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Facts: On April 25, 2000, the parent of a minor patient treated by Dr. Paul A. Mullan, a pediatrician, filed a written complaint with the State Board of Physician Quality Assurance (the Board). The complaint alleged that Dr. Mullan had treated her son while under the influence of alcohol on April 10, 2000.

On August 23, 2000, the Board summarily suspended the doctor's medical license under § 10-226(c)(2) of the Maryland Administrative Procedure Act (APA), Md. Code (1984, 1999 Repl. Vol., 2003 Cum. Supp.) §§ 10-101 to 10-305 of the State Government Article. Dr. Mullan filed exceptions to the findings, and on April 11, 2001, the Board issued a Final Decision and Order affirming the suspension as "an emergency action taken to protect the public health and welfare under [§ 10-226(c)(2)]."

Dr. Mullan filed a petition for judicial review of the administrative agency's decision in the Circuit Court for Baltimore County. The Circuit Court affirmed the Board's summary suspension. Dr. Mullan noted a timely appeal to the Court of Special Appeals.

In an unreported opinion, that court reversed the Board's finding that summary suspension was "imperatively required" because of a lack of substantial evidence. The court reasoned that the Board's acquiescence to the delay of four months between the initial filing of the complaint and the decision to suspend, during which Dr. Mullan continued to see patients without complaint from either his patients or the Board, vitiated any evidence that might support the Board's determination that summary suspension was imperatively required.

The Board filed a petition for writ of certiorari in the Court of Appeals, arguing that the Court of Special Appeals erred when it took into consideration the lapse of time between the Board's cognizance of possible misconduct and its decision to suspend summarily.

Held: Reversed. The Court of Appeals held that the length of the investigatory period preceding the issuance of a summary suspension order was not relevant in determining whether an agency's factual finding that the "public health, safety, or welfare imperatively requires emergency action" under § 10-226(c)(2)(i) is supported by substantial evidence. Instead, the length of the investigatory period was a relevant factor in determining whether the agency acted arbitrarily or capriciously when it chose to issue the summary suspension order at that specific time. The timing of the Board's issuance of the order was not arbitrary or capricious, and the Board's factual finding that the circumstances imperatively required the summary suspension was supported by enough evidence to survive substantial evidence review.

Section 10-226(c)(2) governs the revocation or suspensions of licenses under the APA and provides that the licensing authority "may order summarily the suspension," provided it finds, *inter alia*, that "the public health, safety, or welfare imperatively requires emergency action," § 10-226(c)(2)(i).

The Court found that § 10-226(c)(2), which governs summary license suspension in the APA, grants the Board discretion to issue a summary suspension order. The Court said that while the phrase "imperatively requires" in § 10-226(c)(2)(i) might mislead into an interpretation that takes away the Board's discretion to issue summary suspensions—an interpretation that transforms "may" into "must"—such an ambiguous and contradictory reading is neither necessary nor reasonable. As the first criterion for a proper summary suspension order, the phrase "imperatively requires" describes the circumstances that will satisfy § 10-226(c)(2)(i)'s requirement of an emergency and signals the degree of exigency

contemplated for summary suspension orders. But it does not circumscribe the more general discretion found in § 10-226(c)(2), nor does it require the Board to issue a suspension order when the agency finds § 10-226(c)(2)(i)'s exigency level reached.

In other words, while an emergency that "imperatively requires" summary suspension is *necessary* for a valid summary suspension order, it does not compel such an order. In addition to the Board's finding of an emergency under § 10-226(c)(2)(i), a summary suspension order requires that the Board *exercise its discretion* to issue such an order under § 10-226(c)(2).

The Court reasoned that the discretion to issue a summary suspension order if the agency so chooses necessarily includes the discretion to issue the order *when* the agency chooses. Just as the agency may decide not to issue a summary suspension order under § 10-226(c)(2), even when it finds exigent circumstances under § 10-226(c)(2)(i), the agency also may delay issuing that order under the same statutory provisions.

The Court made clear that courts are not required to ignore completely the length of the investigatory period when it reviews the summary suspension orders of administrative agencies. Instead, the timing of the administrative agency's issuance of the order could be a relevant factor in determining whether the *agency* acted arbitrarily or capriciously when it ordered the summary suspension in the first place. Because the issuance of a summary suspension order is committed to the agency's discretion by law, it is subject to judicial review under the arbitrary or capricious standard of § 10-222(h)(3)(vi). The arbitrary or capricious standard sets a high bar for judicial intervention, meaning the agency action must be "extreme and egregious" to warrant judicial reversal under that standard.

Finally, applying the substantial evidence test without regard to the time lapse, the Court upheld the Board's factual findings. When a pediatrician, with a history of severe alcoholism, renders medical care to children while visibly intoxicated, the lack of sound judgment evinced by the doctor's failure to decide *not* to see patients on that day was sufficient evidence for a reasonable Board to conclude the incident might repeat itself, requiring the immediate suspension of the doctor's license and posing a danger that "imperatively requires emergency action."

Board of Physician Quality Assurance v. Paul A. Mullan, No. 66, September Term, 2003, filed May 10, 2004. Opinion by Raker, J.

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CIVIL PROCEDURE – POST-JUDGMENT MOTIONS – MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT – TIMELINESS OF FILING – DEFENDANT'S/PETITIONER'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT WAS NOT PREMATURE DESPITE BEING FILED PRIOR TO THE ENTRY OF FINAL JUDGMENT ON ALL CLAIMS BECAUSE IT WAS FILED AFTER THE JUDGMENTS SOUGHT TO BE ALTERED OR UPSET BY THE MOTION WERE ENTERED.

RACIAL DISCRIMINATION – ARGUMENT AND EVIDENCE OF – RELEVANCY – APPEAL TO THE PREJUDICES OF THE JURY – A CIVIL JUDGMENT WAS REVERSED DUE TO THE SIGNIFICANT PROBABILITY THAT THE JURY'S VERDICTS WERE INFLUENCED BY THE IRRELEVANT AND IMPROPER INJECTION OF RACIAL CONSIDERATIONS INTO THE TRIAL

Facts: Plaintiffs/Respondents, an African-American family that visited the Six Flags Amusement park in Largo, Maryland in the summer of 1999, asserted that Six Flags employees used unreasonable force in removing them from the park. Plaintiffs/Respondents alleged, in their complaint, that Six Flags was liable for assault, battery, false imprisonment and negligent supervision. Plaintiffs/Respondents did not allege racial discrimination in its complaint or at any time prior to trial, but racial considerations became a major focus of the trial after being injected into the case by Plaintiffs/Respondents. The family did not allege that Six Flags caused them any serious physical injuries. The jury found that "Six Flags" was liable and awarded the various family members a total of $1,000,000 in compensatory damages and $1,500,000 in punitive damages. After the trial was completed, the trial judge found, as a matter of fact, that Tierco Maryland Inc. was the proper name for the entity that had been referred to before the jury only as "Six Flags." Judgment was entered against Petitioner.

Petitioner filed a Motion for Judgment Notwithstanding the Verdict after the filing of the judgments against it, but prior to the formal entry of judgment memorializing the voluntary dismissal of the claims of one of the plaintiffs, Eddie Williams. Williams's claims had been dismissed orally, without any accompanying document or written notation, on the first day of trial. A written notice of his dismissal was added to the record after Petitioner's post-judgment motion was filed. Ruling on the post-judgment motion, the trial judge vacated the punitive damages award, concluding that the jury's finding of actual malice was not supported by the evidence.

On direct appeal, the Court of Special Appeals ruled that Petitioner's post-judgment motion was premature because it preceded the judgment dismissing Eddie Williams from the case. The intermediate appellate court therefore concluded that the trial court lacked jurisdiction to consider the motion and reinstated the

original jury verdict. The Court of Special Appeals further concluded that it lacked appellate jurisdiction to consider the appeal because the notice of appeal had been filed too long after the entry of the original judgment in the case, because the intervening activity related to the motion had been a legal nullity.

Held: Reversed. Maryland Rule 2-532(b), governing motions for judgment notwithstanding the verdict, requires that such a motion be filed within ten days after the judgment the motion seeks to alter or upset. Rule 2-532 and related rules do not require litigants necessarily to wait until final judgment is entered on all claims of all parties to file post-judgment motions. The suggestion to the contrary in *Atlantic Food and Beverage Systems, Inc. v. Annapolis*, 70 Md. App. 721, 523 A.2d 648 (1987) presents a potential trap for the unwary, and should not be followed. Accordingly, Petitioner's motion, which was filed after the entry of the judgments it sought to alter or upset, but before final judgment was entered in the case, was not premature.

A review of the record led the Court of Appeals to conclude that there existed a significant probability that the jury's verdicts were influenced by Plaintiffs'/Respondents' irrelevant and improper injection of racial considerations into the trial, in light of the elements of the causes of action pled. The trial judge abused her discretion by failing to grant fully Petitioner's motion for a new trial based on the probability that Plaintiff's/Respondents' tactics prejudiced the jury and deprived Petitioner of a fair trial on the merits.

Because of the disposition of the other issues, the Court was not required to address Petitioner's argument that the trial court erred by concluding that it was the entity the jury found liable although its name was not the same as that reflected on the jury's verdict sheet. Nevertheless, the Court of Appeals cautioned the trial court of the potential problems associated with issuing a judgment against an entity other than one named in the jury's verdict sheet, given every defendant's constitutional right in a civil action to have every relevant fact, including its identity, determined by a jury.

Tierco Maryland, Inc. v. Linda Williams. et al., No. 65, September Term 2003, filed 14 May 2004. Opinion by Harrell, J.

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COUNTIES- PROSPECTIVE APPOINTMENTS- EXPIRATION OF PLANNING COMMISSION TERMS- TALBOT COUNTY CHARTER

Facts: In 2002, Ms. Makosky, was serving in the last year of a five-year appointment to the Talbot County Planning and Zoning Commission. Her five-year appointment began on December 16, 1997, but her letter of appointment stated that her appointment ran until December 1, 2002. In November, 2002, an election was held in which new members of the Talbot County Council were elected. The official terms of the outgoing or "lame duck" Council members were set to expire, pursuant to the terms of the Talbot County Charter, at noon on December 2, 2002. After the election, on November 26, 2002, the "lame duck" County Council, in an attempt to fill the pending vacancy left by Ms. Makosky on the County Planning and Zoning Commission, purported to appoint Mr. Bryan to the seat. Ms. Makosky filed a complaint for declaratory judgment and injunctive relief alleging that her term did not expire until after that of the incumbent Council, and that the appointment of Mr. Bryan was void. On December 3, 2002, the newly elected County Council voided the purported appointment of Mr. Bryan on the ground that the position was still occupied by Ms. Makosky. The Circuit Court for Talbot County concluded that Ms. Makosky's term did not expire until at least December 16, and that the November 26, 2002 appointment was a nullity. Mr. Bryan filed a timely appeal and this court granted *certiorari* prior to proceedings in the Court of Special Appeals.

Held: *Vacated and Remanded*. Appointments cannot be made to public office unless at the time the appointment is to become effective there is a vacancy; absent some supervening Constitutional or statutory provision to the contrary, an appointing authority cannot validly make an appointment to a public office unless the vacancy to be filled by that appointment will, with certainty, occur when the appointing authority retains power to make the appointment; and the County Charter, and not some subordinate document controls the terms of the Planning and Zoning Commission members. The Talbot County Charter provides that the terms of the Planning and Zoning Commission last for five years. Since the County Council made all of the initial appointments, in conformance with the Charter, on December 3, 1974, that is the date that controls. No subsequent pronouncements by Council members, Commission members, or administrative personnel regarding when terms began or ended can affect the termination dates unalterably set by the Charter to the terms initially fixed by the first appointments. Therefore, while the outgoing County Council's term expired at noon on December 2, Ms. Makosky's appointment ran until midnight separating December 2-3, 2002. Therefore, there was no vacancy to which the outgoing Council could fill and the

appointment of Mr. Bryan was a nullity.

Bryan v. Makosky, No. 76 September Term, 2003, filed April 7, 2004. Opinion by Wilner, J.

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CRIMINAL LAW — CONFESSIONS - EVIDENCE — DECLARATIONS BY ACCUSED — VOLUNTARY CHARACTER OF STATEMENT — INTERROGATION AND INVESTIGATORY QUESTIONING — FOLLOWING DEFENDANT'S INVOCATION OF HIS RIGHT TO COUNSEL, POLICE OFFICER'S STATEMENT, "I BET YOU WANT TO TALK NOW, HUH!", IN CONJUNCTION WITH SERVING OF STATEMENT OF CHARGES ERRONEOUSLY INDICATING DEFENDANT FACED DEATH PENALTY, CONSTITUTED FUNCTIONAL EQUIVALENT OF INTERROGATION IN VIOLATION OF DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST COMPELLED SELF-INCRIMINATION.

CRIMINAL LAW — EVIDENCE — DECLARATIONS BY ACCUSED — RIGHT TO COUNSEL; CAUTION — ABSENCE OR DENIAL OF COUNSEL — WAIVER — AFTER POLICE-INITIATED INTERROGATION IN VIOLATION OF *EDWARDS V. ARIZONA*, 451 U.S. 477, 101 S. CT. 1880, 68 L. ED. 2D 378 (1981), DELAY OF TWENTY-EIGHT MINUTES BEFORE DEFENDANT ASKED IF HE COULD TALK TO THE POLICE IS INSUFFICIENT TO CONSTITUTE WAIVER OF HIS RIGHT TO COUNSEL, AND TRIAL COURT PROPERLY SUPPRESSED DEFENDANT'S SUBSEQUENT INCULPATORY STATEMENTS.

Facts: Petitioner, Leeander Jerome Blake, was arrested at his home in connection with the murder of Straughan Lee Griffin. Wearing boxer shorts, a tank top, and no shoes, petitioner was taken to the police station in Annapolis. After being advised of his *Miranda* rights, petitioner invoked his right to counsel and was placed in a holding cell. Shortly thereafter, Detective William Johns gave petitioner a copy of the arrest warrant and statement of charges, explained the charges to petitioner, told him they were serious charges and told him to read the document carefully. The statement of charges indicated that petitioner was charged with, among other crimes, first degree murder, for which the penalty was DEATH. Petitioner, who was seventeen years old, was ineligible for the death penalty. As the detective turned to leave, Officer

Curtis Reese, who had accompanied the detective to petitioner's cell, said to petitioner, in a loud voice and confrontational manner, "I bet you want to talk now, huh!" Detective Johns, concerned that Officer Reese's statement may have violated petitioner's request for counsel prior to being questioned, said very loudly within petitioner's hearing that petitioner had asked for a lawyer and that they could not talk to him.

Approximately one-half hour later, Detective Johns went back to petitioner's cell to give him some clothing. Petitioner asked the detective, "I can still talk to you?" The detective responded, "Are you saying that you want to talk to me now?" Petitioner responded in the affirmative. He then was taken to an intake room and re-advised of his *Miranda* rights. He waived his rights and made incriminating statements. The police asked petitioner if he would be willing to take a polygraph exam and he agreed to do so. Petitioner was taken to the State police barracks, was re-advised of his *Miranda* rights, took the test, and made further incriminating statements.

The Circuit Court granted petitioner's motion to suppress all statements, ruling that Officer Reese's statement was interrogation in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981. The Court of Special Appeals, in an unreported opinion, reversed. The Court of Appeals granted Blake's petition for writ of certiorari.

Held: Reversed. The Court held that Officer Reese's comment constituted the functional equivalent of interrogation, violated *Edwards* and *Miranda*, and that the police violated petitioner's Fifth Amendment right against compelled self-incrimination by interrogating him after he had invoked his right to counsel. The Court found that, where petitioner was seventeen years old, wearing little clothing in a cold holding cell, believing himself subject to the death penalty, any reasonable officer had to know that his comment, "I bet you want to talk now, huh!", was reasonably likely to elicit an incriminating response. Under *Edwards* v. *Arizona*, once a suspect requests an attorney, that person may not be interrogated further until either counsel has been made available or the suspect initiates further conversation with the police. The Court held that the twenty-eight minute delay between the improper interrogation and petitioner's question to the detective, "I can still talk to you?", was insufficient to constitute a waiver of his right to counsel. The court upheld the trial court's conclusion that petitioner's question was in direct response to and the product of the unlawful interrogation; therefore, petitioner did not "initiate" conversation with the police. All statements made by

petitioner after he invoked his *Miranda* rights were inadmissible and the trial court properly granted the motion to suppress the statements.

Leeander Jerome Blake v. State of Maryland, No. 81, September Term, 2003, filed May 12, 2004. Opinion by Raker, J.

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FAMILY LAW – CHANGE OF CHILD'S SURNAME – DISTINCTION BETWEEN CASES OF NO INITIAL SURNAME OR CHANGE OF SURNAME – STANDARDS TO APPLY

Facts: Alexander Craig Dorsey ("the Child") was born on 5 September 2000 in Montgomery County, Maryland. His name appeared as such on the birth certificate. The Child's biological parents were not married at the time, nor did they marry subsequently. On 14 January 2003, the Father, whose surname was Tarpley, filed in the Circuit Court for Montgomery County a Petition for Name Change seeking to change the surname of the Child from Dorsey to Dorsey-Tarpley. The Mother, whose surname was Dorsey, opposed the Petition. A hearing was held at which counsel argued, but no evidence was adduced. The Petition was granted and an Order for Change of Name was entered on 15 April 2003, changing the Child's name from Alexander Craig Dorsey to Alexander Craig Dorsey-Tarpley.

There was no resolution by the Circuit Court, as a threshold matter, of the parties' apparent and material factual dispute whether the Father agreed to the Child being given at birth solely the Mother's surname.

Held: Vacated. Order for Change of Name vacated and case remanded so that the parties can adduce evidence in support of their respective factual contentions. Based on the virtual absence of an evidentiary record, coupled with the absence of judicial fact-finding, the Court of Appeals could not categorize this case as either a "no initial name" or a "change of name" case for purposes of the application of the correct legal analysis.

The Circuit Court needs to resolve whether an agreement existed between the Mother and Father at birth to give the Child the surname of Dorsey. Relevant factors would include the presence or absence of the Father's signature on the birth certificate, the Mother's testimony, the Father's testimony, and the testimony of any relatives or others who were present during any discussion about naming the Child. If the court finds that the Father acquiesced in the Child's surname at birth, the Father, in order now to justify the desired change in the Child's surname to include his own, must demonstrate "extreme circumstances" to justify changing the child's surname. If the Father did not acquiesce in the naming of the Child at birth, then the court should consider what is in the best interests of the Child.

Dorsey v. Tarpley, No. 95, Sept. Term 2003, filed 6 May 2004. Opinion by Harrell, J.

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COURT OF SPECIAL APPEALS

CONTRACTS - ARBITRATION CLAUSE – WHEN A DISPUTE IS WITHIN THE SCOPE OF AN ARBITRATION PROVISION IN A CONTRACT, CONTRACT DEFENSES THAT RELATE TO THE CONTRACT AS A WHOLE ARE TO BE DECIDED BY THE ARBITRATOR. ANY DEFENSES RELATED TO THE VALIDITY OF THE ARBITRATION PROVISION ONLY, THAT DO NOT RELATE TO THE CONTRACT AS A WHOLE, ARE TO BE ADDRESSED BY THE COURT. IN AN ACTION CHALLENGING ARBITRATION, WHILE DISCOVERY MAY BE AVAILABLE IN CIRCUIT COURT, IT IS LIMITED TO THE LATTER SITUATION AND LIMITED IN SCOPE TO THE DEFENSES TO THE VALIDITY OF THE ARBITRATION PROVISION ONLY.

Facts: This case arose out of an employment dispute between NAHB Research Center, Inc. (the Research Center), appellee, and three former employees: Mark Nowak, David Dacquisto, and Larry Zarker, appellants. Appellants were each long-term employees of the Research Center, working as corporate officers and administrators. Prior to 2002, none of the appellants had written employment contracts.

In 2002, the Research Center presented each appellant with a written employment contract. These contracts were identical, with the exception of the rate of compensation and the description of position. Appellants signed their respective contracts without varying or negotiating the terms. These contracts contained an arbitration clause, which required binding arbitration for all disagreements arising out of or relating to the contract of employment.

While still employed by the Research Center, appellants, along with Liza Bowles, then-President of the Research Center, formed their own company, The Newport Partners, L.L.C. (Newport Partners). Appellee alleges that appellants planned to divert Research Center business to Newport Partners. According to appellee, appellants conspired with Ms. Bowles, whereby Ms. Bowles would terminate them in a fashion entitling them to severance payments, pursuant to a clause in their employment contracts. On September 9, 2002, Ms. Bowles terminated appellants' employment relationship, without cause, and issued severance payments.

According to appellee, upon discovering appellants' scheme, a special meeting of the Board of Directors was convened, at which the Directors voted to rescind the termination of appellants. The Research Center then informed appellants that they had been

improperly terminated, that such termination was rescinded and, as a result, that they were still employed by the Research Center. Appellants were directed to return to work and ordered to repay the severance they had each received, or risk being terminated for cause.

On October 21, 2002, when appellants had not returned to work or repaid their severance, the Research Center terminated the employment of each of the appellants "for cause." The Research Center rested its authority to make this decision on the terms of appellants' employment contracts.

On or about November 18, 2002, the Research Center commenced binding arbitration proceedings against each appellant before the American Arbitration Association (AAA). The Research Center sought $300,000 in damages from each appellant, asserting claims for: (1) civil conspiracy, for misleading the Board of Directors, obtaining wrongful termination, and therefore wrongful severance, and engaging in conduct to fund a competing company in contravention of appellants' fiduciary duties to the Research Center; (2) breach of contract, for failing to comply with the provisions of their employment contracts; (3) breach of fiduciary duty of loyalty, for engaging in conspiracy and diverting business to another company while employed by the Research Center; and (4) unjust enrichment/quantum meruit, for wrongfully obtaining severance and failing to repay it.

On December 16, 2002, appellants filed a petition in circuit court, seeking to stay the arbitration proceedings, along with a Request for Production of Documents and Interrogatories. Appellants contended that appellee's claims were not subject to arbitration and argued that: (1) following their September 9, 2002 termination, their employment contracts no longer existed; (2) even if their contracts still existed, the claims asserted by the Research Center were outside the scope of the arbitration clause; (3) the Research Center acted illegally and without good faith; (4) the arbitration clause is a contract of adhesion and is unconscionable; (5) the arbitration clause fails to comply with Maryland Code (1974, 2002 Repl. Vol.), § 3-206 of the Courts and Judicial Proceedings Article; (6) the arbitration clause fails to carry out its purpose, namely to be more efficient and less expensive than court proceedings; (7) the arbitration clause should fail for want of consideration; and (8) the purpose of the arbitration proceedings was to harass and interfere with the livelihoods of appellants.

In response to appellants' petition, the Research Center filed a motion to dismiss and filed its own petition to compel arbitration. In addition, the Research Center asked the circuit

court to deny appellants' discovery requests. Appellants thereafter filed a motion to dismiss the Research Center's motion to compel arbitration and a motion for sanctions for failure to provide discovery responses. The Research Center opposed appellants' motion for sanctions.

Following a hearing, on June 12, 2003, the court denied appellants' petition to stay arbitration proceedings, noting that the termination of an employment contract does not necessarily terminate a provision for arbitration. The court rejected appellants' arguments that the arbitration agreement did not exist and/or could not be enforced and ordered the parties to submit to binding arbitration.

Thereafter, appellants argued in a motion to alter or amend judgment that the court's order was defective and that the court should have granted an evidentiary hearing and permitted discovery to comply with due process requirements. This motion was denied on July 14, 2003.

Held: The Court of Special Appeals held that when a dispute falls within the scope of a contractual arbitration provision, only defenses relating to the validity of the arbitration provision are to be addressed by the court. Contract defenses related to the contract as a whole are to be decided by the arbitrator.

The Court began by analyzing whether there was a binding agreement to arbitrate and noting that, if the Court finds that a mutual exchange of promises to arbitrate exists, its inquiry ceases, as the agreement to arbitrate has been established as a valid and enforceable contract.

The Court held that a mutually agreed upon arbitration provision existed in appellants' employment contract. Although appellants argued that their employment contracts were no longer valid once they were terminated as employees, the Court held that such an argument went to the merits of the contract as a whole and was a question for the arbitrator to decide. The Court further noted that, as a matter of contract interpretation, a court will generally presume that parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement.

Having determined that a binding agreement to arbitrate existed, the Court turned to the scope of the arbitration clause to decide whether the issues raised by the Research Center fell within that scope. Noting that the arbitration clause in appellants'

contracts was broad and encompassing, the Court held that the wording unambiguously provided that all disputes arising out of or related to appellants' employment contract should be submitted to binding arbitration.

The Court held that the claims raised by the Research Center were clearly related to appellants' employment and arose out of their employment contracts: the conspiracy allegations were based on appellants' allegedly misleading the Board of Directors and for obtaining wrongful termination and severance in accordance with provisions in the Contract; the breach of contract and breach of fiduciary duty claims were based specifically on portions of the Contract; and the unjust enrichment/quantum meruit claim arose from appellants' allegedly obtaining wrongful severance and failing to repay it.

The Court further noted, that with regard to the defenses raised by appellants, to the extent they were addressable, the circuit court considered these defenses and correctly found that the Research Center's claims fell within the scope of the arbitration agreement.

Finally, the Court addressed appellants' contentions that their employment contracts were ones of adhesion and that they were unconscionable due to the expense of arbitration and want of consideration.

The Court held that, to the extent these defenses related to appellants' employment contracts as a whole, as explained earlier, they were proper issues for the arbitrator to decide. With regard to the issue of lack of consideration related solely to the arbitration clause itself, the Court found that there was consideration because of the mutual agreement of the parties.

With regard to appellants' arguments of adhesion and unconscionability due to expense, the Court held that appellants failed to provide any support for these assertions. Moreover, there was nothing distinguishable about the arbitration provision as compared to the contract as a whole. Assuming discovery is available, the Court noted that the discovery has to relate to determining whether an arbitration clause exists. The Court held that the discovery requested by appellants went to the merits of the case, was not directed at the validity of the arbitration provision specifically, and was, therefore, properly denied.

Finally, with regard to appellants' allegation that the arbitration provision was unconscionable because of excessive costs, the Court held that appellants failed to cite any relevant

case law in support of their argument. The Court noted that the arbitration provision in appellants' contracts provided for fee splitting, whereby each party bears its own costs, and there was nothing unusual in the provision. Appellants' defenses were properly considered and denied by the circuit court.

Mark S. Nowak, et al. v. NAHB Research Center, Inc., No. 1019, September Term, 2003, filed May 6, 2004. Opinion by Eyler, James R., J.

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CRIMINAL LAW - EXPUNGEMENT - STATE HAS THIRTY DAYS FROM SERVICE OF EXPUNGEMENT PETITION TO OBJECT - EXPUNGEMENT HEARING MAY NOT BE HELD BEFORE THE STATE HAS AN OPPORTUNITY TO OBJECT AND/OR PRIOR TO EXPIRATION OF THIRTY-DAY PERIOD - STATUTORY CONSTRUCTION - TWO OR MORE CHARGES ARISING FROM SAME TRANSACTION ARE CONSIDERED A UNIT - A PETITIONER IS NOT ENTITLED TO EXPUNGEMENT ON ONE CHARGE OF A UNIT IF NOT ENTITLED TO EXPUNGEMENT ON ANY OTHER CHARGE IN THE UNIT.

Facts: In a search incident to his arrest for possession of stolen property, Phillip Nelson was found to be in possession of a small amount of marijuana. He was charged with possession with intent to distribute, and theft. After his guilty plea to possession, and an Alford plea to theft, the State entered a *nol pros* to the possession with intent to distribute charge. Later, Nelson filed a petition for expungement, and the required release, so that his record might permit his enlistment in the military service. Within three days of filing, the State's Attorney was served with the petition. Two days later the matter came on for hearing in the circuit court. The State, despite having had at least a verbal notice of the hearing, did not participate. The Court granted the expungement.

The State appealed, contending that the conditions for expungement set out in Md. Code, Crim. Proc. § 10-105, were not met. The State further argued that it was denied the opportunity to object to the petition.

Held: Section 10-105(d)(2) provides the State with 30 days in which to object to a petition for expungement. The wording of the statute that permits the court to order expungement "at any time on a showing of good cause" does not trump the provisions of the statute that provides the State 30 days from the date of service to object. Further, Nelson was not entitled to expungement under Crim. Proc. § 10-107(a) and (b) because the charges of which he was convicted stemmed from the same incident, thus they were part of a unit of charges for which expungement was not permitted.

State v. Nelson, No. 2335, September Term 2002, filed April 23, 2004 Opinion by Sharer, J.

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CRIMINAL LAW - ROBBERY - SPECIFIC INTENT TO FRIGHTEN - CONSTRUCTIVE FORCE - SUFFICIENCY OF EVIDENCE - CIRCUMSTANTIAL EVIDENCE. - EVIDENCE WAS SUFFICIENT TO UPHOLD ROBBERY CONVICTION OF THE INTENT TO FRIGHTEN VARIETY. JURY WAS ENTITLED TO CONSTRUE APPELLANT'S REMOVAL OF SHOTGUN FROM UNDER HIS COAT AS A DELIBERATE, PURPOSEFUL THREAT OF FORCE, EVEN THOUGHT APPELLANT DID NOT POINT THE WEAPON AT THE VICTIM, NOTWITHSTANDING APPELLANT'S CLAIM THAT HE HAD MERELY REMOVED THE WEAPON IN ORDER TO ENTER THE CAR THAT HE WAS ABOUT TO STEAL.

Facts: On November 19, 2001, appellant walked from his apartment to a neighborhood gas station. He noticed a white 1984 Trans Am parked with its motor running near the service area; the driver was talking to a service technician some five to fifteen feet away. Appellant pulled a 12 gauge shotgun from under his trench coat, placed it on top of the car, removed his backpack and coat, put them on the backseat of the car, grabbed the gun from the top of the car, and put the weapon in the car. Then, he got into the car and drove away. Appellant then led the police on a chase that ended in a recreational area near a school. The shotgun, a backpack containing ammunition, and a trench coat were recovered by police from the car. Appellant never explicitly threatened anyone

by brandishing or pointing the weapon, nor did he speak to anyone when he took the car.

Appellant was convicted by a jury of robbery, theft, and related charges. He was later found not criminally responsible.

Held: Conviction of robbery affirmed. The Court held that the evidence was sufficient to sustain the robbery conviction, even though appellant never pointed the shotgun at anyone or threatened anyone.

The Court reviewed the elements of robbery, focusing on a robbery of the "putting in fear" variety. The Court noted that intent is rarely shown by direct evidence, and concluded that the jury had ample evidence to conclude that appellant intended to frighten the owner of the vehicle by displaying the weapon. The Court also stated that appellant could have continued to conceal the shotgun instead of placing it on the top of the car. The jury was not required to accept an "alternate theory of convenience," i.e. that appellant put the gun on top of the car to more easily allow him to take off his backpack and jacket.

David Michael Fetrow v. State of Maryland, No. 425, September Term, 2003, filed April 30, 2004, opinion by Hollander, J.

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CRIMINAL LAW — SENTENCING — TERM OF CONFINEMENT — MD. CODE § 6-218(d) OF THE CRIMINAL PROCEDURE ARTICLE PROVIDES THAT, WHEN A DEFENDANT IS SERVING MULTIPLE SENTENCES, AND ONE OF THE SENTENCES IS SET ASIDE, THE DEFENDANT SHALL RECEIVE CREDIT FOR ALL TIME SPENT IN CUSTODY UNDER THE SENTENCE SET ASIDE.

THE CIRCUIT COURT FOR CARROLL COUNTY SENTENCED APPELLANT TO A TERM OF YEARS TO BE SERVED "CONSECUTIVE WITH" A SENTENCE IMPOSED BY THE CIRCUIT COURT FOR TALBOT COUNTY. THE TALBOT COUNTY COURT'S SENTENCE WAS "CONSECUTIVE TO THE SENTENCES PREVIOUSLY IMPOSED IN OTHER JURISDICTIONS." AT THAT TIME, A SENTENCE HAD BEEN IMPOSED IN

DELAWARE.

ON MARCH 26, 1999, THE TALBOT COUNTY CONVICTIONS WERE VACATED, ON PETITION FOR POST CONVICTION RELIEF, AND THE STATE LATER NOL PROSSED THE CHARGES.

APPELLANT CAME INTO CUSTODY OF THE MARYLAND DEPARTMENT OF CORRECTION ON MAY 2, 1990, WHEN APPELLANT WAS PAROLED BY DELAWARE, AND HE BEGAN SERVING THE TALBOT COUNTY SENTENCE.

HELD THE CARROLL COUNTY SENTENCE WAS CONSECUTIVE TO THE DELAWARE SENTENCE, AND APPELLANT'S TERM OF CONFINEMENT UNDER THE CARROLL COUNTY SENTENCE BEGAN ON MAY 2, 1990, SUBJECT TO APPLICABLE CREDITS.

Facts: Robert Michael Wilson, appellant, appealed from the Circuit Court for Carroll County's denial of his application for a writ of habeas corpus. Appellant is presently in the custody of the Division of Correction (D.O.C.), within the Department of Public Safety and Correctional Services, housed in the Maryland House of Correction. Appellees are Stuart O. Simms, in his then capacity as Secretary of the Department; William R. Sondervan, in his capacity as Commissioner of the Division of Correction; and Ronald Hutchinson, in his capacity as Warden of the Maryland House of Correction.

On December 19, 1978, appellant was convicted by a jury in the Circuit Court for Carroll County of assault with intent to murder, burglary, and related offenses. On February 8, 1979, after merging the offenses for purposes of sentencing, the circuit court sentenced appellant to 18 years' imprisonment for the assault with intent to murder conviction, to be served "consecutive with the sentence received in Talbot County";[1] 15 years' imprisonment for a conviction of burglary, to be served consecutively to the term imposed for the assault with intent to murder conviction; 15 years' imprisonment for a conviction of conspiracy, to be served concurrently with the term imposed for the conviction of burglary; and 3 years' imprisonment for a conviction of carrying a weapon openly, to be served consecutively to the term imposed for the conviction of burglary. This sentence shall be referred to as the "Carroll County" sentence/term.

On January 20, 1979, the Circuit Court for Talbot County

[1] The court ordered that appellant be allowed 526 days credit against the 18 year term, pursuant to Md. Code (1957, 1976 Repl. Vol.), Art. 27 § 638C,(now Md. Code (2001), § 6-218 of the Crim. Pro. Art.).

sentenced appellant with respect to several prior convictions in that court. Appellant was sentenced to 15 years' imprisonment for a conviction of armed robbery; 15 years for a second conviction of armed robbery; 10 years for a conviction of burglary; 5 years for a conviction of conspiracy; and 5 years for a conviction of unlawful use of a handgun in the commission of a crime of violence. The court ordered that each term of imprisonment be served consecutively to the other terms and that all terms were to be served "consecutive to the sentences previously imposed in other jurisdictions." This sentence shall be referred to as the "Talbot County" sentence/term.

The Carroll County convictions were affirmed on appeal. Wilson v. State, (Court of Special Appeals of Maryland No. 704, Sept. Term, 1979, filed: February 27, 1980). Appellant's petition for certiorari was denied.

On January 23, 1990, appellant was paroled by the Delaware Board of Parole. The certificate of parole states that appellant was paroled to the "Maryland detainer only." Appellant did not come into the custody of the Maryland D.O.C., however, until May 2, 1990. It is not clear where appellant was between January 23 and May 2, 1990.

When appellant was received into custody, the D.O.C. calculated the maximum expiration date of appellant's term of confinement as August 15, 2074. To reach this date, the D.O.C. used January 23, 1990 as the start date, applied 526 days credit to the Carroll County term, and added the terms of confinement from both the Carroll County and the Talbot County sentences.

On March 26, 1999, the Talbot County convictions were vacated by the Circuit Court for Talbot County, on petition for post-conviction relief, based on prosecutorial misconduct. The State appealed, and this Court reversed. State v. Wilson, No. 519, Sept. Term 1999 (filed May 12, 2000). Appellant's petition for writ of certiorari was granted, and the Court of Appeals reversed this Court. Wilson v. State, 363 Md. 333 (2001). On May 9, 2002, the State nol prossed the charges.

After appellant's Talbot County convictions were vacated, the D.O.C. recalculated appellant's maximum expiration date to be November 22, 2024. Again, the D.O.C. used January 23, 1990, as the start date, applied 526 days' pretrial credit, and added 36 years.

On June 19, 2002, appellant filed an application for writ of habeas corpus in the Circuit Court for Carroll County, contending

that, once the Talbot County convictions were vacated, he was entitled to immediate release.

In response to appellant's application for writ of habeas corpus, and prior to the hearing in the circuit court, the D.O.C. computed appellant's mandatory supervision release date as follows. Appellees applied 2073 good conduct diminution of confinement credits, computed at 5 credits per month from May 2, 1990, to November 22, 2024; 407 industrial diminution of confinement credits; and 252 special project diminution of confinement credits. The D.O.C. then subtracted 65 good conduct credits imposed for disciplinary violations. Application of the net of the diminution of confinement credits to the maximum expiration date yielded an anticipated mandatory supervision release date of August 4, 2017. The D.O.C. concluded that appellant was lawfully detained, and his application should be dismissed.

On July 29, 2003, the Circuit Court for Carroll County held a hearing on appellant's application. At the time of the hearing, appellees re-calculated the maximum expiration date of appellant's term of confinement to be May 2, 2026. Appellees determined that March 26, 1999, the date the Talbot County convictions were vacated, was the commencement date of the Carroll County sentence; subtracted 526 days as pretrial credits, making the start date October 16, 1997; allowed credits for the time served under the Talbot County sentence from May 2, 1990 (not January 23, 1990) to October 16, 1997; and ran 36 years from the resultant date, May 2, 1990. Additionally, appellees allowed 2160 good conduct credits, computed at 5 credits per month from May 2, 1990, to the maximum expiration date, May 2, 2026; 407 industrial credits; and 292 special project credits. Appellees also subtracted 65 good conduct credits rescinded for disciplinary violations. The result was an anticipated mandatory supervision release date of September 18, 2018.

In a memorandum opinion and order dated September 30, 2003, the circuit court denied appellees' motion to dismiss, but, on the merits, denied appellant's application. The court adopted appellees' position, finding that appellant's Carroll County sentence began on March 26, 1999, the date the Talbot County convictions were vacated; applied 526 pretrial credits, making the start date October 16, 1997; and credited the 2724 days between May 2, 1990 and October 16, 1997. The court concluded that appellant's maximum expiration date is May 2, 2026, and that his anticipated mandatory supervision release date was to be determined by the D.O.C., after applying diminution of confinement credits.

Held: Affirmed. The Court of Special Appeals affirmed the

circuit court's denial of appellant's writ of habeas corpus, holding that appellant was not entitled to immediate release from custody.

The Court began by noting that it was proper for appellant to file a writ of habeas corpus, rather than seek administrative remedies, and that it would address appellant's contentions on their merits.

The Court went on to address appellant's arguments. Appellant contended that his Carroll County sentence should be deemed to have begun on the date it was imposed because, when the Talbot County convictions were vacated, the effect was as if they never existed. By applying 526 pretrial credit days to the date of imposition of the sentence, February 8, 1979, appellant concludes that the Carroll County sentence began on August 31, 1977. Once all of his diminution of confinement credits were applied, appellant claimed he was entitled to immediate release as he had served all of his time under the Carroll County convictions.

The Court disagreed and held that appellant's Carroll County sentence was to be served consecutively to the Talbot County sentence, and the Talbot County sentence was to be served consecutively to sentences previously imposed in other jurisdictions. The Delaware sentence was imposed prior to the Talbot County sentence. With respect to the words used, the Court held that the Carroll County sentence, by incorporating the Talbot County sentence, was to be consecutive to sentences previously imposed in other jurisdictions. The earliest the sentence could begin, therefore, after the Talbot County convictions were vacated, was when appellant was paroled in Delaware and came into custody of the DOC.

The Court discussed and applied § 6-218(d) of the Criminal Procedure Article, which addresses the situation where a defendant is serving multiple sentences and one of them is set aside as a result of a direct or collateral attack. The sentencing court must apply credit for time spent in custody under the sentence set aside, "including credit applied against the sentence set aside in accordance with subsection (b) of this section."[2]

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[2] Section 6-218(b)(1) addresses those situations where a defendant is in custody before trial and is subsequently convicted on the charge for which he was held. The time spent in custody prior to the imposition of sentence must be credited against the sentence imposed. Subsection (b)(2) addresses those situations where a defendant is in custody and a warrant or commitment is lodged against him. If the original charge results in a dismissal or

The circuit court, in denying appellant's application for habeas corpus relief, held that "any defendant whose prior sentence is set aside, begins serving the new sentence on the date the prior sentence was set aside." Appellant argued that the court erred, relying on the language in (d) requiring credit for all time spent in custody under the sentence set aside, "including credit applied against the sentence set aside." Appellant concludes that § 6-218 requires appellees to "transfer the time and earned good time credits and other such credits" to the Carroll County sentence. Specifically, although his argument was not entirely clear, the Court determined that appellant contended that he was entitled to credit for all time served from February 8, 1979, to date, plus diminution of confinement credits, plus the number of days between May 2, 1990 and March 26, 1999, plus additional diminution of confinement credits applicable to that period, in effect, double counting.

In response the appellant's argument, the Court noted that appellant was serving a sentence of confinement in Delaware when the Carroll County sentence was imposed and that the Carroll County sentencing court clearly and unambiguously made the sentence consecutive to the Talbot County sentence, which was clearly and unambiguously consecutive to the sentence being served in Delaware. Consequently, the Court noted, the Carroll County sentence was clearly and unambiguously consecutive to the sentence being served in Delaware. The Court, therefore, rejected appellant's contention that the Carroll County sentence should be deemed to have begun on February 8, 1979, the date of sentencing. Even if the Court assumed that the Talbot County convictions never existed, as appellant urged, the earliest date the Carroll County sentence would have begun was May 2, 1990,[3] the date appellant came into D.O.C.'s custody, subject to applicable credits.

The Court then discussed appellees' position, noting that its effect, with regard to appellant's maximum expiration date, is that appellant does not receive 526 days of pretrial credit, as mandated by his Carroll County sentence. Appellees begin their computation

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acquittal, and the defendant is convicted of the charge for which the warrant or commitment was lodged against him, the time spent in custody must be credited against the sentence imposed for the conviction. In cases other than those described in (b)(2), the sentencing court has discretion to apply credit for time spent in custody for another charge or crime.

[3] Near the end of its opinion, the Court discussed the possibility that appellant deserves credit for time served dating back to January 23, 1990, and instructed the D.O.C. to investigate this issue.

of appellant's maximum expiration date on March 26, 1999, apply 526 pretrial credits to make the start date October 16, 1997, and then apply credit for time spent in custody between May 2, 1990 and October 16, 1997. Appellees then run 36 years from the resultant date, May 2, 1990, leading to a maximum expiration date of May 2, 2026, subject to diminution of confinement credits. By only giving appellant credit for time spent in custody between May 2, 1990, and October 16, 1997, rather than until March 26, 1999, appellees actually deprive appellant of the 526 pretrial credits he is owed.

Holding that section 6-218 of the Criminal Procedure Article is ambiguous, the Court applied the rule of lenity and found that § 6-218 should be construed in appellant's favor. Consequently, beginning with May 2, 1990, the day appellant came into custody of DOC, appellant's 526 pretrial credits must be applied to obtain the date of the beginning of appellant's term of confinement, November 22, 1988. Appellant should then be given credit for the time he spent in custody between May 2, 1990 and March 29, 1999. Thus, the maximum expiration date of appellant's 36-year sentence is November 22, 2024.

While noting that computation of diminution of confinement credits, after the period of confinement is determined, is an administrative matter and should be left to correctional authorities, the Court nevertheless provided guidance in determining the amount of credits appellant was owed. The Court found that appellant was incorrect in arguing that he was entitled to any additional credit as a result of the Talbot County sentence, other than actual time served and credits actually earned. Additionally, the Court noted that an inmate is entitled to diminution of confinement credits only for the time that he is committed to the custody of the D.O.C.

The Court then applied the following formula to obtain appellant's anticipated mandatory supervision release date: apply good conduct credits at the rate of 5 per month from May 2, 1990, to November 22, 2024; 407 industrial credits; and 252 special project credits, less 65 good conduct credits rescinded as a result of disciplinary violations, resulting in a mandatory supervision release date on or about 2017. Consequently, the Court determined that appellant was not entitled to immediate release.

Finally, the Court addressed the issue with regard to appellant's whereabouts between January 23, 1990, when appellant was paroled in Delaware, and May 2, 1990, when he came into D.O.C. custody. The Court noted that appellees originally computed appellant's maximum expiration date from January 23, 1990. The Court found, however, that it had insufficient facts to determine

whether appellant was in fact in custody, and if so, under what circumstances. As a result, the Court instructed the D.O.C. to investigate this matter and take it into consideration when computing appellant's maximum expiration date and his mandatory supervision release date.

The denial of appellant's habeas corpus relief was affirmed, and appellant's new mandatory supervision release date was ordered to be computed by the D.O.C. in accordance with the Court's determination of appellant's term of confinement.

Robert Michael Wilson v. Stuart O. Simms, et al, No. 1973, September Term, 2003, filed May 7, 2004. Opinion by Eyler, James R., J.

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EVIDENCE – HEARSAY – PROMPT COMPLAINT EXCEPTION UNDER MARYLAND RULE 5-802.1(d) NOT LIMITED TO FIRST PROMPT COMPLAINT.
EVIDENCE – RELEVANCE – VICTIM'S BEHAVIOR AFTER THE CRIME IS RELEVANT TO DEMONSTRATE ATTACK OCCURRED OR LACK OF CONSENT.

Facts: On April 15, 2001, Elijah Parker, age seventeen, drove Latissa F., age sixteen, to a parking lot in Frederick, Maryland, where, according to Latissa's later testimony, he had non-consensual vaginal intercourse with her. Shortly thereafter, Latissa called the police.

Frederick City Police Officer Heather Richter responded to the call and noticed that Latissa appeared scared and had blood and scratches on her body. Latissa told the officer that she had been raped by Parker.

Latissa was taken to Frederick Memorial Hospital. About five hours after the rape, Latissa, while still hospitalized, told her grandmother that the appellant had raped her. At trial, the grandmother testified about the above statement. She also testified that, following the rape, Latissa's behavior changed

dramatically. The victim became fearful, did not want to be left alone, stopped attending school, and eventually moved away from home to live out of state with her uncle.

After Parker's conviction for second degree rape and second degree assault, he appealed. He made two main arguments. First, he contended that the court erred when it allowed the victim's grandmother to testify as to what Latissa had told her regarding the identity of the rapist. According to Parker, only one prompt report of a rape should be allowed, and in this case, the State's first witness, Officer Richter, had already testified as to such a complaint. Second, Parker maintained that the court erred in allowing Latissa's grandmother to testify as to her granddaughter's post-rape behavioral changes.

Held: Affirmed. The Court first held that the circuit court did not err in admitting testimony of Latissa's complaint of the rape to her grandmother at the hospital. Although the statement was hearsay, it was admissible under the hearsay exception found in Maryland Rule 5-802.1(d), which allows for the admission of a "statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony." The Court held that there is no implied limitation in Rule 5-802.1(d) that would restrict the exception to the first prompt complaint of sexually assaultive behavior.

The Court also held that the trial court did not err in admitting testimony as to the victim's post-rape behavior. This testimony was relevant to demonstrate that the attack did occur and that there was a lack of consent. Therefore, the testimony was admissible.

Parker v. State, No. 1726, September Term, 2002, filed April 8, 2004. Opinion by Salmon, J.

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EVIDENCE – SPOUSAL ADVERSE TESTIMONY PRIVILEGE - COURTS AND JUDICIAL PROCEEDINGS ARTICLE ("CJ") 9-106 - IMPERMISSIBLE ADVERSE INFERENCE FROM FACT OF ASSERTION OF SPOUSAL ADVERSE TESTIMONY PRIVILEGE - PRESIDING TRIAL JUDGE'S EXERCISE OF DISCRETION IN QUESTIONING WITNESSES FOR CLARIFICATION AND TO ASSIST JURY.

Facts: On November 4, 2001, a man broke into the apartment of Mary Blake Johnson, the estranged wife of the appellant, James Johnson, and in her presence shot and killed her boyfriend, Matthew Boyd. She told police who responded to the scene that "someone broke in" and shot Boyd.

Before trial, Mary invoked her spousal privilege not to testify, under CJ 9-106. Without her testimony, the evidence that the appellant was the shooter was entirely circumstantial.

On direct examination of Constance Calloway, the appellant's long-time girlfriend, the prosecutor questioned her about any contact she had with the appellant after the day of the murder. She testified that she did not speak to him, which was "unusual." On cross-examination, Calloway admitted that she saw the appellant on at least one occasion while he was in prison awaiting trial. Defense counsel, in an effort to impeach her testimony, asked her to read a letter to the jury in which she wrote, "we can't see each other." She then explained that she had written that because the appellant had asked her "not to come back to see him *because it would mess things up with him and Mary as far as her testifying*." Defense counsel chose not to pursue any follow-up questions.

On redirect, in an effort to clarify her earlier remark, the prosecutor asked Calloway if the appellant told her why he was attempting to reconcile with his wife. Calloway responded that she did not ask him that question. At that point, the trial judge interjected and asked, "Did [the appellant] indicate to you whether or not he had a specific reason not to get on [Mary's] bad side while he was incarcerated?" Calloway then replied, "These aren't the words he said but however it went, *it was so that she did not end up testifying against him that he committed this crime, but those were not the words that he used, but somewhere around in there like that*."

Defense counsel moved for a mistrial, which the judge denied, and then requested a curative instruction. The judge denied the request. At the close of evidence, the judge instructed the jury not to speculate about what Mary would have testified to had she been available.

The appellant was subsequently convicted of second degree

murder, use of a handgun in a felony or crime of violence, and wearing, carrying, or transporting a handgun.

Held: Judgements reversed. When the spouse of a defendant asserts the spousal adverse testimony privilege before trial, the jurors should not be told, directly or indirectly, that that is the reason for the witness spouse's absence from trial, because of the likelihood that the jurors will draw an impermissible inference from that information that the witness spouse's testimony would be damaging to the defendant.

The Court recognized that a presiding judge in a jury trial has discretion to examine witnesses on matters admissible into evidence when the prior testimony is unclear, evasive, or equivocal. However, the Court held that even if a witness's testimony on a point is unclear, it is an abuse of discretion for the trial judge to question the witness so as to elicit information that is not admissible and is prejudicial. In this case, the Court explained that the trial judge should not have questioned Calloway so as to make it clear to the jury that Mary, the only eyewitness to the murder for which the appellant was on trial, had invoked her privilege not to testify.

The Court further explained that the trial judge also must not take on a prosecutorial role in questioning witnesses in a criminal trial. The judge should not have questioned Calloway so as to clarify that the appellant was ingratiating himself to his wife before trial in an effort to have her choose not to testify against him, when the question not only elicited, indirectly, information destroying the spousal adverse testimony privilege, but also was prosecutorial in nature.

Finally, the Court concluded that an instruction informing jurors that the appellant's spouse did not testify because she was "unavailable" did not cure the damage caused by putting before the jurors information from which they likely would conclude that she had chosen not to testify, *i.e.*, asserted her privilege not to testify.

Johnson v. State, No. 192, September Term 2003, filed May 3, 2004. Opinion by Eyler, Deborah S., J.

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EVIDENCE - SPOUSAL PRIVILEGE - TESTIMONIAL PRIVILEGE - CONFIDENTIAL SPOUSAL COMMUNICATIONS.

Facts: Junior Wong-Wing, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of second degree sexual offense, two counts of third degree sexual offense, two counts of child sexual abuse, and five counts of second degree assault.

Appellant had been married to Sherri Frazier and, for much of the relevant time, he lived with his wife; her mother, Shirley Griffin; and Frazier's daughter, Christina M. Christina was born in 1988 and was thirteen years of age at the time of appellant's trial.

In February 1998, appellant and Frazier separated. They attempted a reconciliation in April 2000, but were divorced in June 2001. However, during the separation, appellant sometimes cared for Christina on the weekends at an apartment he rented on Harford Road.

On April 24, 2000, Christina told her grandmother, Shirley Griffin, about the events that led to appellant's prosecution. Specifically, Christina testified that, beginning when she was about ten years old, appellant began watching pornographic videotapes with her and touching her sexually. She claimed that appellant last touched her sexually when she was eleven years old. Christina stated that the sexual incidents occurred between April 1999 and April 2000.

On April 25, 2000, Griffin told Frazier what she had learned from Christina. Thereafter, Frazier notified the police.

Frazier testified that, on April 27, 2000, appellant left a message on her telephone answering machine. She played the message for the detective who had been assigned to the case. A tape recording was played for the jury, and a transcript of the recording was admitted into evidence. The transcript provided:

> Sherry [sic] I know (inaudible) I don't (inaudible) think they're wrong, so (inaudible)[.] At this point, I don't want to hear anything that happened before but I just want to say that (inaudible) cause a lot of pain and grief.
>
> (beep)
> Sherry, I just want to say good bye again. Sorry for all the pain and grief I caused in your life. I mean its

> [sic] too late to say that now, but, anyway, I ain't feel like living anymore. I caused too much (inaudible) you know. (Inaudible) I wish I could die and I'm sorry. Ok, bye bye.
>
> (beep)
> Sherry, there's some money in (inaudible) suitcase in the apartment (inaudible) anything happens to me (inaudible)[.]

On or about May 1, 2000, appellant terminated the lease on his apartment by written notice to his landlord, indicating that his mother was ill. A week later, on May 8, 2000, appellant was arrested in Highland Park, New Jersey. He had a cashier's check for $10,000 in his possession, as well as $2,350 in cash.

Appellant testified that he suffered from kidney problems and from sexual impotency. He introduced his hospital records into evidence to support his claims. Michelle Thomas, appellant's aunt, testified that because of appellant's health problems, she offered to care for him at her home in Highland Park, New Jersey. Thomas also suggested that appellant visit his mother in Trinidad, because she had suffered a stroke, and the money he had in his possession at the time of his arrest was to pay for his trip.

Held: Judgment affirmed. Appellant argued on appeal that the trial court erred in admitting the message he left on Frazier's answering machine, because it was "intended solely for his wife" and constituted a protected confidential spousal communication. The Court concluded that appellant failed to preserve the spousal privilege question for appellate review; despite articulating several grounds at trial to support his objection to the evidence, appellant never asserted the statutory spousal communication privilege under Maryland Code (1974, 2002 Repl. Vol.), § 9-105 of the Courts and Judicial Proceedings Article ("C.J."). It provides: "One spouse is not competent to disclose any *confidential* communication between the spouses occurring during their marriage." (Emphasis added).

Nevertheless, even if preserved, the Court rejected appellant's claim of error. Relying on *United States v. Meriwether*, 917 F.2d 955 (6th Cir. 1990), the Court reasoned that, under the circumstances, even if appellant intended to leave a confidential message for Ms. Frazier, he had no reasonable expectation of confidentiality in the message, nor was it shown that the message was communicated in a confidential way. The Court explained that when appellant left the message on the answering machine, he ran the risk that someone other than Frazier

would retrieve the message.

Junior Martin Wong-Wing v. State of Maryland, No. 2255, September Term, 2002, filed April 29, 2004, by Hollander, J.

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FAMILY LAW - DIVORCE - ALIMONY - NECESSITY OF MAKING A FINDING AS TO THE PARTIES' INCOMES

FAMILY LAW - DIVORCE - ALIMONY - IMPUTATION OF INCOME TO SPOUSE BASED ON INVESTMENT STRATEGY

FAMILY LAW - MARRIAGE - PRESUMPTION OF JOINT OWNERSHIP OF HOUSEHOLD GOODS AND FURNISHINGS

Facts: After almost thirty-five years of marriage, the circuit court granted appellee, Gretchen K. Brewer, a judgment of absolute divorce from appellant, Lawrence J. Brewer. In doing so, the circuit court awarded Mrs. Brewer $2,000 a month in indefinite alimony, but upon consideration of a motion to reconsider that was filed by Mr. Brewer, the court reduced that amount to $1,500. In addition, the court awarded Mrs. Brewer a monetary award in the amount of $250,000, but upon consideration of Mr. Brewer's motion for reconsideration, the court reduced that amount to $175,000. Both parties noted appeals from that order.

In determining Mr. Brewer's income for purposes of alimony, Mrs. Brewer argued that the circuit court should impute income to Mr. Brewer based on what she argued was an underutilization of his investments. Mr. Brewer testified that he had always invested in growth-oriented stocks. Mrs. Brewer argued that if Mr. Brewer were to instead invest in income producing securities, his income would be substantially higher. The circuit court declined to impute income to Mr. Brewer based on his investment strategy.

Also at issue was furniture that Mr. Brewer had inherited from his mother. Mr. Brewer maintained that the inherited furniture

belonged solely to him. Mrs. Brewer, on the other hand, argued that the furniture was jointly-owned, pointing out that there is a presumption that household goods and furnishings used for the family are jointly-owned. The circuit court found no evidence that Mr. Brewer intended the furniture to be a gift to Mrs. Brewer and ordered that the furniture belonged solely to Mr. Brewer.

Held: Vacated. The circuit court erred in failing to make a finding as to Mrs. Brewer's income. Moreover, after considering Mrs. Brewer's income from her job, her eligibility for social security benefits, and her portion of Mr. Brewer's pension, which was to be awarded by a QDRO, Mrs. Brewer's monthly income would equal almost 80% of Mr. Brewer's. No reported Maryland appellate decision has upheld an award of indefinite alimony where there is such a small disparity in the parties' incomes. Indeed, after including her alimony payment, her income would far exceed Mr. Brewer's.

As for the imputation of income, Maryland law does not require the court to impute a higher rate of return to spouses from their investment assets. This is especially true in cases such as this where the spouse has always elected to invest in growth stocks and there is no evidence that he chose that strategy simply to lessen his alimony payments. Thus, under the circumstances, the trial court neither erred nor abused its discretion by not imputing a higher rate of return to Mr. Brewer from his investment assets.

As for the furniture, Mrs. Brewer is correct that in Maryland furniture used for marital purposes is presumed to be jointly-owned, regardless of whether one spouse uses separate funds to purchase that furniture. That presumption does not, however, extend to cases where the spouse passively inherits furniture, even if used for marital purposes. Simply using inherited household goods as they are intended to be used is not enough to create a presumption that the spouse intended to make a gift of the property to the marital unit. A distinction can legitimately be drawn between a spouse purchasing household goods or furnishings for family use and inheriting those same goods. Unlike purchased goods, inherited items frequently have a sentimental value that exceeds market worth, but only to the recipient.

Lawrence J. Brewer, Jr. v. Gretchen K. Brewer, No. 2704, September Term, 2002, filed March 31, 2004. Opinion by Krauser, J.

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INSURANCE - DUTY TO COOPERATE - MOTORCYCLE INSURANCE - CLAIMS AND CONTRACTS

Facts: On October 30, 2000, William Phillips purchased a 2001 Yamaha motorcycle. Phillips obtained an insurance policy from Allstate that included protection against loss of the motorcycle. Approximately eight days later, the motorcycle allegedly was stolen from a parking space in front of Phillips' apartment. On November 19, 2000, Phillips provided an employee of Allstate with a recorded statement in which he gave untruthful information about his employment and income. Because of inconsistencies in the information provided by Phillips, Allstate required that he submit to an examination under oath ("EUO"). At the EUO, Phillips refused to answer any questions about his finances. Allstate denied Phillips' claim based on lack of cooperation.

Phillips filed a complaint for breach of contract, which was amended to add a count for declaratory judgment. At a deposition, Phillips refused to answer ten questions concerning his income and expenses. Allstate filed a motion for summary judgment, arguing that Phillips could not pursue a claim after making material misrepresentations, failing to cooperate during the EUO, and failing to answer relevant questions during the deposition. The circuit court granted judgment for Allstate.

Held: Affirmed. Phillips' invocation of the Fifth Amendment privilege against self incrimination would not in itself provide the grounds upon which summary judgment could be granted prior to trial. However, under the facts and circumstances of this case, Phillips' refusal to answer questions about his financial circumstances during the EUO violated the terms of the policy and constituted a failure to cooperate.

William H. Phillips v. Allstate Indemnity Company, No. 491, September Term, 2003, filed May 5, 2004. Opinion by Kenney, J.

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POSTCONVICTION PROCEDURE – LAW OF CASE – RIGHT TO COUNSEL – DNA TESTING – WHERE POSTCONVICTION COURT HAD PREVIOUSLY DENIED MOTION OF INMATE, WHO WAS SERVING SENTENCES FOR KIDNAPING, RAPE, AND MURDER, TO HAVE VICTIM'S BODY EXHUMED FOR DNA TESTING, AND COURT OF SPECIAL APPEALS HAD AFFIRMED DENIAL OF MOTION, SUBSEQUENT MOTION BY INDIGENT INMATE FOR APPOINTMENT OF COUNSEL TO INVESTIGATE POSSIBILITY OF OBTAINING DNA TESTING WAS BARRED BY LAW OF CASE; HAD MOTION FOR APPOINTMENT OF COUNSEL NOT BEEN BARRED BY LAW OF CASE COURT OF SPECIAL APPEALS WOULD HOLD THAT INDIGENT INMATE NOT ENTITLED TO APPOINTMENT OF COUNSEL FOR POSTCONVICTION PROCEEDING BROUGHT UNDER TITLE 8, SUBTITLE 2 OF CRIMINAL PROCEDURE ARTICLE.

Facts: The appellant, James Russell Trimble, was an inmate who had been committed to the custody of the Commissioner of Correction for nearly 24 years, serving multiple sentences in connection with a 1981 kidnaping, rape, and murder. He had apparently exhausted the number of postconviction petitions he was entitled to file under Title 7 of the Criminal Procedure Article. In addition, Trimble had moved *pro se* to have the body of the murder victim exhumed so that DNA testing could be conducted upon it. That motion had been denied and the Court of Special Appeals had affirmed.

Trimble subsequently moved for the appointment of counsel, explaining in the motion that he was indigent and he desired to have counsel look into the possibility of having DNA testing conducted. The post-conviction court denied the motion without a hearing, and Trimble appealed to the Court of Special Appeals. He argued that the post-conviction court erred by denying the request for the appointment of counsel and by failing to conduct a hearing on the request.

Held: Judgment affirmed. The Court of Special Appeals explained that since Trimble's earlier motion to have the victim's body exhumed for DNA testing had been denied, and since that denial had been affirmed on appeal, it was the law of the case that DNA testing would not be conducted.

For guidance purposes, the Court nevertheless addressed the merits of Trimble's motion for the appointment of counsel. The Court explained that there is no federal constitutional right to the appointment of counsel for a postconviction challenge, and that in Maryland the right to the appointment of counsel in postconviction proceedings is derived from Md. Code (1957, 2003 Repl. Vol.), §§ 4 and 6 of Article 27A. The Court further explained that, under those sections, an indigent person who seeks to pursue a postconviction proceeding under Title 7 of the Criminal Procedure Article is entitled to the appointment of counsel by the

Office of the Public Defender or by the court.

The Court of Special Appeals observed that, because Trimble had apparently exhausted the number of postconviction petitions that he could file under Title 7 of the Criminal Procedure Article, and because in any event the time for filing a petition under Title 7 had expired, any further postconviction action that Trimble might contemplate would have to be pursued under § 8-201 of the Criminal Procedure Article, which specifically addresses postconviction review concerning DNA evidence. The Court determined that no language in §§ 4 or 6 of Article 27A, or in § 8-201 of the Criminal Procedure Article, extends the right to the appointment of counsel to indigent persons who pursue postconviction proceedings under § 8-201. The Court declined to extend, by judicial interpretation, the right to the appointment of postconviction counsel to such cases.

James Russell Trimble v. State of Maryland, No. 1134, September Term, 2003, filed May 7, 2004. Opinion by Smith, J. (retired, specially assigned).

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WORKERS' COMPENSATION ACT - DEPENDENT SPOUSE BENEFITS - L.E. § 9-503; L.E. § 9-610 - SURVIVING DEPENDENT - COMBINED BENEFITS - OFFSET PROVISIONS - OCCUPATIONAL DISEASE - STATUTORY CONSTRUCTION - PURSUANT TO L.E. § 9-503, WHEN A FIREFIGHTER DIED FROM AN OCCUPATIONAL DISEASE, THE SURVIVING SPOUSE IS NOT ENTITLED TO RECOVER COMBINED SERVICE PENSION BENEFITS AND COMPENSATION BENEFITS. INSTEAD, THE OFFSET PROVISIONS OF L.E. § 9-610 APPLY.

Facts: Ernest Johnson served as a firefighter for Baltimore City for thirty-two years. He was diagnosed with colon cancer in January 1993, while still employed as a firefighter, and succumbed to the illness on March 11, 1994. At the time of his death, Johnson earned an average weekly wage of $989.75. The parties agreed that Mrs. Johnson was wholly dependent upon her husband, and that Mr. Johnson's cancer constituted an occupational disease under L.E. §

9-503(c).

Mrs. Johnson received a service pension benefit of $603.90 following her husband's death. Mrs. Johnson later filed a Workers' Compensation claim to recover compensation benefits under L.E. § 9-503(e). The Workers' Compensation Commission awarded Mrs. Johnson additional benefits. The circuit court affirmed.

Held: Reversed. The Court of Special Appeals concluded that L.E. § 9-503 did not apply and that the provisions of L.E. § 9-610 governed Mrs. Johnson's claim. L.E. § 9-503 provides special treatment for certain public safety employees. In regard to a firefighter with a specified occupational disease, of which rectal cancer is one, L.E. § 9-503(e) permits a public safety employee simultaneously to collect workers' compensation benefits and retirement benefits, up to a maximum that does not exceed the worker's weekly wage. L.E. § 9-610 provides that dependents of government workers may recover pension benefits in the same amount as paid to the employee before the employee's death.

The Court considered whether L.E. § 9-503(e) extended to a surviving, dependent spouse of a deceased firefighter who died from an occupational disease recognized by L.E. § 9-503(c). The Court concluded that, pursuant to the rules of statutory construction, L.E. § 9-503 does not apply to dependents. The Court compared the language of L.E. § 9-503 with L.E. § 9-678, which specifically provided for payment of benefits to "individuals ... wholly dependent on a deceased covered employee at the time of death," and concluded that the legislature could have included a similar provision if it intended for L.E. § 9-503(e) to extend to dependents. The provision includes no such language, however. The Court concluded that no ambiguity was present in L.E. § 9-503(e), and thus it did not apply to dependents of deceased public safety employees. Rather, the set off provisions of L.E. § 9-610 applied.

Mayor and City Council of Baltimore City v. Ernest A. Johnson, No. 1061, September Term, 2003, filed April 23, 2004, by Hollander, J.

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ATTORNEY DISCIPLINE

By and Opinion and an Order of the Court of Appeals of Maryland dated May 13, 2004, the following attorney has been disbarred, from the further practice of law in this State:

ALLAN J. CULVER, JR.
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By an Order of the Court of Appeals dated May 19, 2004, the following attorney has been disbarred by consent, from the further practice of law in this State:

ROBERT WHITING ELDRIDGE
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