. Opinion by Harrell, J.

***

CRIMINAL LAW - ARREST SEARCH AND SEIZURE - WHEN EXECUTING A WARRANT, POLICE MAY TEMPORARILY DETAIN ENCOUNTERED INDIVIDUALS AND USE A SHOW OF FORCE SUFFICIENT TO TAKE "UNQUESTIONED COMMAND OF THE SITUATION"

Facts: On the strength of a 68-page verified application summarizing a four-year investigation of three individuals believed to be involved in a complex drug distribution operation, police in Caroline County obtained a warrant to search the house and surrounding area that comprised a known open-air drug market and to arrest the individuals. Prior to the execution of the warrant, the police were informed that the main target of the investigation was using counter-surveillance to monitor the police, that he associated with violent persons, and had threatened to shoot a police officer if the investigation continued.

When about 20-25 officers arrived at the house to execute the warrant, several individuals immediately fled. After the fleeing

suspects were apprehended and the remaining individuals were secured, the lead investigator began to briefly interview each of the detainees. Petitioner, Steven Terry Cotton, who was being held in handcuffs was given *Miranda* warnings and asked whether he possessed anything that might injure the investigator during a pat down. Cotton responded, "All I've got is a bag of weed, that's all I got." Petitioner was then searched, arrested, and later convicted for possession of marijuana.

At his suppression hearing, and on appeal, Cotton argued that his detention, which lasted about 15-20 minutes, constituted a *de facto* arrest for which there was no probable cause, and in the alternative, that his temporary detention was not justified because he was not a resident of the house at which he was found, nor had he been named in the search and seizure warrant. The trial court rejected that argument as did the Court of Special Appeals.

Held: Affirmed. The Court of Appeals held that both *Michigan* v. *Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L.Ed.2d 340 (1981), and *Maryland* v. *Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L.Ed.2d 276 (1990) permit the police conduct at issue in this case. The rule of *Michigan* v. *Summers* allows police officers to temporarily detain individuals during the execution of a warrant, for the purposes of 1) preventing flight, 2) officer safety, and 3) when applicable, so that those individuals can assist with the search. Although Summers was a resident of the house that was searched in his case, the reasoning behind that decision applies to non-resident occupants as well, so long as it is not immediately clear that the individual has no connection to the premises.

Similarly, the reasoning behind *Maryland* v. *Buie* allows for the "protective detention" of any individuals that may be encountered during the execution of a warrant.

Cotton v. State, No. 29, September Term, 2004, filed April 11, 2005. Opinion by Wilner, J.

***

CRIMINAL LAW - ILLEGAL SENTENCE - JURY FINE - COSTS

Facts: This case involves an illegal sentence where the judge's remarks, taken at face value, expressed a legally erroneous understanding of the judge's sentencing discretion in levying or setting a fine.

Following his conviction of one count of possession of marijuana, based on a guilty plea and agreed facts before the Circuit Court for St. Mary's County, Medley was sentenced by the trial judge, in part, as follows:

> [Y]ou have to pay a fine of a thousand dollars, plus $125 court costs. Fine and costs are due today. And the Court is going to see to it in these fine cases that they are paid, because after all, the jury has to be paid.

Prior to entering a guilty plea (and ultimately waiving his right to a trial by jury), Medley elected a jury trial.

Medley filed in the Circuit Court a motion to correct the illegal sentence, i.e., the $1,000 fine, which was denied. The Court of Special Appeals affirmed the judgment in an unreported opinion. Medley's timely petition for certiorari was granted.

Held: Reversed with directions to the Court of Special Appeals to remand to the Circuit Court for St. Mary's County for a new sentencing.

Ordinarily, a judge is presumed to know and apply properly the law. *Cheney v. State*, 375 Md. 168, 179, 825 A.2d 452, 459 (2003). When, however, a judge, on the record, misstates the law or acts in a manner inconsistent with the law that presumption is rebutted. *Perry v. State*, 381 Md. 138, 154 n. 8, 848 A.2d 631, 641 n. 8 (2004); *Cheney*, 375 Md. at 184, 825 A.2d at 461-62.

In this case, the sentencing judge's comment, "because after all, the jury has to be paid," misstated his statutory authority and placed the fine of $1,000.00 for jury costs outside his statutory authority. Md. Code (1957, 2003 Repl. Vol.), Article 38, §§ 1, 2, & 4(b) (court costs may be assessed and legal fines shall be collected by the respective County that levies the sentence but the court costs "shall not constitute a part of any fine."); Md. Code (1973, 2002 Repl. Vol.), §8-106 of the Courts and Judicial Proceedings Article (jury *per diem* costs are paid by the State, not by the County); Md. Rule 2-509 (defendant may be ordered to pay court costs only in a criminal case); Md. Rule 4-353 (St. Mary's

County does not fall within specifically enumerated counties that have the authority to levy jury costs to defendants in civil cases). As a result, the thousand dollar fine was an illegal sentence.

Medley v. State, No. 87, September Term 2004, filed 1 April 2004. Opinion by Harrell, J.

***

CRIMINAL LAW - PROSECUTORIAL MISCONDUCT - CLOSING ARGUMENTS - CREDIBILITY OF POLICE OFFICER - MOTIVE TO LIE - A PROSECUTOR MAY COMMENT ON A POLICE OFFICER WITNESS'S ABSENCE OF A MOTIVE TO LIE SO LONG AS THE COMMENTS DO NOT CONSTITUTE VOUCHING BY THE PROSECUTOR THAT THE WITNESS IS CREDIBLE
CRIMINAL LAW - PROSECUTORIAL MISCONDUCT - CLOSING ARGUMENTS - CREDIBILITY OF POLICE OFFICER - MOTIVE TO TESTIFY TRUTHFULLY - EVIDENCE NOT ADMITTED AT TRIAL - A PROSECUTOR MAY NOT MAKE COMMENTS DURING CLOSING ARGUMENTS THAT SUGGEST A POLICE OFFICER WILL FACE ADVERSE CONSEQUENCES TO HIS OR HER CAREER AS A POLICE OFFICER IF HE OR SHE WERE TO TESTIFY FALSELY

Facts: Jesse Spain, Jr. was convicted of several charges relating to his involvement in a drug transaction. At Spain's jury trial, the State's sole witness was Officer Cornelius Williams, who testified that, as he was walking down a Baltimore City street dressed in plain clothes, Spain approached him and offered heroin for sale. Officer Williams testified at trial as both a fact witness and an expert on the packaging, identification, and distribution of street level narcotics in Baltimore City.

The defense consisted of one witness, Spain's sister, who testified that she spoke with Spain earlier on the day of the drug transaction and he told her that he planned to attend a Super Bowl party later that evening at his grandfather's house, near the scene of the narcotics transaction. Spain's defense at trial hinged on the contentions that Officer Williams was mistaken as to the

encounter between himself and Officer Williams and that Spain was in no way involved in the narcotics transaction that followed.

During closing argument, the prosecutor made several comments suggesting that Officer Williams had no motive to lie in the present case, and that he in fact had a motive to testify truthfully because to testify falsely would expose him to the penalties of perjury and adverse consequences to his career as a police officer. The jury returned a guilty verdict on all counts. Spain timely appealed to the Court of Special Appeals, which affirmed in an unreported opinion. He then petitioned this Court for a writ of certiorari, which we granted, 383 Md. 256, 858 A.2d 1017 (2004).

Held: Affirmed. The Court held that, although it is not improper for a prosecutor to comment on the motives, or absence thereof, that a witness may have for testifying, a prosecutor may not make comments during closing argument that rely on facts not in evidence at trial or that suggest a police officer should be deemed more credible simply as a result of his or her status as a police officer. When the prosecutor argued that the police officer in this case lacked a motive to testify falsely, such comments were not improper because they were merely an allusion to a lack of evidence presented by the defendant that the officer possessed any motive to lie or devise a story implicating the defendant in criminal conduct. Before sending it to deliberate, the trial judge gave the jury instructions, based on Maryland Criminal Pattern Jury Instructions § 3:10 (MICPEL 2003), stating that, as part of the overall determination of credibility, the jury should consider whether a particular witness has a motive or incentive not to tell the truth. Because the jury could properly consider a witness's motive in determining credibility, the prosecutor was thus free to comment on Officer Williams's lack of a motive to testify falsely. The prosecutor's invitation for the jury to consider whether the officer had a motive to lie did not amount to improper vouching because the comments did not express any personal belief or assurance on the part of the prosecutor as to the credibility of the officer. Nor did such comments, in isolation, explicitly invoke the prestige or office of the government or police department.

The Court, however, found improper the prosecutor's comments during closing argument that implied that a police officer would not testify falsely because to do so would jeopardize his or her career as a police officer. The Court found the prosecutor's comments to be improper because they invited the jury to make inferences from facts not admitted in evidence at trial. The Court found that, even had evidence been admitted from which it could be

inferred that a police officer would face serious employment consequences as a result of testifying falsely, the prosecutor's comments constituted improper vouching because they also implied that the witness's status as a police officer entitled him to greater credibility in the jury's eyes than any other witness. The Court held that by invoking unspecified, but assumed, punitive consequences or sanctions that may result if a police officer testifies falsely, a prosecutor's arguments imply improperly that a police officer has a greater reason to testify truthfully than any other witness with a different type of job.

Although the Court found that some of the prosecutor's comments were improper, the Court was convinced, beyond a reasonable doubt, that the prejudice resulting from the comments did not in any way influence the verdict. When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused. The Court found that the improper comments were an isolated event that did not pervade the entire trial. The Court also found that any prejudice from the remarks was tempered by the judge's contemporaneous remarks to the jury and the jury instructions given by the judge before sending the jury to deliberate that argument of counsel was not evidence. Also, because Spain's defense was not predicated on attacking Officer Williams's veracity (only the accuracy of his memory), the erroneous argument was unlikely to have had a sufficiently prejudicial effect.

Spain v. State, No. 81, September Term, 2004, filed 7 April 2005. Opinion by Harrell, J.

***

CRIMINAL LAW - REQUEST TO DISCHARGE COUNSEL

Facts: The Respondent, Campbell was arrested and charged with child abuse and assault after his then thirteen month old daughter, Destiny, was rushed to the hospital with a fractured skull, second-degree burns, a cut nose and a bruised cheek. Subsequently, Campbell's case was set for trial but was interrupted after Campbell became disruptive during the course of the proceedings. The trial judge declared a mistrial after Campbell was determined to be competent to stand trial, but exhibited a history of malingering.

During the second trial, Campbell's attorney who had been trial counsel at the first trial, expressed concern about his client's relationship with him and at the close of the State's case-in-chief, Campbell addressed the court, making statements that he did not like his public defender and claimed that his attorney had made negative statements concerning the outcome of the case, including sentiments such as, "I don't like this man as my representative," "you all wouldn't let me fire him," and "[my attorney] told me he ain't going to represent me." The trial judge responded to Campbell's statements, denied the request and then proceeded with jury instructions and closing arguments. The jury found Campbell guilty of the crimes charged to which he was later sentenced to fifteen years imprisonment for child abuse and a consecutive twenty-five years for first-degree assault. He appealed to the Court of Special Appeals, which reversed the convictions concluding that the trial judge should have determined the reason for Campbell's requested discharge of counsel.

Held: The Court of Appeals reversed the Court of Special Appeals and held that Campbell's expressed dissatisfaction with his attorney during trial qualified as a request to discharge counsel because his reasons for wanting to dismiss his counsel were apparent. Under the circumstances of the case, however, Campbell's right to discharge counsel, to permit either substitution of counsel or self-representation, was curtailed once meaningful trial proceedings had commenced; and the trial judge in his discretion was not required to make any further inquiry and properly denied the request to discharge counsel.

State of Maryland v. Bernard Campbell a.k.a. Sean Kelly, No. 63, September Term, 2004, filed March 15, 2005. Opinion by Battaglia, J.

***

ESTATE ADMINISTRATION - REDISTRIBUTION AGREEMENTS - TESTATE SUCCESSION

Facts: Walter L. Brewer, Sr. founded a plumbing business, which he incorporated under the name of Walter L. Brewer, Inc. After his death in 1986, the corporate stock was left to his widow, May, but the business, in its corporate form, was carried on by three of his five children – Walter, Jr., Brent and Barry. May died testate in April, 1997, and Walter, Jr. was appointed personal representative of her Estate. May's Will devised the capital stock in the plumbing business and several unimproved lots that were used in the plumbing business to Walter, Jr., Brent and Barry. The residue of the Estate was left to all of her children. In October, 1999, the five children entered into an Agreement of Distribution which provided for a distribution of the Estate that was inconsistent with the Will. Walter, Jr., filed a sixth and final administration account showing a distribution pursuant to the Agreement. On January 2, 2001, the Orphans' Court approved the final administration account without reviewing the Distribution Agreement. On October 24, 2002 – more than twenty months after the sixth and final administration account was approved and the Estate was closed, and eight months after the two deeds implementing the Agreement were recorded – May's son, Scott, filed, in the Orphans' Court, a petition to reopen the Estate. The Orphans' Court denied Scott's petition and the Court of Special Appeals, in an unreported opinion, affirmed the judgment. *Certiorari* was granted to consider whether the Court of Special Appeals erred in finding that "notice, disclosure or judicial approval is not required before a distribution agreement could supersede a properly probated will."

Held: Affirmed. Redistribution Agreements are Permissible and, so long as they comply with the requirements of basic contract law, neither the personal representative nor the court has any authority to disapprove or veto them, but if they are to be implemented as part of the Orphans' Court proceeding, through a deed from the personal representative pursuant to an approved administration account, they must be attached to that account or otherwise made part of the Orphans' Court record.

Scott C. Brewer v. Walter L. Brewer, Jr., Personal Representative of the Estate of May C. Brewer, No. 67, September 2004, filed April 8, 2005. Opinion by Wilner, J.

***

EXECUTORS AND ADMINISTRATORS — ACTIONS — COSTS — UNDER MD. CODE (1974, 2001 REPL. VOL., 2004 CUM. SUPP.), § 7-603 OF THE ESTATES AND TRUSTS ARTICLE, A PERSONAL REPRESENTATIVE IS ENTITLED TO RECEIVE NECESSARY EXPENSES AND DISBURSEMENTS FROM THE ESTATE WHEN THE PERSONAL REPRESENTATIVE DEFENDS OR PROSECUTES A PROCEEDING IN GOOD FAITH AND WITH JUST CAUSE.

EXECUTORS AND ADMINISTRATORS — ACTIONS — COSTS — SECTION 7-603 DOES NOT CONTAIN AN *INDEPENDENT OR SEPARATE REQUIREMENT* THAT THE PERSONAL REPRESENTATIVE'S DEFENSE OR PROSECUTION OF A PROCEEDING BENEFITS THE ESTATE.

EXECUTORS AND ADMINISTRATORS — ACTIONS — COSTS — THE EXISTENCE OF GOOD FAITH AND JUST CAUSE AS REQUIRED BY § 7-603 IS A QUESTION OF FACT TO BE DETERMINED BY THE ORPHANS' COURT BASED UPON ALL OF THE EVIDENCE. WHETHER A PERSONAL REPRESENTATIVE ACTED TO BENEFIT THE ESTATE IS A FACTOR TO BE CONSIDERED IN THE OBJECTIVE INQUIRY INTO WHETHER GOOD FAITH AND JUST CAUSE EXISTS.

EXECUTORS AND ADMINISTRATORS — ACTIONS — COSTS — A PERSONAL REPRESENTATIVE ACTED TO BENEFIT THE ESTATE WHEN HE SOUGHT TO EFFECTUATE THE TESTATOR'S INTENT BY DEFENDING AGAINST REMOVAL.

Facts: Appellants Brian Goldman, personal representative of the estate of Sigmund Stanley Hartz, and Piper Rudnick LLP, counsel to Goldman, appealed the Orphans' Court for Frederick County's denial of Piper Rudnick's petition for payment of its counsel fees from Hartz's estate.

Hartz died on April 22, 1996. Hartz's will named Brian Goldman personal representative of his estate. In 1999, the beneficiaries of Hartz's estate, appellees Carol Hartz, Barbara Hartz Habermann, and Benjamin Hartz, excepted to Goldman's seventh administration account and petition to close the estate. Appellees sought to remove Goldman and surcharge him and/or his law firm.

The Orphans' Court declined to surcharge Goldman, but removed him as personal representative, disapproved his administration account, and denied his petition to close the estate. Goldman appealed to the Circuit Court for Frederick County, and the beneficiaries cross-appealed. The Circuit Court affirmed the Orphans' Court's removal of Goldman and refusal to surcharge him. Goldman and the beneficiaries appealed and cross-appealed, respectively, to the Court of Special Appeals, which reversed Goldman's removal and affirmed the refusal to surcharge.

Piper Rudnick represented Goldman in all the above litigation. Pursuant to Md. Code (1974, 2001 Repl. Vol., 2004 Cum. Supp.), § 7-

602, Piper Rudnick petitioned the Orphans' Court for its fees incurred primarily in the Circuit Court appeal. Goldman signed the petition asserting under § 7-603 that he was entitled to be reimbursed from the estate for Piper Rudnick's fees.

The Orphans' Court denied the petition. Piper Rudnick and Goldman appealed to the Court of Special Appeals. The Court of Special Appeals held that § 7-603 required that the Orphans' Court determine whether the litigation was "for the protection or benefit of the estate." Finding that the Orphans' Court did not make this determination, the Court of Special Appeals vacated the order and remanded. On remand, the Orphans' Court again denied the petition, holding that the expenses were not "for the protection or benefit of the estate." Piper Rudnick and Goldman appealed to the Court of Special Appeals. Before the Court of Special Appeals considered the case, the Court of Appeals granted certiorari on its own initiative.

Held: Reversed and remanded. The Court held based on the plain language of § 7-603 that the statute contains no independent or separate requirement that the personal representative benefit the estate. The Court found support in the legislative history of the statute, the Court's case law, and other state courts' interpretations of similar statutory language.

The Court held that under § 7-603, a personal representative is entitled to receive necessary expenses and disbursements from the estate when the personal representative defends or prosecutes a proceeding in good faith and with just cause. The existence of good faith and just cause as required by § 7-603 is a question of fact to be determined by the orphans' court based upon all of the evidence. Whether a personal representative acted to benefit the estate is a factor to be considered in the objective inquiry into whether good faith and just cause exists. A personal representative who seeks to effectuate the testator's intent by defending against removal acts to benefit the estate.

Applying these rules, the Court concluded that Goldman had acted in good faith and with just cause and had met the requirements of § 7-603.

Piper Rudnick LLP, et al. v. Carol Hartz, et al., No. 84, September Term, 2004, filed April 8, 2005. Opinion by Raker, J.

***

EXTRAORDINARY WRITS – WRITS OF PROHIBITION AND MANDAMUS - STATE'S RIGHT TO APPEAL IN CRIMINAL CASES

Facts: On June 7, 2002, a grand jury in Anne Arundel County indicted Michael Darryl Henry for first degree murder for his actions in the death of a fellow inmate at the Maryland House of Correction Annex in Anne Arundel County. On February 3, 2003, the State filed a Notice of Intention to Seek the Penalty of Death. In the Notice, the State set forth two aggravating factors: that the defendant committed the murder while confined in a correctional facility; and that the defendant employed or engaged another to commit the murder and the murder was committed under an agreement for remuneration.

On May 1, 2003, Henry filed a motion to strike the State's Notice and argued that the State constitutionally could not seek to impose the death penalty unless all of the elements of a crime required for the defendant to be eligible for death are considered by the grand jury and contained in the indictment. Henry maintained that he would not be eligible for the death penalty because the indictment failed to allege that he was a first-degree principal. On June 25, 2004, Judge Joseph P. Manck denied Henry's motion.

At approximately the same time, Judge Pamela J. North of the Circuit Court for Anne Arundel County heard similar arguments in another capital proceeding. In that case, the State, on May 4, 2002, had filed a Notice of Intention to Seek the Penalty of Death enumerating two aggravating circumstances. As in the case against Henry, the indictment failed to allege Abend's status as a first-degree principal.

Abend filed a motion to strike the State's Notice arguing that the indictment was insufficient to support the Notice because it did not allege that he was a principal in the first-degree. On September 2, 2004, Judge North granted Abend's motion and permitted the State to either withdraw its Notice and pursue life imprisonment or to re-indict Abend and allege that he was a first-degree principal, if the State wanted to continue to seek the death penalty. The State chose to re-indict Abend and did so on September 3, 2004.

On September 28, 2004, Judge Manck reconsidered his earlier denial of Henry's motion and granted Henry's motion to strike the State's Notice of Intention to Seek the Penalty of Death. Judge Manck granted a postponement to permit the State time to obtain a new indictment and file a new notice within the required 30-day period prior to trial. On September 29, 2004, rather than obtain

a new indictment, the State filed a Petition for Writ of Prohibition, Mandamus, or Other Appropriate Extraordinary Relief with this Court requesting that we direct Judge Manck to vacate his order striking the notice.

The State and Henry filed briefs or memoranda in the Court of Appeals to address whether the Court has the authority to grant a writ of prohibition, mandamus or to grant other appropriate extraordinary relief under the circumstances, and whether a judge has any discretion to strike a notice of intention to seek death penalty.

Held: An extraordinary writ in aid of appellate jurisdiction may not issue where no independent appellate jurisdiction would otherwise exist. The State may not receive an extraordinary writ issued on its behalf where it would not have the right to appeal the issue under Md. Code (1973, 2002 Repl. Vol.), § 12-302 (c) of the Courts and Judicial Proceedings Article.

State of Maryland v. Manck, Misc. No. 1, Sept. Term 2004, filed March 15, 2005; Opinion by Battaglia, J.

***

FULL FAITH AND CREDIT – ARBITRATION AGREEMENTS – COLLATERAL ESTOPPEL

Facts: A number of asbestos manufacturer defendants in multiple lawsuits pending in several States entered into an agreement that created a non-profit entity known as the Center for Claims Resolution (CCR), to act as a claims agent with respect to all asbestos-related claims made against the participating members. Edna O'Rourke, representing the Estate of Franklin Adams, entered into a Settlement Agreement with CCR which contained an arbitration clause. CCR was to pay three installments. At the time of the first installment, one CCR member failed to pay its apportioned share, resulting in a partial paid installment. O'Rourke's counsel stopped payment and requested that O'Rourke retain her remedies

until settlement was paid in full. CCR responded in a letter that O'Rourke could "pursue a remedy in contract against the CCR members for any deficiency . . . by lawsuit or otherwise." When CCR failed to reissue the payment, O'Rourke filed suit in the Circuit Court for Baltimore City against CCR and its 12 then-remaining members, seeking a declaratory judgment that CCR was jointly and severally liable for all payments due under the Settlement Agreement. CCR responded with a motion to dismiss and compel arbitration. O'Rourke contended that CCR's letter expressly gave plaintiffs a judicial remedy for breach of contract and relied on a Virginia case (*Amchem Products v. Newport News Circuit Court Asbsestos Cases*) which hinged on a similar letter from CCR, and which held that the dispute was not subject to arbitration. The Circuit Court for Baltimore City granted the motion to compel arbitration, but denied the motion to dismiss. The Court of Special Appeals held that as Virginia would not give preclusive effect to its *Amchem* decision and prevent the defendants here from litigating arbitrability in a Virginia court, preclusive effect should not be given to the judgment in a Maryland court. *Certiorari* was granted.

Held: In applying full faith and credit to the Virginia judgment, a Maryland court must treat the judgment precisely the same as it would be treated in a Virginia court, and that requires that the Court apply the preclusion rules that would be applied in Virginia. As the parties agree that Virginia continues to require mutuality as part of its collateral estoppel law and would therefore give preclusive effect to its *Amchem* judgment in a second action by different plaintiffs, and clearly would not, and could not, give preclusive effect to it against defendants who were not parties, or in privity with parties, in the Virginia action, the Circuit Court and the Court of Special Appeals were correct in not giving preclusive effect to it in this action.

Edna O'Rourke, Personal Representative for the Estate of Franklin Adams, et al. v. Amchem Products, Inc., et al., No. 130, Sept. Term 2003. Opinion by Wilner, J.

***

LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS (LEOBR) - EXCLUSION FROM PROTECTION OF PROBATIONARY POLICE OFFICERS - ALTHOUGH PERMANENTLY CERTIFIED BY THE MARYLAND POLICE TRAINING COMMISSION, A POLICE OFFICER ON PROBATIONARY STATUS WITH HIS OR HER POLICE AGENCY EMPLOYER UPON INITIAL EMPLOYMENT BY THAT DEPARTMENT IS DENIED, AS A RESULT OF THAT LATTER PROBATIONARY STATUS, THE PROTECTIONS OF THE LEOBR

Facts: In December 1997, Andrew A. Mohan graduated from the Prince George's County Police Municipal Academy and was hired as a police officer by the Town of Edmonston Police Department. Before assuming duties with that department, Mohan was issued a provisional certification card by the Maryland Police Training Commission ("MPTC"). Mohan remained in this provisional status while an officer with the Town of Edmonston until September 1998, when he departed to join the Town of Cheverly Police Department. The MPTC issued Mohan a permanent certification card at this juncture.

On 7 January 2002, Mohan was hired by the Maryland Department of State Police ("State Police"), and received a permanent certification card from the MPTC for this new employment. Two days later, he signed an "Agreement" with the State Police outlining the terms of his employment, which included recognition of a statutorily-imposed 24 month probationary period. Md. Code (2003), § 2-403 of the Public Safety Article. The probationary period, according to the Agreement, would be in effect during Mohan's further training at the Maryland State Police Academy and would continue after his assumption of regular duties with the State Police.

During this probationary period, Mohan was served on 29 July 2003 with documents charging him with violating various rules, policies, and procedures of the State Police. The documents informed Mohan that, as a result of the alleged infractions, he would be suspended summarily for a total of 11 days. Mohan requested that he be given a hearing on the charges pursuant to the rights outlined in the Law Enforcement Officers' Bill of Rights ("LEOBR"), Md. Code (2003), §§ 3-101 - 3-113 of the Public Safety Article. The LEOBR is a comprehensive statutory scheme intended to provide certain procedural protections to law enforcement officers facing disciplinary or punitive sanctions. The LEOBR, however, excludes from its definition of protected "law enforcement officer" "an officer who is in probationary status on initial entry into the law enforcement agency . . . ." *Id.* § 3-101(e)(2)(iv). The State Police informed Mohan that he was not entitled to the LEOBR's protections because, at the time of the alleged infractions, he was still a probationary employee of the State Police.

On 13 August 2003, Mohan filed in the Circuit Court for Prince George's County a complaint for an ex parte injunction and issuance of a show cause order against Colonel Edward T. Norris, then-Secretary of the Maryland State Police, and the Department. A show cause order was issued and an expedited hearing held. On the undisputed facts, the trial judge ruled, as a matter of law, that Mohan was a probationary employee, as defined by the State Police Act ("SPA"), Md. Code (2003), § 2-403 of the Public Safety Article, and was therefore not entitled to the protections of the LEOBR. The Court of Special Appeals affirmed the trial court's judgment. *Mohan v. Norris*, 158 Md. App. 45, 854 A.2d 259 (2004). Mohan petitioned this Court for a writ of certiorari, which we granted, 383 Md. 569, 861 A.2d 60 (2004).

Held: Affirmed. The Court of Appeals held that, because Mohan was a probationary employee under the SPA, he was therefore a probationary employee for purposes of the LEOBR. Mohan had argued that because he fulfilled his probationary period under the Maryland Police Training Commission Act ("MPTCA"), Md. Code (2003), §§ 3-201 - 3-218 of the Public Safety Article, and therefore held a permanent certification from the MPTC, he was precluded from ever again being placed in a probationary status for purposes of the LEOBR.

Mohan claimed that *Moore v. Town of Fairmount Heights*, 285 Md. 578, 403 A.2d 1252 (1979) supported his position that once an officer receives a "permanent appointment" from the MPTC, he or she no longer is "in a probationary status" for purposes of the LEOBR. Mohan argued that *Moore* settled, once and for all, that "probationary status," as used in the LEOBR, referred solely to the maximum one year "probationary period" provided for in the MPTCA.

The facts of *Moore* involved a police officer, Moore, who was first hired by the Town of Fairmount Heights in 1970, then discharged in 1974. Although Moore was reinstated by the Town in 1976, he subsequently was discharged from his employment once again when he withdrew from the police academy after he was accused of cheating on an examination at the academy. Moore then brought an action in the circuit court to compel the police agency to afford him a hearing pursuant to the LEOBR. The Court of Appeals held that Moore was not entitled to the protections of the LEOBR because he was still a probationary officer. Although the LEOBR did not define "probationary status," the Court in *Moore* looked to the MPTCA, which defined "probationary period" as "a period not exceeding 1 year to enable the individual seeking permanent appointment to take a training course . . . ." Md. Code (2003), § 3-215(c) of the Public Safety Article. The Court in *Moore* held that, because he had not completed the training course required for

permanent certification under the MPTCA, Moore was precluded from attaining a non-probationary status under the MPTCA and thus was ineligible for the protections of the LEOBR.

Mohan argued that the Court's reliance in *Moore* on the MPTCA definition precluded the application of any other definition of "probationary status" in his case. The Court of Appeals rejected this argument, finding that *Moore* did not hold that the one year MPTCA definition of probation was intended as the sole or exclusive definition for purposes of the LEOBR. The Court also concluded that *Moore* did not preclude a police agency from denying the protections of the LEOBR to those officers who had been placed in a probationary status by that employer.

The Court in *Moore* also held that, for purposes of the LEOBR, Moore's "initial entry" into the police agency was not his initial hire in 1970, but rather when he was reinstated into the police agency in 1976. The Court reasoned that, although it was unusual for an individual to be on probation for eight years, it was bound by the language in the MPTCA that clearly indicated a person could become an unconditional police officer only by completing the required training course. Because the LEOBR excludes only those probationary officers "on initial entry into the law enforcement agency," any permanently certified officer who was transferred or promoted within a particular police agency would be precluded from again being placed in a probationary status.

Mohan argued that this holding in *Moore* supported his position that, because he was permanently certified by the MPTC, he was precluded from being placed in a probationary status when he was hired by the State Police. To the contrary, the Court held that, although a permanently certified police officer may not be placed again in a probationary status upon a transfer or promotion within the same police agency, nowhere did *Moore* indicate that a permanently certified police officer, such as Mohan, may not be placed by his employer in a probationary status as a result of being newly hired by a different or subsequent police agency.

Mohan also argued that because the MPTCA contained language stating that the MPTCA preempted all other statutes that conflicted with its provisions, any attempt to apply the SPA-imposed two year probationary period to the LEOBR would conflict with the MPTCA. The Court rejected this argument, finding that the probationary periods in the SPA and MPTCA did not conflict with each other. The MPTCA-imposed probationary period is not necessarily fixed in duration and fulfills the purpose of providing a period during which a person may execute law enforcement functions while he or she receives the mandated training necessary to receive a permanent

certification from the MPTC. Md. Code (2003), § 3-215(c) of the Public Safety Article. The SPA-imposed probationary period, on the other hand, is imposed automatically by statute for two years without regard to the prior experience, training, or background of the new hire. Md. Code (2003), § 2-403 of the Public Safety Article. The SPA probationary period does not fulfill solely a further training requirement, but rather gives effect to the authority and oversight that the SPA grants the Secretary over the State Police. *Id.* §§ 2-204, 2-205.

The Court also found that the legislative history of the three implicated statutes supported the position that the LEOBR excludes those police officers that are placed in a probationary status by their employers. The Court found that the Legislature was aware of the SPA's two year probationary period, imposed since 1945, when it amended the LEOBR in 1975 to exclude probationary officers from its coverage. The Court noted that, in amending the LEOBR in 1975 to exclude probationary officers from its coverage, the Legislature employed the exact language used by the SPA, "in a probationary status," to describe those individuals not subject to the protections of the LEOBR.

The Court also gave weight to the MPTC's interpretation of the probationary language found in the MPTCA, expressed through regulations promulgated pursuant to the MPTCA. The MPTC regulations interpreting the probationary period in the MPTCA, COMAR 12.04.01.01(13)(b), state:

> (b) "Probationary period" does not relate to or restrict a probationary period that may be imposed by the hiring agency.

This language appears to be a clear statement that the agency responsible for construing the MPTCA does not construe its provisions to conflict with, or supercede, probationary provisions of greater duration, such as that in the SPA, imposed by a hiring agency.

Although the LEOBR is a remedial statute that should be liberally construed to effectuate its purpose, a liberal interpretation of the LEOBR was unnecessary in this case because the LEOBR expressly excludes from its coverage police officers, such as Mohan, who are in a probationary status. The Court rejected Mohan's argument that allowing individual police agencies to impose their own probationary periods with regard to the LEOBR would be inconsistent with the purpose of the LEOBR because it would lead to a lack of uniformity in the application of the LEOBR throughout the many law enforcement agencies in the State. The Court found instead that the LEOBR's exclusion of probationary

police officers reflected a legislative decision to provide each individual police agency with the authority to prescribe its own probationary period during which that particular agency has the autonomy to impose disciplinary sanctions, including dismissal, without implicating the protections of the LEOBR.

Mohan v. Norris, No. 88, September Term, 2004, filed 4 April 2005. Opinion by Harrell, J.

***

WORKERS' COMPENSATION LAW - SELF-INSURANCE GROUPS - SELF-INSURANCE GROUPS QUALIFY AS "INSURERS," FOR PURPOSES THEIR RIGHT TO MAKE CLAIMS AGAINST THE PROPERTY AND CASUALTY GUARANTY CORPORATION

Facts: Maryland Code, § 9-402(a) of the Labor and Employment Article requires Maryland employers to secure workers' compensation benefits for their employees and provides several methods by which they may do so. One of these methods, available to companies in designated businesses, is to join together with like companies and create a workers' compensation self-insurance group. In 1993, several companies associated with the Maryland Motor Truck Association created the Maryland Motor Truck Association Workers' Compensation Self-Insurance Group (MMTA Group). The purpose of the MMTA Group, as reflected in its governing documents, is "to provide economical Workers' Compensation and Employers' Liability Insurance coverage" for its members.

The MMTA Group had retained enough funds to pay up to $150,000 per claim and obtained excess insurance from the Reliance National Indemnity Company (Reliance), to cover any additional amounts. Between February, 1999 and June, 2000, four claims in excess of $150,000 were made, however, Reliance was unable to cover those excess claims due to insolvency. The MMTA Group then submitted the claims to the Property and Casualty Guaranty Corporation (PCIGC), the corporate guarantor created by the Maryland Legislature to help avoid financial losses by Maryland residents whose insurers become

insolvent. The PCIGC rejected the claims on the theory that the MMTA Group was an "insurer," defined in Maryland Code, § 1-101(v) of the Insurance Article, as "each person engaged as indemnitor, surety, or contractor in the business of entering into insurance contracts," and was therefore prohibited from making "covered claims" against the PCIGC under INS § 9-301(d)(2)(i).

The MMTA Group then filed a declaratory judgment and breach of contract action in the Baltimore County Circuit Court. Ruling on cross-motions for summary judgment, the trial court held that because the MMTA Group performed the precise functions of an insurer it could not make a claim against the PCIGC.

Held: Affirmed. The Court of Appeals held that the MMTA Group fell within the statutory definition of "insurer," because of its stated purpose and because it performed the functions of risk transference and risk distribution by means of collecting premiums from its members: all core attributes of insurers.

Maryland Motor Truck Association Workers' Compensation Self-Insurance Group v. Property and Casualty Insurance Guaranty Corp., No. 95, September Term, 2004, filed April 6, 2005. Opinion by Wilner, J.

***

COURT OF SPECIAL APPEALS

CIVIL PROCEDURE - VENUE - TRANSFER OF VENUE UNDER MARYLAND RULE 2-327(c) TO COUNTY WHERE PLAINTIFF RESIDES AND ACCIDENT OCCURRED NOT AN ABUSE OF DISCRETION WHERE TRANSFERRING COURT HAS NO RELATION TO THE ACTION.

Facts: Appellant, Patrick Stidham, brought a negligence action in the Circuit Court for Prince George's County against Rachel and David Morris, for damages from an automobile accident that occurred on a local road in Baltimore County. Stidham is a resident of Baltimore County and the Morrises are residents of Felton, Pennsylvania. The Morrises moved to transfer venue to the Circuit Court for Baltimore County under Maryland Rule 2-327(c), which the court granted.

Held: Affirmed. Where the plaintiff lives in the transferee county and the automobile accident occurred in that county, the circuit court did not abuse its discretion by ordering the transfer, where the transferring court's county had no relation to the action. Although ordinarily proper regard for the plaintiff's choice of forum should be given, less deference should be accorded that choice when the plaintiff is not a resident of the forum he chooses, and such deference is further mitigated if a plaintiff's choice of forum has no meaningful ties to the controversy and no particular interest in the parties or subject matter.

Stidham v. Morris, No. 1577, September Term, 2004, filed April 1, 2005. Opinion by Krauser, J.

***

CRIMINAL LAW - ARREST SEARCH AND SEIZURE - TRAFFIC STOP - "WHREN STOP" - BICYCLIST - TRANSPORTATION ARTICLE, §§ 21-1202; 21-308.

Facts: Appellant moved to suppress narcotics recovered from him. The following facts were adduced at the suppression hearing.

On October 2, 2001, Baltimore City Police Officers Maxwell Anderson and Chris Tims were on patrol in the area of Federal and Wolfe streets, an area known for drug-dealing. While in their vehicle, the officers noticed appellant riding his bicycle. Earlier that day, the officers had seen appellant in that same area, standing on the street corner with other individuals.

When appellant saw the officers, he sped up on his bicycle while glancing over his shoulder. Believing appellant's behavior to be suspicious, the officers followed him. Appellant turned from one street to the next, then proceeded to ride his bicycle northbound on Wolfe Street, a one-way street in the southbound direction. On Wolfe Street, appellant cut between two parked cars and made a U-turn on the sidewalk.

While appellant was making a U-turn, the officers saw him lose his balance when he used one hand to remove from his pocket a clear plastic bag. The officers, who were a few feet away, believed the baggie discarded by appellant contained suspected narcotics. At that point, Tims ordered appellant to stop. Once the officers confirmed that the bag contained suspected drugs, appellant was arrested. In a subsequent search of appellant, another baggie of suspected narcotics was recovered. The contents were later tested and found to be heroin.

At the hearing, appellant denied that he removed the drugs from his pocket as the officers followed him. He also disputed that the officers told him to stop after they saw him remove the drugs from his pocket.

The trial court assumed that, as appellant contended, the officers told appellant to stop before they saw him discard the drugs. Nevertheless, the trial court ruled that the officers made a lawful *Terry* stop, which then ripened into a detention based on probable cause, because the officers saw appellant discard the suspected drugs. Therefore, the court denied the suppression motion.

Held: Affirmed. Relying on *Illinois v. Wardlow,* 528 U.S. 119, 124-25 (2000), the Court concluded that the police made a lawful investigatory stop because "a person's flight and nervousness, along with his presence in a high crime area, are factors that are relevant to the issue of reasonable, articulable suspicion."

Alternatively, the Court rejected appellant's request to limit an officer's right to make a traffic stop to the motor vehicle context. Citing § 21-1202 of the Transportation Article ("Tr.") of the Maryland Code (1974, 2002 Repl. Vol.), the Court recognized that bicyclists are subject to many of the same laws and duties as are the drivers of motor vehicles. Relying on *Whren v. United States,* 517 U.S. 806, 810 (1996), the Court determined that the police made a lawful traffic stop of appellant, because the officers saw him ride his bicycle the wrong way on Wolfe Street, in violation of Tr. § 21-308(a)(2). The Court noted that police are permitted to stop a bicyclist or a motorist when they have probable cause to believe that a traffic violation has occurred; the actual motivation of the officers in making the traffic stop was not relevant.

David Cox v. State of Maryland, No. 0191, September Term, 2003 filed April 6, 2005. Opinion by Hollander, J.

***

CRIMINAL LAW - SEARCHES AND SEIZURES – INVESTIGATIVE STOP – INFORMANTS.

SEARCHES AND SEIZURES – INVESTIGATIVE STOP.

SEARCHES AND SEIZURES – AUTOMOBILES.

Facts: Detective Anthony Weaver received a tip from a known informant that a man named "Jimmy" was present in the vicinity of Emo Street in Prince George's County for the purpose of distributing crack cocaine. The informant stated that "Jimmy" was "driving a grayish-black Jeep Cherokee with tinted windows." In response to the informant's tip, Detective Weaver and Sergeant Davey, ventured to the Emo Street and Clovis Avenue neighborhood, where they located a gray Jeep Cherokee.

Surveilling the Jeep and the area, the officers witnessed a man, matching the description given by the informant, exit the vehicle several times, approach a group of males across the street, and then reenter the driver's seat of the vehicle. One of the officers also witnessed a man approach the driver's window of the Jeep, but neither officers could verify that a drug transaction occurred. Believing that the driver was distributing drugs, the officers decided to conduct an investigative stop of the vehicle when it became mobile.

When the Jeep went mobile, it was immediately surrounded by three marked police vehicles. During the stop, the three occupants of the Jeep, including the driver, James Nathaniel Smith, were ordered to exit and were seated on the ground to the rear passenger's side of the Jeep. A police canine alerted to the presence of drugs. Subsequently, the officers searched the interior of the vehicle and found, among other things, a scale covered in suspected cocaine residue. After the discovery of the scale, Smith was arrested. A search incident to his arrest revealed $1,573 and a small quantity of marijuana. The Jeep was then towed to the police precinct because the location of the initial stop had become crowded with traffic. A continued search of the vehicle uncovered a secret compartment containing two handguns and more than 50 grams of crack cocaine.

Smith was charged with, among other things, possession with intent to distribute greater than fifty grams of crack cocaine and possession of a firearm with nexus to drug trafficking. He moved to suppress the evidence obtained as a result of the search of the Jeep and incident to his arrest, claiming that he was subjected to an unlawful arrest at the time of both searches. The Circuit Court for Prince George's County denied Smith's motion to suppress. Smith pleaded not guilty on a statement of the facts and was convicted.

Held: Affirmed. The circuit court did not err in denying Smith's motion to suppress the evidence obtained from either search because Smith's rights under the Fourth and Fourteenth Amendments to the United State's Constitution were not violated.

The circuit court determined that Smith was not handcuffed until after the police canine alerted to the presence of drugs during the exterior scan of the Jeep. Accordingly, the circuit court did not err in concluding that at the time the vehicle was searched Smith was not under arrest, but merely seized within the confines of the Fourth Amendment.

At the time he was seized, the police had a reasonable articulable suspicion that Smith was in possession of illicit drugs based on the known informant's tip and the surveilling officer's additional observations. Thus, the investigative stop was permissible under *Terry v. Ohio*, and its progeny.

The officers did not exceed the permissible scope of a *Terry* stop by ordering Smith and the other occupants out of the vehicle and seating them on the curb before conducting an exterior canine scan. Once the drug sniffing canine alerted, the officers obtained probable cause to search the vehicle under *Carroll v. United States.*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). When the officers discovered a scale containing suspected cocaine residue in Smith's glove compartment, the police had probable cause to arrest Smith and search him incident to arrest.

In order to ensure the safety of the officers conducting the continued search of the vehicle, the Jeep was towed to the police precinct. The Supreme Court of the United States has held that the removal of a vehicle to a place of greater safety before continuing a search under the *Carroll* doctrine does not implicate a defendant's constitutional rights. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970).

Smith v. State, No. 2371, September Term, 2003, filed April 1, 2005. Opinion by Kenney, J.

***

CRIMINAL LAW - STALKING - SUFFICIENCY OF THE EVIDENCE:

Facts: Appellant, Wendell Hackley, was charged with, *inter alia*, second degree assault, reckless endangerment, and stalking. The evidence at trial disclosed that appellant dated Devora P. for some time and, in 1991, the two had a child together. They did not come into contact with one another until November 2001, when appellant approached Ms. P. while she sat in her car, which was parked in her driveway. He pulled out a gun, opened the car door,

pulled Ms. P. out of the car, and hit her on the head with the gun, cutting her.

Over the course of the next month, appellant made contact with Ms. P. on four more occasions. On the first occasion, Ms. P. found two letters written in appellant's handwriting on the windshield of her car. In one letter, addressed to appellant's daughter, appellant stated that he would never hurt his daughter but could not say the same about Ms. P. In the other letter, addressed to Ms. P., appellant threatened physical harm to Ms. P. and referred to his assault on Ms. P. in her driveway.

On another occasion, Ms. P. again found two letters written in appellant's handwriting on the windshield of her car. Again, one letter was addressed to appellant's daughter, the other to Ms. P. In them, appellant threatened harm to Ms. P., including an immediate threat of death.

On a third occasion, Ms. P. and her daughter were returning home from a neighbor's house when Ms. P. saw appellant driving up the street in the Jeep he had driven on the day that he assaulted her. She and her daughter ran into the house and called the police.

Finally, on December 16, 2001, Ms. P. found a book bag on the windshield of her car. Inside, the police found two letters written in appellant's handwriting. Again, one letter was addressed to appellant's daughter, the other to Ms. P. The letters both threatened serious bodily harm to Ms. P. In the letter to Ms. P., appellant expressed his displeasure with her retreat into her home on the day that appellant drove down her street.

The jury convicted appellant of second degree assault, reckless endangerment, and stalking.

Held: Affirmed. Stalking is prohibited by statute and, in 2001, was codified at Maryland Code (1957, 1996 Repl. Vol., 2001 Supp.), Art. 27, § 124. The statute requires that, whatever else the course of conduct referred to in § 124(3) might involve, it must "include" the stalker's "approaching or pursuing" the victim. The terms "approaching" and "pursuing" encompass conduct like that produced by the State in this case. The terms cover a person's driving by the victim's residence, and placing threatening letters on the windshield of the victim's car while it is located in the immediate environs of the victim's home.

The stalking statute also requires that the behavior involve a "course of conduct," which is defined as "a persistent pattern of

conduct, composed of a series of acts over a period of time, that evidences a continuity of purpose." The State presented evidence of appellant's conduct, occurring over the course of several weeks, that included his physically assaulting Ms. P., twice delivering threatening letters to her, driving down her street and causing her to flee into her home, and delivering two more letters expressing anger at her retreat and threatening to shoot her. Viewed in a light most favorable to the prosecution, this constituted sufficient evidence to establish the offense of stalking.

Hackley v. State, No. 2953, September Term, 2002, filed January 28, 2005. Opinion by Barbera, J.

***

REAL PROPERTY- LAND PATENT.

REAL PROPERTY- EASEMENT- QUASI-EASEMENT.

REAL PROPERTY- EASEMENT- BY NECESSITY.

REAL PROPERTY- EASEMENT- LOCATION OF EASEMENT.

Facts: Nancy R. Stansbury owns lots 9A and 179 in the Pleasant Plains subdivision in Anne Arundel County. MDR owns lots 10A and 178. A channel, which was created after the lots were platted, runs between lots 179 and 178 and lots 10A and 9A. As platted, lots 179 and 10A shared a common lot line, as do lots 178 and 9A. The common lot lines are below and approximately midway the channel. The depth of the channel varies with tide, but it is stipulated to be navigable.

On April 2, 1936, James Edward Stansbury, Ms. Stansbury's father, acquired fee simple title to the four lots, subject to a life estate in Mallee B. Moore, Ms. Stansbury's maternal grandmother. At the time, Mr. Stansbury lived on Lot 7A and dredged a channel in the mid 1950s. Thereafter, he built a footbridge, approximately 100 to 150 feet in length, that was

constructed over the channel in lots 9A and 178. The footbridge was created to facilitate traffic from Lot 7A to Lot 179. The middle portion of the footbridge could be removed to allow small boats to traverse the channel and seek safe harbor during storms. The footbridge fell into a state of disrepair. MDR, having recently acquired lots 10A and 178, seeks to have the footbridge reconstructed to access lot 10A from lot 178.

Held: Vacated and remanded. The circuit court engaged in a balancing test, which was not supported by law, and determined that MDR's right to construct a footbridge prevailed over Ms. Stansbury's right to prevent any interference with the interest in her property. Rather, MDR's right to construct a footbridge arises from an easement by necessity.

The circuit court concluded that there was no easement corresponding to a pre-existent quasi easement in this case because there was no evidence that the footbridge, which was erected to facilitate pedestrian traffic between lots 178 and 10A, was still being used for that purpose. The circuit court's focus was too narrow. Lot lines have little practical significance when the lots are under common ownership. The location of the footbridge was not dependent upon the ownership of lots because the lots were under common ownership. Each owner could have used the footbridge to access the lots across the channel.

An easement by necessity is typically declared when one conveys land to another, which is entirely surrounded by the grantor's land or which is accessible only across the grantor's land or the land of a stranger. An easement of necessity exists only as long as the necessity itself exists. The only access to Lot 10A from Lot 178 is by small boat or walking through the channel at low tide. Therefore, MDR is entitled to an easement by necessity, subject to applicable laws and governmental regulations, over Ms. Stansbury's submerged property, either Lot 9A or 179 or both, in order to access Lot 10A.

An equitable disposition requires the circuit court to determine a location that will be fair to both parties and will inconvenience the owner of the servient parcel, "only so much as necessary to provide" the owner of the dominant parcel reasonable access to his land. *Johnson v. Robinson*, 26 Md. App. 568, 582, 338 A.2d 88 (1975)

Nancy R. Stansbury v. MDR Development, L.L.C., No. 1555, September Term, 2003, filed April 4, 2005. Opinion by Kenney, J.

***

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated March 31, 2005, the following attorney has been suspended for sixty (60) days by consent, effective May 2, 2005, from the further practice of law in this State:

MARK O. SOBO

*

By an Order of the Court of Appeals of Maryland dated April 5, 2005, the following attorney has been suspended for thirty (30) days by consent, effective immediately, from the further practice of law in this State:

JOHN DICKERSON

*

By an order of the Court of Appeals of Maryland dated April 5, 2005, the following attorney has been suspended for thirty (30) days by consent, effective May 16, 2005, from the further practice of law in this State:

DAVID A. RODGERS

*

By an Order of the Court of Appeals of Maryland dated April 7, 2005, the following attorney has been disbarred by consent from the further practice of law in this State:

BRUCE LESLIE RICHARDSON

*

By an Order of this Court dated April 11, 2005, the following attorney has been disbarred, from the further practice of law in this State:

JAMES L. PRICHARD

*

By an Opinion and Order of the Court of Appeals of Maryland dated April 13, 2005, the following attorney has been indefinitely suspended from the further practice of law in this State:

CHARLES J. ZUCKERMAN

*

By an Opinion and Order of the Court of Appeals of Maryland dated April 15, 2005, the following attorney has been disbarred from the further practice of law in this State:

WAYNE MAURICE MITCHELL

*