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Facts: Pursuant to a warrant, police officers seized a quantity of suspected marijuana from Petitioner's residence. Petitioner was charged with possession with the intent to distribute. Petitioner moved to suppress the evidence seized, arguing that the issuing judge lacked a substantial basis to issue the warrant because probable cause, based upon the results of a trash seizure and search that revealed drug trafficking, was stale. The affidavit indicated that the trash seizure occurred one year and one day prior to the application for the warrant. The affidavit also indicated that the affiant was aware that trash collection days for the residence are Wednesday and Saturday. No on-going activities of like kind in the interim were recited. The affidavit stated also that neighbors complained of noise and foot traffic and that officers observed a car parked by the Petitioner's house, which vehicle assertedly was registered in the name of a convicted drug dealer. Petitioner contended that the hearing court neither could assume that the date of the trash seizure was a typographical error, nor consider facts or testimony beyond the four corners of the affidavit to allow the affiant to supplement the affidavit by testifying to a typographical error, if a mistake had occurred.

The Circuit Court concluded that the State was not entitled to have the affiant police officer testify as to his belief in the existence of probable cause or his good faith in completing the search warrant affidavit and executing the warrant. The hearing judge observed that only upon a showing by a defendant that a governmental affiant has perjured himself on a material matter, when litigating the propriet of issuing of a warrant, will witnesses ever be called or extraneous evidence produced, relying on *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) and *Fitzgerald v. State*, 153 Md. App. 601, 837 A.2d 989, *aff'd*, 384 Md. 484, 864 A.2d 1006 (2003). Because the circumstances in the present case did not implicate this rare exception, the judge explained, the court's consideration of the showing of probable cause was limited to the warrant and its application documents. The Circuit Court, therefore, granted Petitioner's motion to suppress. In reaching that result, the

Circuit Court determined that the good faith exception to the exclusionary rule was not applicable because the police officer lacked an objective, reasonable good faith basis to believe that the warrant was issued properly by the District Court judge, due to the facial staleness of probable cause.

The State appealed to the Court of Special Appeals, arguing that the issuing judge could have concluded from the information presented within the four corners of the affidavit that the date of the trash seizure and search actually occurred the day before the warrant application; hence, probable cause existed and was not stale. Alternatively, the State pressed the notion that the good faith exception to the exclusionary rule should be applied. The Court of Special Appeals reversed the judgment of the Circuit Court. *State v. Greenstreet*, 162 Md. App. 418, 875 A.2d 177 (2005). The intermediate appellate court determined that, like the circumstances in *Valdez v. State*, 300 Md. 160, 476 A.2d 1162 (1984), testimony to "clarify or explain" the asserted typographical error could be allowed and yet remain consistent with the "four corners" rule that prohibits courts from going beyond the text of a warrant and its supporting application when reviewing the issuing judge's determination of probable cause. The court looked to a number of cases from foreign jurisdictions to support the proposition that if the affidavit contained an identifiable and certain clerical error, such as a date material to the probable cause finding, the warrant should not be vitiated. Despite this conclusion, the court determined that it did not need to decide whether the reasoning employed in those cases should be adopted as Maryland law or to order testimony be taken in the present case by the Circuit Court because, "from information within the four corners of the affidavit, the District Court judge reasonably could have concluded that that date was a clerical error . . . ." The Court of Special Appeals highlighted several reasons why it was able to infer that the date in the affidavit in the present case was error: (1) the narrative in the affidavit probably was constructed in chronological order and the first item in the narrative was the trash seizure; (2) reasonable police officers would not wait one year to get a warrant after a revealing trash seizure; and (3) the days of the week for normal trash pick-up given in the affidavit are consistent with the day before the warrant was sought, but not the day specified in the affidavit. Because the appellate court determined that the Circuit Court erred when it found that the issuing judge did not have a substantial basis for concluding that the warrant was supported by probable cause, it reversed the suppression order; thus, it became unnecessary to address the arguments regarding the good faith exception to the exclusionary rule.

Held: Reversed. The Court of Appeals determined that the State was precluded from presenting testimony or other extrinsic evidence at the suppression hearing to controvert the date contained in the affidavit in an effort to prove that it was a typographical error because to do so would be an unsanctioned violation of the four corners doctrine. The Court would not consider evidence beyond the warrant and its application that sought to supplement or controvert the truth of the grounds advanced in the affidavit.

The Court also concluded that it could not infer that the issuing judge recognized the purported typographical error in the affidavit, ignored it, and found a substantial basis to support her finding of probable cause based on the trash seizure. The affidavit in this case did not present enough internal, specific, and direct evidence from which to infer a clear mistake of a material date upon which the affiant police officer depended for probable cause. Close review of the affidavit supporting the warrant is the purpose of the warrant process itself. To countenance otherwise, the Court stated, is to degrade the purpose of requiring a magistrate or judge to review and issue warrants.

The Court next concluded that the evidence providing probable cause was stale under the circumstances of this case because it facially existed at a time so remote from the date of the affidavit as to render it improbable that the alleged violation of the law authorizing the search warrant was continuing or extant at the time application was made. The affidavit suggested the criminal activity of illegal drug distribution from Petitioner's residence, but provided evidence of that activity on only one occasion – the trash seizure and search that occurred one year prior to the date of the warrant application. No sales were observed or purchases made, or other indication of *on-going* drug sales were described in the affidavit that might provide for the issuing judge a substantial basis to conclude that it was probable that evidence of narcotic sales would be found in Petitioner's home one year later. The affidavit did not recite facts indicating activity of a protracted or continuous nature, or a course of conduct. The averments of the affidavit were insufficient to provide probable cause, or support a finding that the "easily transferable" narcotics would probably be in the home a year later.

Finally, the Court resolved that the good faith exception to the exclusionary rule did not apply in the present case because probable cause was based on a single event of illegal activity eleven months before the warrant application and the affidavit failed to describe a continuing criminal enterprise, ongoing at the time of the application. No police officer reasonably would rely

on the warrant due to stale probable cause.

Greenstreet v. State, No. 55, September Term, 2005, filed 11 May 2006. Opinion by Harrell, J.

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CRIMINAL LAW - TRIAL - RECEPTION OF EVIDENCE - OFFER OF PROOF

CRIMINAL LAW - TRIAL - COURSE AND CONDUCT OF TRIAL - REMARKS AND CONDUCT OF JUDGE

WITNESSES - RIGHT OF ACCUSED TO COMPULSORY PROCESS

Facts: Francesco A. Kelly, petitioner, was convicted of two counts of attempted first degree murder, attempted second degree murder, first degree assault and use of a handgun in the commission of a felony or a crime of violence. The case began with an altercation between petitioner and three other individuals, two men and a woman, while riding on a bus. After the argument, the victims got off the bus and went to a 7-Eleven to get something to eat. Petitioner, however, remained on the bus. A short time later while the victims were waiting for a second bus they were assaulted by an individual, alleged to be the petitioner. One of the men was shot in the forehead, the second man was shot six times as he ran away from the shooter. The woman, who was six months pregnant at the time, was not shot although she fell twice while running away. The woman and one of the men identified petitioner as the assailant.

At trial, the judge, in the presence of the State's Attorney, required defense counsel to proffer the testimony of all of the witnesses who were going to provide testimony for the defense. The trial court then decided, *sua sponte*, that the testimony would be hearsay and therefore inadmissible. As a result, the defense was not allowed to present any of the three witnesses, two of which were present and ready to testify. After the conviction, petitioner filed a timely appeal with the Court of Special Appeals and that court affirmed the convictions in an unreported opinion.

The Court of Appeals granted certiorari to determine whether the trial judge abused its discretion in requiring the detailed proffer and not allowing the witnesses to testify. *Kelly v. State*, 388 Md. 404, 879 A.2d 1086 (2005).

Held: Reversed and remanded for a new trial. Although proffers are helpful, they should not normally substitute for a witness's testimony when the witness is ready to testify. Generally, witness testimony should be excluded on hearsay grounds upon objection by the opposing party. In the absence of an objection by opposing counsel, hearsay testimony may sometimes be admitted. Testimony which is admitted in such fashion, although hearsay, sometimes may be highly relevant and may play an important role in the disposition of a case. When a trial judge *sua sponte* requires only the defense to provide an advance summary of all of its witnesses' testimony (and not the State) the trial judge puts into question the court's impartiality. As a result, judges must be careful not to leave their role as impartial arbiters by requiring any one party to proffer the testimony of their witnesses in the presence of opposing counsel and then *sua sponte* excluding all of the defense's evidence, i.e., all of the defense's testimony because it may be hearsay.

Francesco A. Kelly v. State of Maryland, No 49, September Term, 2005, filed May 8, 2006. Opinion by Cathell, J.

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COURT OF SPECIAL APPEALS

CRIMINAL LAW – CHILD PORNOGRAPHY - THE DECISION BY THE SUPREME COURT IN *ASHCROFT V. FREE SPEECH COALITION*, 535 U.S. 234 (2002), DOES NOT ESTABLISH A RULE THAT IN CASES INVOLVING CHILD PORNOGRAPHY THE STATE, ABSENT SOME DIRECT EVIDENCE OF THE IDENTITY AND AGE OF THE INDIVIDUAL DEPICTED, MUST PRODUCE AN EXPERT TO TESTIFY THAT THE IMAGE IS OF A REAL CHILD. JURORS CAN BE ENTRUSTED TO DISTINGUISH BETWEEN REAL AND VIRTUAL CHILDREN.

Facts: George McIntyre was convicted of forty-seven counts of possession of child pornography and two counts of distribution of child pornography. The conviction was based upon the contents of two computer disks located in a trailer where McIntyre resided. The disk contained child pornography images.

In his appeal, McIntyre contended, *inter alia*, that the trial court committed reversible error when it denied his motion for judgment of acquittal due to the fact that the prosecution failed to offer any evidence that the images for which he was being prosecuted were, in fact, images of real children. This contention was founded upon the decision of the United States Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Held: Judgment affirmed. The *Ashcroft* case dealt with the constitutionality of a portion of the Federal Child Pornography Prevention Act. The provision in question prohibited the possession or distribution of "sexually explicit images that appear to depict minors but were produced without using any real children." As interpreted by the *Ashcroft* Court, the statute prohibited images created by "using adults who look like minors or by using computer imaging." The Supreme Court struck down a portion of the act on the ground that using virtual images of children or adults who look like children did not involve the actual exploitation of children.

The Court of Special Appeals rejected the appellant's contention that the State, based on the *Ashcroft* decision, was required to prove either the identity of the children in the photographs (and thereafter establish their ages) or alternatively produce an expert witness to testify that the photographs were those of actual children, rather than virtual images of children. Relying on *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003), and rejecting the reasoning of *United States v. Hilton*, 386 F.3d 13

(1st Cir. 2004), the Court concluded that *Ashcroft* did not establish a broad, categorical requirement that, in every case on the subject, absent direct evidence of identity, an expert must testify that the unlawful images is of a real child. Instead, the Court adopted the reasoning of *Kimler* that "juries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the trial court."

George Raymond McIntyre v. State, No. 2206, September Term, 2004, filed April 28, 2006. Opinion by Salmon, J.

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CRIMINAL LAW – RIGHT TO CONFLICT-FREE COUNSEL

Facts: On March 10, 2004, Ramon Catala was arrested in Cecil County as a result of a highspeed car chase. The sole issue in dispute at trial was whether Catala was the driver of the vehicle. Two Maryland State Troopers testified that they witnessed Catala in the driver's seat during and after the car chase, but Catala contended that Rafael Paulhino was driving.

Immediately after the jury returned a verdict of guilty on all sixteen traffic charges, Catala's attorney, Michael Halter, informed the court that he would begin working for the State's Attorney's Office on September 14, 2004, and thus would not be able to represent Catala at his sentencing hearing. Catala told the trial judge that he was aware of Halter's future employment plans and that, as a result, he knew that Halter would not be his counsel at sentencing. Catala then said, "I'm going to get another lawyer. . . . ." He voiced no objection to the fact that his trial counsel was going to work for the organization that had just successfully prosecuted him.

On September 14, 2004, Halter filed a motion to withdraw as counsel for Catala. In his motion, Halter said that he had advised Catala on August 12, 2004, that he had accepted a position with the

Cecil County State's Attorney's Office. Movant also said he advised his client that if any portions of the proceedings were scheduled later than September 14, 2004, he (Halter) would be "forced to withdraw his appearance . . . due to a conflict of interest." Halter gave Catala "the option of retaining other counsel," but Catala said that he wished for Halter to represent him as long as he was able to do so. On October 6, 2004, the circuit court granted Halter's motion to withdraw.

Catala appeared at the October 21 sentencing hearing without counsel. The sentencing judge, after concluding that Catala had not made sufficient efforts to obtain new counsel, told him, "You don't have an absolute right to counsel at sentencing like you do at the time of guilt or innocence phase of the case." The court then denied Catala's (implied) request for a postponement.

Catala based his appeal on the following contentions. He argued that the trial court erred by failing to make any meaningful inquiry into his trial counsel's conflict of interest and by failing to ask appellant whether he knowingly and voluntarily waived his right to a conflict-free counsel. Catala also argued that the trial court erred in failing to give him some meaningful opportunity to explain why he had appeared without counsel at the sentencing hearing.

Held: Judgments affirmed, but case remanded for re-sentencing.

The Court noted that Catala did not raise any objections at any time in the trial court as to his attorney's (alleged) conflict of interest. Therefore, based on *Cuyler v. Sullivan*, 445 U.S. 335 (1990), the appellant was required to show that an actual conflict of interest adversely affected his trial counsel's performance. The Court observed that because Halter had already been hired by the State's Attorney's Office over three weeks prior to trial, he had no reason to "curry favor" with his new employer. Moreover, the Court found nothing in the record to support the appellant's assertion that Halter was less than zealous in his representation of appellant. The Court also concluded what the appellant characterized as an actual conflict was, in fact, a mere theoretical conflict of interest, and therefore a conflict that did not entitle appellant to a new trial. The Court also ruled that even if appellant had shown an actual conflict of interest, he would not have been entitled to a reversal based on that conflict because the record did not support the conclusion that the conflict adversely affected Halter's trial performance.

In regard to sentencing, the Court held that, under Maryland

Rule 4-215, it is clear that, when a defendant appears at sentencing after his trial counsel has withdrawn, the sentencing judge may not force an unrepresented defendant to proceed without counsel unless the court first gives the defendant a fair opportunity to explain why he or she has not retained new counsel. The Court concluded that the sentencing judge failed to give appellant such an opportunity. As a consequence, appellant was entitled to a new sentencing hearing.

Ramon Catala v. State of Maryland, No. 1952, Sept. Term, 2004, filed April 27, 2006. Opinion by Salmon, J.

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CRIMINAL LAW – SEARCH AND SEIZURE – EXIGENT CIRCUMSTANCES – DESTRUCTION OF EVIDENCE

CRIMINAL LAW – SEARCH AND SEIZURE – EXIGENT CIRCUMSTANCES – GRAVITY OF THE OFFENSE

Facts: Sergeant Steven Nalewajkl accompanied a barefoot Leslie Nicole Harmon, a potential witness to a shooting, to her Baltimore City apartment so that she could retrieve her shoes before going to the police station for questioning. When the two arrived at the door to the apartment, Harmon knocked, and after a minute or two, her roommate, Curtis Painter, answered the door. Sgt. Nalewajkl noticed that Painter was breathing heavily and was acting nervous. He could also smell the odor of burnt marijuana. Nalewajkl asked why Painter was nervous; Painter replied that he had two bags of marijuana. Sgt. Nalewajkl followed Harmon into the apartment, placed Painter under arrest, and conducted a protective sweep of the apartment. While checking the open closet to see if anyone was inside, Sgt. Nalewajkl observed several handguns protruding over a closet shelf. He used this information to obtain a search warrant for the apartment, which resulted in the seizure of numerous weapons, narcotics, paraphernalia, and money. Gorman, who also shared the apartment with Painter and Harmon, was arrested and charged with numerous counts relating to the goods seized in his

apartment.

Gorman moved prior to trial to suppress the goods, arguing that Sgt. Nalewajkl's initial warrantless entry into the apartment was illegal, and that the seizure of goods was the fruit of the poisonous tree. The Circuit Court for Baltimore City denied the motion on the grounds that there were exigent circumstances justifying the warrantless entry into the apartment, namely, the potential for the destruction of evidence.

A Baltimore City jury convicted Gorman of four counts of being a felon in possession of a firearm. He appealed, again arguing that the warrantless entry into his apartment was not supported by exigent circumstances. He further maintained that, even if exigent circumstances were present, a warrantless entry to arrest for marijuana possession was presumptively unreasonable because that crime is a "minor offense."

Held: Sgt. Nalewajkl's warrantless entry to prevent the destruction of evidence was reasonable. He accompanied a potential shooting witness to her apartment to retrieve her shoes, and smelled burnt marijuana when a nervous co-tenant opened the door after a delay. Sgt. Nalewajkl had no probable cause to believe that the crime of marijuana possession was occurring until after he arrived at the apartment in the course of an unrelated investigation, and had no time to obtain a warrant before Painter was aware of his presence and detection of the drugs.

Additionally, as a matter of first impression, no bright line rule will be established to determine whether an offense is a "minor offense" such that a warrantless entry to arrest for it is presumptively unreasonable under *Welsh v. Wisconsin.* 466 U.S 740, 753, 104 S. Ct. 2091, 2099 (1984)(explaining that warrantless entries to arrest for "minor offenses" "should rarely be sanctioned"). The Supreme Court in *Illinois v. MacArthur,* 531 U.S. 326, 121 S. Ct. 946 (2001), relied on two factors to determine that the warrantless entry in that case was not presumptively unreasonable under *Welsh*: the penalty that attached to the offense, and the "intrusiveness" of the entry. Under the facts and circumstances of Gorman's case, the warrantless entry to arrest for marijuana possession was reasonable because (1) marijuana possession carries a potential jail term, and (2) the entry was "less intrusive" than a forcible entry because Sgt. Nalewajkl was at the apartment to accompany a cooperating tenant to retrieve her shoes, and merely followed her inside through an open door.

Christopher Gorman v. State of Maryland, No. 1282, September Term, 2004, filed April 26, 2006. Opinion by Adkins, J.

FAMILY LAW - CUSTODY AND VISITATION - MD. CODE (2004 REPL. VOL., 2005 SUPP.), FAM. LAW (F.L.) § 9-101; REJECTION OF CUSTODY OR VISITATION IF ABUSE LIKELY; *IN RE BILLY W.*, 387 MD. 405 (2005); TRIAL COURT ERRED IN RENDERING FINDINGS OF FACT APPLYING THE PREPONDERANCE OF THE EVIDENCE STANDARD, AKIN TO A LEVEL OF CERTITUDE OF PROBABLE CAUSE, RATHER THAN THE LESS STRINGENT STANDARD OF WHETHER THE COURT HAD REASONABLE GROUNDS TO BELIEVE THAT THE MINOR CHILD HAD BEEN ABUSED BY APPELLEE; UPON A DETERMINATION, APPLYING THE REASONABLE GROUNDS STANDARD, THAT THE MINOR CHILD WAS ABUSED BY APPELLEE, IT IS MANDATORY THAT THE COURT DENY UNSUPERVISED VISITATION UNLESS THE COURT SPECIFICALLY FINDS THAT THERE IS NO LIKELIHOOD OF FURTHER ABUSE OR NEGLECT; CASE *SUB JUDICE*, DISTINGUISHED FROM *BOHNERT v. STATE*, 312 MD. 266 (1988), WHEREIN THE COURT OF APPEALS HELD THAT PERMITTING WITNESS TO VOUCH FOR CREDIBILITY OF ANOTHER WITNESS INVADED THE PROVINCE OF THE JURY; TRIAL COURT PROPERLY DETERMINED THAT EXPERT WITNESSES WERE NOT DISQUALIFIED BECAUSE OF LACK OF CONCENTRATION OF STUDY IN SPECIALTY OR BECAUSE THEY HAD NOT PUBLISHED OR LEARNED TREATISES.

Facts: Kira Tarachanskaya, appellant, and Mikhail Volodarsky, appellee, parents of Greta, a minor child, filed petitions and cross-petitions in the Circuit Court for Baltimore County to modify the parties' custody and visitation. Allegations of sexual abuse by appellee played the primary role in the custody/visitation case. The circuit court found, by a preponderance of the evidence, that Greta was not sexually abused by appellee and subsequently ordered that appellee be "permitted to visit with his daughter in a therapeutic setting," and that the therapist should provide a reunification plan. Appellant retained legal and physical custody and appealed.

Held: Vacated and remanded in part; affirmed in part. Pursuant to F.L. § 9-101, "reasonable grounds to believe" was the proper standard for the court to use to conside4r the evidence and not "preponderance of the evidence". The Court also improperly delegated its judicial authority to decide upon custody and visitation when it ordered a therapist to draft reunification plans for appellee and Greta. On remand, The circuit court must examine the evidence to determine if there are reasonable grounds to believe Greta was molested by appellee and, based upon that ruling, decide whether abuse may be likely to recur and, construct a clear, supervised or unsupervised visitation schedule, if applicable. In affirming the court's judgment, the trial court did not abuse its discretion in qualifying and accepting expert testimony from two experts, who failed to conclude that appellee sexually abused Greta. Finally, it did not err by considering testimony and evidence from prior hearings to render rulings in the case at bar.

Kira Tarachanskaya v. Mikhail Volodarsky, No. 1453, September Term, 2005, decided May 2, 2006. Opinion by Davis, J.

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INSURANCE – PROPERTY DAMAGE COVERAGE – "BUSINESSOWNERS POLICY" – IF INSURER IS LIABLE FOR SNOW REMOVAL COSTS UNDER PROPERTY COVERAGE FORM, INSURER MAY BE LIABLE FOR FEES AND EXPENSES INCURRED BY INSURED IN DEFENDING CLAIM BY THIRD PARTY BUT NOT IN PURSUING CLAIM AGAINST INSURER.

INSURANCE – COVERAGE – LIABILITY COVERAGE UNDER "BUSINESSOWNERS POLICY" INSURER OWED NO DUTY TO DEFEND INSURED AND INCURRED NO LIABILITY UNDER LIABILITY COVERAGE FORM WHERE CLAIM BY THIRD PARTY AGAINST INSURED CAME WITHIN INSURANCE CONTRACT EXCLUSION.

Facts: Appellants, Chik S. Chang and Hye Ja Chang, filed a complaint against Brethren Mutual Insurance Company, appellee, in the Circuit Court for Anne Arundel County to recover the fees and costs incurred in defending a claim by a third party against appellants, and for the fees and costs incurred in pursuing a claim against appellee. The circuit court granted summary judgment for appellee, and appellants appealed that decision.

Appellants were the insureds on a "businessowners policy" (the Policy), issued by Brethren Mutual Insurance Company, appellee. The policy provided both property coverage and liability coverage. In the "coverage" part of the property coverage form, appellee agreed to "pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." In the "coverages" part of the liability coverage form, appellee agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' . . . caused by an 'occurrence[.]'" Under this section, appellee also agreed to defend any suit seeking such "property damage."

Section E.3.a.(4) of the Policy provided that the insured must "in the event of loss or damage to the Covered Property . . . [t]ake all reasonable steps to protect the Covered Property from further damage . . . for consideration in the settlement of the claim." Section A.5.g provided in part that the insurer "will pay necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property at the described premises" and "Extra Expense means expense incurred (a) To avoid or minimize the suspension of business and to continue 'operations': (i) At the described premises[.]"

Snow accumulated on the roof of the building insured by the Policy and caused property damage to the building and its contents. Appellants contracted with a third party, Security Remodeling, Inc. (Security), to remove the snow from the roof. By contract, Security agreed "to perform all restorations which are approved by [appellants'] insurance company, with the funds that are provided by [appellants'] insurance company." The agreement further provided that appellants would incur no "out of pocket expense" except for "the homeowners' deductible as described in your homeowners insurance policy."

Appellee denied liability for the cost of snow removal, and Security sued appellants for the cost. In his deposition, a representative of Security, Lloyd K. Butts, testified that he received a call from Kirsten W. Barefield, an ajuster employed by an outside adjusting agency retained by appellee. According to Mr. Butts, Ms. Barefield agreed that the snow had to be removed in order to prevent further water damage to the insured building. After repairs were done and a copy of the invoice sent to appellants was also sent to Ms. Barefield, Ms. Barefield sent to Mr. Butts "a revised estimate of repair," in which she stated that the charges for snow removal, overhead, and profit had been removed and would not be covered by appellee. Appellants ultimately prevailed on the claim brought by Security.

Appellants then sued appellee for the fees and costs incurred in defending the claim by Security against appellants and for the fees and costs incurred in pursuing a claim against appellee. Appellants asserted three counts in their complaint: (1) breach of contract, alleging that the claim for Security's work was property loss and covered under the Policy; (2) breach of contract, asserting that appellee had a duty to defend appellants in the suit by Security; and (3) a real party in interest claim that was later abandoned. Appellants sought attorneys fees in conjunction with both counts I and II.

Following discovery, appellants filed a motion for partial summary judgment against appellee, requesting that judgment be entered on count II. Appellee responded with a motion for summary judgment with respect to all of appellants' claims. By memorandum opinion and order, the circuit court denied appellants' motion and granted appellee's motion. Appellants appealed that decision to this Court.

On appeal, appellants' claims are for fees and costs incurred (1) in defending the claims by Security against them and (2) in pursuing the third party claim against appellee, in which appellants asserted first party coverage (under the property coverage form) and at least the potentiality of third party coverage (under the liability form), carrying with it a duty to defend appellants in the suit by Security. Appellants asserted first party coverage on the grounds that snow removal costs were covered as a mitigation expense under section E.3.a.(4) of the policy or as an "extra expense" under section A.5.g. With respect to third party coverage, appellants contended that Security's suit sought damages "because of . . . property damage . . . to which this insurance applies," as stated in the "coverages" portion of the liability coverage form, and thus, the duty to defend provision was satisfied.

Held: Judgment vacated, and case remanded to the circuit court for further proceedings not inconsistent with the opinion. With respect to first party coverage, the Court determined that when an insured has a duty to mitigate damages under an insurance contract, the insured is not necessarily entitled to mitigation expenses from the insurer as a matter of law. The Court also declined to read the word "consideration" as unambiguously providing that appellee could arbitrarily and unreasonably decline to pay for costs that met the necessity and reasonableness requirement of the mitigation expense clause. Thus, the provision in the policy providing that appellee would consider expenses incurred in mitigating further loss, in settlement of a claim, was ambiguous, and there was a fact question as to whether appellee was liable for snow removal costs as a mitigation expense.

On remand, the circuit court must determine whether appellee, through Ms. Barefield, authorized removal of the snow before the work was actually done and, at least impliedly, agreed to pay for it. If it is determined that an authorized agent did authorize and approve the work performed by Security, the ambiguity in the Policy would not have to resolved, and fact questions would exist as to whether the work was within the scope of the authorization and whether the costs were reasonable and necessary. If it is determined there was no prior valid authorization, the ambiguity

would have to be resolved. Consistent with the rules of contract construction, the parties may present admissible extrinsic evidence to explain the ambiguity. If they fail to do so, the circuit court must construe the provision against appellee.

Even if it is determined that appellee was liable for snow removal costs, there is still a question as to whether appellants were entitled to attorney's fees and expenses as a matter of law. In the absence of an express duty to defend the insureds or for payment of litigation fees and expenses, the prevailing party in a lawsuit may not recover attorney's fees. The Court, held, however, that, under the "collateral litigation" exception, an insured may recover, as an element of damage in a contract action, attorney's fees and expenses reasonably incurred in defending an action against it, when initiation of the action by a third party was the natural and probable consequence of an insurer's wrongful denial of a first party coverage claim. Thus, on remand, if it is determined that appellee was contractually bound to pay for some or all of snow removal costs, damages may include the amount of fees and expenses reasonably incurred in the defense of Security's claim against appellants.

With respect to third party coverage, the Court held that appellee owed no duty to defend appellants and incurred no liability under the liability coverage form. The Court first laid out the general rule that a prevailing party in a lawsuit may not recover attorney's fees. The Court noted an exception that when the policy contains a duty to defend, the insured may recover not only fees and expenses incurred in defending a claim against it but also in enforcing the insurer's obligations under the policy. In this case, however, the Policy did not contain a duty to defend either in the property coverage form or in any portion of the Policy that applied to the Policy as a whole, and the duty to defend contained in the liability coverage form did not apply to the snow removal costs. In addition, the liability coverage form excluded "'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement," and the obligation and any liability by appellants to Security arose solely by agreement.

Chik S. Chang et al. v. Brethren Mutual Insurance Company, No. 657, September Term, 2005, filed May 1, 2006. Opinion by Eyler, James R., J.

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TORTS - MALICIOUS PROSECUTION; INITIATION/CONTINUATION OF LEGAL PROCEEDINGS; THE EXISTENCE OF PROBABLE CAUSE AS A BAR TO A SUIT FOR MALICIOUS PROSECUTION; *BROWN v. DART DRUG*, 77 MD. APP. 487 (1989); MERE FACT THAT APPELLANT TURNED OVER ITS REPORT OF INVESTIGATION OF THEFT FROM ITS PLANT TO POLICE WHO, IN THEIR SOLE DISCRETION, MADE DECISION TO BRING CHARGES AGAINST APPELLEES DID NOT SUPPORT CONCLUSION THAT APPELLANT INITIATED PROCEEDINGS; OFFER TO FORBEAR TERMINATION OF APPELLEE IN EXCHANGE FOR HIS TESTIMONY AGAINST CO-EMPLOYEE IN CONJUNCTION WITH FAILURE TO TURN OVER INFORMATION WHICH COULD INFLUENCE POLICE AND PROSECUTORS TO CONDUCT FURTHER INVESTIGATION BEFORE DECIDING WHETHER TO PROCEED OR DISMISS CHARGES AGAINST APPELLEE WAS SUFFICIENT TO SUPPORT A DETERMINATION THAT APPELLANT CONTINUED PROSECUTION AGAINST APPELLEE/TRUCK DRIVER; TRIAL COURT ERRED IN NOT FINDING THAT APPELLANT, AS A MATTER OF LAW, HAD PROBABLE CAUSE TO REPORT BEHAVIOR OF ITS DRIVER WHERE THE FACTS UPON WHICH IT BASED PROBABLE CAUSE WERE THAT (1) ITS FACILITY WAS EXPERIENCING SERIOUS PROBLEMS WITH THEFT (2) ITS UNDERCOVER INVESTIGATOR HAD OBSERVED EMPLOYEES STEALING HAMS ON THE NIGHT SHIFT AND PLACING THEM IN THEIR PRIVATE VEHICLES (3) AN EMPLOYEE, PERRY, WAS FREQUENTLY OBSERVED STEALING HAMS AND (4) APPELLANT'S UNDER COVER INVESTIGATOR OBSERVED APPELLEE/TRUCK DRIVER DRIVE TRACTOR UP TO LOADING DOCK WITH LIGHTS OFF AND RECEIVE FROM PERRY TWO CASES OF HAMS THAT APPELLEE/DRIVER, IN CONTRAVENTION OF COMPANY POLICY, PLACED IN THE CAB, RATHER THAN THE REFRIGERATED REAR OF THE TRUCK.

Facts: Appellant initiated an investigation into possible thefts by its employees at its Landover, Maryland facility. An undercover investigator, who worked at the plant, reported to the head of security any acts of theft or violations of company policy he observed. The investigation, which identified nine possible suspects, concluded following a sting operation conducted in cooperation with the Prince George's County Police Department. Appellee was employed by appellant as a truck driver, who at times would drive shipments from the Landover, Maryland facility. Appellee was not one of the workers identified as a suspect due to the sting operation, but rather he was identified by the undercover worker, based upon events, which occurred on December 18, 2000.

On that evening, appellee arrived at the Landover facility and, after speaking with the supervisor, was told that his load was two cases short. In order to correct the problem, he was told that he would have to connect his tractor to the trailer and bring it to the dock to be loaded. Appellee, who was in a hurry to get to dinner, did not want to connect the trailer only to disconnect it to go to dinner, then repeat the process before driving the shipment to its destination. He was then told to pull his tractor up to the dock without the trailer connected, and two dock workers,

one of whom was the undercover worker and the other a previously identified suspect, were told to take him two cases of hams, which he loaded in the cab of his tractor. The undercover worker reported the events and the report was turned over to the police. Appellee was charged with theft as a result, and was later terminated by the company as a result of the charges. The case went to trial and appellee was acquitted.

Appellee then filed suit against appellant, alleging malicious prosecution and abusive discharge. The jury found for appellee on his claims and awarded $560,523 in compensatory damages of which $52,947 was lost wages and $2,971 was interest thereon. The jury also awarded appellee $1,000,000 in punitive damages. Appellant filed a motion for JNOV on the claim for lost wages, which the court granted. It also filed a remittitur on the compensatory and punitive damages awards, which were reduced to $304,605 and $200,000 respectively.

Appellant appealed, alleging that appellee did not establish that it initiated or continued the prosecution against him; that it had probable cause to initiate or continue the prosecution; or that it initiated the prosecution with malice. It also alleged that appellee failed to prove that it acted with actual malice to support the award for punitive damages. Appellee cross-appealed, claiming that the court erred in granting the motion for JNOV and, in granting appellant's motion for remittitur. Appellee also claimed that the court erred by granting appellant's motion for JNOV at a prior trial on his claim for abusive discharge.

Held: Reversed. There was insufficient evidence to support appellee's claim for malicious prosecution because appellant had probable cause to believe that appellee was involved in the thefts.

Smithfield Packing Company, Inc. v. Ransom Evely, et al., No. 806, September Term, 2005, decided May 1, 2006. Opinion by Davis, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated May 4, 2006, the following attorney has been disbarred by consent from the further practice of law in this State:

WILLIAM N. PORTER

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By an Order of the Court of Appeals of Maryland dated May 4, 2006, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

REX B. WINGERTER

*

By an Order of the Court of Appeals of Maryland dated May 4, 2006, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

DONALD L. HOAGE

*

By an Order of the Court of Appeals of Maryland dated May 8, 2006, the following attorney has been disbarred by consent from the further practice of law in this State:

CARLOS H. CACERES

*

By an Order of the Court of Appeals of Maryland dated May 23, 2006 the following attorney has been suspended for sixty (60) days by consent, effective June 5, 2006, from the further practice of law in this State:

MICHAEL W. RYAN, JR.

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By an Order of the Court of Appeals of Maryland dated May 23, 2006, the following attorney has been indefinitely suspended by consent, effective immediately, from the further practice of law in this State:

JOHN J. DICKERSON

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