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Facts: Michael Pollock was released from the Patuxent Institute on parole on the condition that he undergo annual urinalysis testing to determine whether he was in compliance with the "no drugs" and "obey all laws" requirement of his parole order. On May 15, 1997, Pollock arrived at Patuxent to submit a urine sample. In the process of collecting his urine sample, the on-duty staff member failed to comply with several technical requirements included in the Patuxent internal directive that set forth the procedures to be followed in collecting and identifying urine samples. Specifically, the wrong inmate number was written on the specimen paperwork and Pollock himself secured the evidence tape over his own sample instead of the officer. Subsequently, Pollock's urine sample tested positive for marijuana. These test results were admitted at his parole revocation hearing and his parole was revoked.

Pollock argued that the failure of the Patuxent Institution staff to strictly comply with technical collection and document procedures for urinalysis samples set forth in the Patuxent directive justified the exclusion of his positive urinalysis drug test results. He argued that the Patuxent directive set forth a mandatory procedural framework that must be followed when obtaining and testing a Patuxent inmate's urine for illicit drugs, and the

Patuxent staff's violations of the directive rendered the decision to admit the urinalysis results "arbitrary and capricious."

The Court of Special Appeals held that where *Accardi* is applicable, any agency violation of a rule or regulation is a violation *per se* and the agency violation must be invalidated. However, the Court of Special Appeals recognized the primary exception to the *Accardi* doctrine and held that an agency's failure to follow its internal administrative procedures only requires a reversal of the agency's action if the complaining party can show substantial prejudice. The intermediate appellate court went on to opine that Pollock's case fell within the *Accardi* exception and upheld the decision of the Patuxent Institute Board of Review to revoke Pollock's parole because Pollock did not show that he was prejudiced by the Patuxent staff's violation of the internal directive at issue.

Held: Affirmed. The Court of Appeals affirmed the judgment of the Court of Special Appeals, however, the Court of Appeals rejected the Court of Special Appeals' holding that there can be a *per se* violation of the *Accardi* doctrine any time an agency rule or regulation is violated.

The Court of Appeals held that whether the *Accardi* doctrine applies in a given case is a question of law that requires the courts to scrutinize if the rule or regulation at issue "affects individual rights and obligations" or whether it confers "important procedural benefits" or, conversely, whether *Accardi* is not implicated because the rule or regulation falls within the ambit of the exception which does not require strict agency compliance with internal "procedural rules adopted for the orderly transaction of agency business." The Court of Appeals further held that where the *Accardi* doctrine is applicable, a complainant must still show prejudice to him or her that resulted from the agency decision in order to have the agency decision struck down. Additionally, the Court of Appeals held that where an exception to the *Accardi* doctrine applies and where an agency fails to follow its "internal administrative procedures," if a complainant can nonetheless show prejudice to a substantial right due to the violation of the rule or regulation by the agency, then the agency decision may be invalidated pursuant to the Maryland Administrative Procedure Act. In either case, prejudice must be shown.

In Pollock's case, the Court of Appeals affirmed the Court of Special Appeals' holding that Pollock failed to demonstrate that he suffered any prejudice in the way his urine sample was handled by Patuxent staff, who committed purely technical infractions of a Patuxent internal directive adopted to carry out "internal administrative procedures."

Michael Pollock v. Patuxent Institution Board of Review. No. 106, September Term, 2002, filed May 8, 2002. Opinion by Cathell, J.

ADMINISTRATIVE LAW – EXHAUSTION OF REMEDIES – MEMBERS OF GOVERNMENT PENSION PLAN SHOULD HAVE PURSUED ADMINISTRATIVE REMEDIES AS OUTLINED BY STATUTE RATHER THAN FILING A DECLARATORY JUDGMENT ACTION IN CIRCUIT COURT; THEREFORE, JUDGMENT VACATED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

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Facts: Petitioners, nine officers with the Baltimore City Police Department, received a letter from the Fire and Police Employees' Retirement System ("Retirement System") stating that their retirement benefits under the city's Deferred Retirement Option Plan ("DROP") would be paid out as marital property to their former wives pursuant to their respective judgments of divorce. Petitioners filed a Complaint for Declaratory and Injunctive Relief in the Circuit Court for Baltimore City, seeking a declaration that their retirement benefits are not marital property and should be disbursed solely to them.

The Circuit Court dismissed the Complaint, with prejudice. After doing so, the court ordered the Retirement System to "treat all DROP benefits as ordinary pension benefits for the purposes of payments pursuant to the parties' Judgments of Divorce."

Petitioners noted a timely appeal to the Court of Special Appeals. In an unreported opinion, that court affirmed.

Held: Judgment of the Court of Special Appeals vacated and case remanded to the Circuit Court for Baltimore City with directions to dismiss the action. The Court of Appeals held that petitioners did not exhaust their specific administrative remedies. Petitioners should first have sought a hearing in front of the Board before seeking judicial review. The Court explained that the exhaustion doctrine enforces the notion that an administrative agency should have the opportunity to exercise its expertise and discretion first to resolve an issue.

The Court also pointed out that, although the trial court properly dismissed the action, it erred in following its dismissal of the complaint with an order that the Retirement System "treat all DROP benefits as ordinary pension benefits for purposes of payments pursuant to the parties' Judgments of Divorce." Once the

court dismissed the action, the Retirement System was no longer before the court, and thus, there is nothing then pending. All jurisdiction of the court as to the matter previously pending was at an end when the court dismissed the amended complaint, with prejudice.

Brown v. Fire and Police Employees' Retirement System, No. 115, September Term, 2002, filed June 17, 2003. Opinion by Raker, J.

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ATTORNEYS – MISCONDUCT - INDEFINITE SUSPENSION – INDEFINITE SUSPENSION WITH PERMISSION TO REAPPLY NO SOONER THAN SIX MONTHS ORDERED FOR ATTORNEY WHO VIOLATED MARYLAND RULES OF PROFESSIONAL CONDUCT 1.1, 1.2(a), 1.3, 1.4, 8.1 AND 8.4(c) AND (d) IN THE REPRESENTATION OF A CLIENT.

Facts: On April 22, 2002, the Attorney Grievance Commission of Maryland filed a petition for disciplinary action against Thomas Leo Granger, III, for multiple violations of the Maryland Rules of Professional Conduct (MRPC) in his representation of Phyllis Klingenberg. In November of 2002, an evidentiary hearing was held and the hearing judge concluded that Granger had violated all the MRPC alleged by Bar Counsel. The record was then transferred from the hearing judge to the Court of Appeals for oral argument. Both the Attorney Grievance Commission and Granger filed exceptions to the hearing judge's findings of facts and conclusions of law.

Ms. Klingenberg was in danger of losing her home by foreclosure because she was five months delinquent on her mortgage as of August 2001. In response to a letter she received in the mail from Granger, informing her of certain rights and obligations concerning the impending foreclosure sale and his possibility of

providing legal services to her, Ms. Klingenberg called respondent to meet with him about saving her home. Ms. Klingenberg was able to talk to Granger directly who told her of the cost for his representation and what documents were needed. Ms. Klingenberg told Granger that she did not have much money and he accepted $200 to get started on her case. On August 12, 2001, Ms. Klingenberg and her son met with Granger at his office regarding her legal matter. Ms. Klingenberg brought with her all the documents he requested she bring to the meeting. Ms. Klingenberg related to Granger that the foreclosure sale of her home was scheduled for August 28, 2001.

The hearing court found that Granger told Ms. Klingenberg that she had brought all necessary documents for him to file the petition to stop the foreclosure sale of her home and that Granger told her that she need not return to his office. Granger unsuccessfully argued that he told Ms. Klingenberg that she would have to return to his office with other items, additional documents and fees he alleged she did not bring with her to the initial meeting.

Among other things, the hearing court found that Granger knew of the impending date of Ms. Klingenberg's foreclosure sale, but that he made no effort to call her or send her letters reminding her of the urgency to return with the documents he alleged she knew he still needed to file her petition. The hearing court concluded that Ms. Klingenberg was never told to return to his office with more documents and fees before Granger would file her petition. The hearing court also found that Granger told Ms. Klingenber on the phone, on more than one occasion, that her petition had been filed and that her home was "safe." Granger made these false representations to Ms. Klingenberg even after she called him and told him that she received a card in the mail from the person who purchased her home at the foreclosure sale on August 28, 2001. Granger continued to tell Ms. Klingenberg that was impossible and her home was "safe." The hearing court found that Granger did not proffer any evidence showing, after Ms. Klingenberg advised him that her home had been sold at the foreclosure sale, that Granger made any effort to check on the status of her case or confirm that he had, in fact, filed her petition.

Held: Indefinite suspension ordered. The hearing court concluded that Granger was in violation of MRPC 1.1, 1.2(a), 1.3, 1.4, 8.1 and 8.4(c) and (d). The Court of Appeals, after an independent, extensive review of the record, concluded that the hearing court's findings of fact as to these violations were not clearly erroneous and were supported by clear and convincing evidence; therefore, the Court of Appeals found Granger to be in

violation of the MRPC 1.1, 1.2(a), 1.3, 1.4, 8.1(a) and 8.4(c) and (d). Additionally, the Court of Appeals upheld the Attorney Grievance Commission's sole exception to the hearing's judge's findings and conclusions and overruled all but one of Granger's exceptions to the same.

The Court of Appeals held that an indefinite suspension with permission to reapply no sooner than six months was the appropriate penalty.

Attorney Grievance Commission v.Thomas Leo Granger, III, Misc. AG No.31, September Term, 2002, filed May 8, 2003. Opinion by Cathell J.

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CRIMINAL LAW – A DEFENDANT MAY WAIVE HIS RIGHT TO A JURY TRIAL AND ELECT INSTEAD TO BE TRIED BY THE COURT. A DEFENDANT MAY WAIVE THIS RIGHT AT ANY TIME BEFORE THE COMMENCEMENT OF THE TRIAL. THE COURT MAY NOT ACCEPT THE WAIVER UNTIL IT DETERMINES THAT THE WAIVER IS MADE KNOWINGLY AND VOLUNTARILY.

CRIMINAL LAW AND PROCEDURE – TRIALS – JURIES – DEFENDANT'S RIGHTS – RIGHT TO JURY TRIAL – WAIVER OF A JURY TRIAL – A TRIAL JUDGE SHOULD NOT SUGGEST LENIENCY TO INDUCE A DEFENDANT TO ELECT A COURT TRIAL OR THREATEN OR IMPLY A HARSHER SENTENCE IF THE CHOICE IS MADE TO PROCEED WITH A JURY TRIAL OVER A COURT TRIAL. NOR SHOULD A TRIAL JUDGE BASE ANY SENTENCING ON A PREVIOUS EXERCISE OR WAIVER OF A CONSTITUTIONAL RIGHT. HOWEVER, THE RECORD IN THIS CASE DOES NOT ADEQUATELY REFLECT THAT THE SENTENCING JUDGE MADE ANY IMPROPER CONSIDERATIONS IN SENTENCING.

Facts: On January 18, 2002, Gerald Ballard Smith was arrested in Washington County and charged with various controlled dangerous substance offenses. Partly as a result of certain negotiations with the State, some of the charges were dropped. Following a court trial, Smith was found guilty of possession of cocaine with

intent to distribute. Smith, a subsequent offender, received the mandatory minimum sentence of ten years without the possibility of parole.

On July 16, 2002, Smith filed a notice of appeal and the Court of Appeals on its own initiative granted a writ of certiorari to resolve the issue of whether Smith's waiver of his right to be tried by a jury was proper where the trial judge made certain statements on the record regarding Smith's sentencing in light of Smith's decision to waive his right to a jury trial.

At the outset of Smith's proceedings, his attorney indicated to the court that Smith would waive a trial by jury in return for a maximum sentence of ten years without parole if he were to be convicted by the court, which, based upon his status as a subsequent offender was the minimum sentence Smith could have received if he was found guilty of the charges that would remain pending against him pursuant to his agreement with the State.

The trial judge was informed that a part of the agreement between the State and Smith included the dropping of other charges and a second judge's agreement to sentence Smith to a concurrent period of incarceration on a violation of probation charge. On the record, after Smith's counsel indicated to the court that Smith had already decided to waive his right to a jury trial, the trial court judge stated "Well he certainly will make a better decision, I think, as far as sentencing is concerned, if he is found guilty by the Court than if he is found guilty by a jury." Smith argued that this statement by the trial court judge was improper and had a chilling effect on his decision to proceed with a jury trial instead of the court trial, thus, making his waiver ineffective.

Held: Affirmed. The Court of Appeals held that a trial judge should not suggest leniency to induce a defendant to elect a court trial or threaten or imply a harsher sentence if the choice is made to proceed with a jury trial over a court trial. Nor should a trial judge base any sentencing decision on a previous exercise or waiver of a constitutional right.

The Court of Appeals held that, pursuant to the facts and record of Smith's trial, Smith's waiver of his right to be tried by jury was proper. The Court of Appeals opined that the trial judge's statement was ambiguous at best, not unequivocal and, most importantly, was made after Smith's counsel had initially indicated on the record at the outset of the proceedings without objection from Smith, that Smith had already chosen to waive his constitutional right to a jury trial.

The defendant alleged that there were certain other statements of the trial judge made in a conversation in chambers held prior to the commencement of Smith's trial that were also improper and rendered his waiver ineffective. The Court of Appeals emphasized that the statement the trial judge did make on the record does not establish that there had been a prior conversation outside of the courtroom wherein Smith's counsel, the State and the trial judge might have "bargained" for the minimum possible sentence for Smith in exchange for his decision to waive his right to a jury trial. The Court of Appeals relied only on the information in the record and noted that Smith's appeal turned on whether the record disclosed that his waiver was knowing and voluntary.

In Smith's case, the Court of Appeals noted that the record reflected that all the factors regarding Smith's agreeing to a bargain in his case were presented to him prior to his trial and agreement, a part of which involved the State's recommendation of a sentence cap to the trial judge in exchange for Smith waiving his right to a jury trial. This agreement was "hammered out" by Smith's counsel and the prosecutor prior to trial. The Court of Appeals opined that there was no indication that the ambiguous statement later made by the trial judge on the record had any influence on Smith's prior decision to knowingly and voluntarily waive his right to a jury trial.

The Court of Appeals concluded that it is permissible for a criminal defendant to waive a jury trial and elect instead to take a court trial in return for concessions when the defendant's decision is a result of bargaining between the defense counsel and the prosecutor, independent of any representations of leniency or harshness by the trial judge.

Gerald Ballard Smith v. State, No. 128, September Term, 2002, filed June 12, 2003. Opinion by Cathell J.

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CRIMINAL LAW – EXTRATERRITORIAL PRESENTMENT – TIMING AND EFFECT OF DELAY ON VOLUNTARINESS OF ORAL STATEMENT – REQUIREMENT OF MARYLAND RULE 4-212(E) THAT A DEFENDANT SHALL BE TAKEN BEFORE A JUDICIAL OFFICER OF THE DISTRICT COURT WITHOUT UNNECESSARY DELAY BEGINS ONLY WHEN THE ARRESTEE ENTERS THE PROSECUTING JURISDICTION, AND FOR PURPOSES OF DETERMINING WHETHER THE RULE HAS BEEN VIOLATED, THAT PERIOD OF TIME FOLLOWING ARREST IN A NEIGHBORING JURISDICTION IS NOT INCLUDED IN THE TIME CALCULATION. EXTRATERRITORIAL CUSTODY MAY BE CONSIDERED IN THE TOTALITY OF THE CIRCUMSTANCES IN ASSESSING THE VOLUNTARINESS OF A STATEMENT.

Facts: A man, later identified as petitioner, Steven Fritz Facon, attempted to rob a convenience store during the early morning hours of August 22, 1999. The man held two clerks at gunpoint, but neither clerk was able to open the register. The man then put away the gun, grabbed a pack of cigarettes, and exited the store. The man did not pay for the cigarettes. One of the clerks testified that no attempt was made to stop the man because he "had a gun."

Petitioner was arrested on the evening of August 31, 1999, in the District of Columbia. He waived extradition to Prince George's County and arrived at Central Processing at about 10:00 p.m. on September 1, 1999. Petitioner was interviewed from shortly after 10:00 p.m., September 1st, until his confession at 7:14 a.m., September 2nd, except for breaks to have photos taken and to use the restroom. At the outset of the interview, petitioner was not read his *Miranda* rights, nor was any mention made initially of petitioner's rights to an attorney, to remain silent, or to prompt presentment before a judicial authority.

Prior to trial, Petitioner moved to suppress an oral statement he gave to police while in custody. The motions court denied the motion to suppress, finding that petitioner's statement was knowing and voluntary. Petitioner was tried before a jury in the Circuit Court for Prince George's County. Over petitioner's objection, the State introduced evidence of petitioner's oral statement during its case in chief.

Petitioner noted a timely appeal to the Court of Special Appeals. That court affirmed, holding, *inter alia*, that the trial court did not err in denying the motion to suppress and that the State had presented sufficient evidence to prove the offense of robbery.

Held: Reversed. The Court of Appeals held that the prompt presentment requirement of Rule 4-212(e) is not triggered where the defendant is held in custody outside of Maryland, absent evidence that officers were working in conjunction with the other jurisdiction for purposes other than to secure extradition. The Court rejected petitioner's argument that, for purposes of calculating delay under the Rule, the clock begins to run whenever and wherever the arrest occurs. The Court noted that the Rule requires that presentment be made before "a judicial officer of the District Court." The Rule refers to the District Court of Maryland. Thus, under a plain reading, and common sense interpretation, presentment of the defendant to a court in a foreign jurisdiction would not satisfy the Rule. The underlying purpose of the Rule and the prompt presentment requirement is to provide a defendant with a full panoply of safeguards. The Court pointed out that a court in a foreign jurisdiction would not be able to satisfy the requirements of the Rule. The Court held that the Rule did not have extraterritorial effect and that the prompt presentment requirement under the Rule is not triggered where the defendant is held in custody outside of the State of Maryland.

The Court ruled that the delay in presentment, standing alone, was not sufficient grounds to suppress a defendant's statement. Courts and Judicial Proceedings Article § 10-912 has made clear that a confession may not be excluded from evidence *solely* because the defendant was not taken before a judicial officer after arrest within any time period specified by the Maryland Rules.

In *Williams v. State,* __ Md. __, __ A.2d __ (2003), the Court held "that any deliberate and unnecessary delay in presenting an accused before a District Court Commissioner, in violation of Rule 4-212(e) or (f) must be given *very heavy weight* in determining whether a resulting confession is voluntary, because that violation creates its own aura of suspicion." In the instant case, the Court noted that the motions judge did not give any weight to the time petitioner was in custody, except for the period of time petitioner spent with the interrogating officer. Based on the analysis and holding in W*illiams,* the Court held that petitioner was entitled to have the trial court consider the Rule violation and to have the court accord such violation very heavy weight in considering whether petitioner's confession was voluntary.

Petitioner also raised the sufficiency of the evidence as to the robbery charge. The Court rejected petitioner's claim that the taking of the cigarettes, after an unsuccessful effort to rob the cash register, did not constitute a robbery because there was no force or intimidation. The Court found the evidence presented at trial was sufficient, if believed, to support a finding of guilt beyond a reasonable doubt. The Court noted that the evidence of intimidation was clear in that petitioner drew a gun on the store

clerks, demanded money and threatened to shoot them. Although petitioner took the cigarettes on his way out the door, the clerk testified at trial that the reason he did not stop petitioner was that he knew he had a gun.

Facon v. State, No. 30, September Term, 2002, filed June 13, 2003. Opinion by Raker, J.

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CRIMINAL LAW - MISCONDUCT OF OR AFFECTING JURORS - AN INHERENT, AND GIVEN THE RESTRAINTS OF MARYLAND RULE 5-606, VIRTUALLY IRREFUTABLE, PREJUDICE EXISTS TO A DEFENDANT IN A CRIMINAL CASE WHEN A JUROR AND A STATE WITNESS STILL SUBJECT TO BEING RECALLED HAVE SIGNIFICANT AND INTENTIONAL PERSONAL CONVERSATIONS AND CONTACT DURING THE MIDDLE OF THE TRIAL AND THIS CONDUCT IS NOT DISCLOSED UNTIL AFTER THE VERDICT HAS BEEN RENDERED AND ACCEPTED AND THE JURY HAS BEEN DISCHARGED.

Facts: The defendant, Marvin Jenkins, was charged with several crimes, including the murder of Stephen Dorsey, Jr., as the result of the April 13, 2000 shooting of Dorsey and Michael Clark. Clark, the key State' witness, was interviewed by Detective Patricia Pikulski shortly after the shooting. Detective Pikulski testified as to her interaction with Clark at trial on Wednesday, March 21, 2001, and was subject to recall and to the court's rule on witnesses.

On April 4, 2001, after the jury had issued their guilty verdict in the defendant's case and after the trial court had accepted its verdict and excused the jury, Detective Pikulski informed the prosecutor in the defendant's case that she had contact with a Mr. McDonald, a juror, at a religious retreat during the weekend of March 23rd and 24th, 2001, while the trial was ongoing. The State's attorney immediately contacted the court and defense counsel. The next day, an emergency hearing took place.

On April 19, 2001, the trial court heard testimony from Detective Pikulski and Juror McDonald. Juror McDonald was subject

to the limitations of Maryland Rule 5-606, which provides that after a verdict has been rendered and accepted and the jury discharged, jurors are prohibited from giving certain testimony pertaining to jury deliberations and the influencing effect of anything on the juror's ability to deliberate and on a juror's mental processes during deliberations. Both testified regarding the extensive contact they had during and immediately following the weekend religious retreat, which the two had attended while the proceedings against the defendant were in mid-trial.

Testimony revealed that Juror McDonald approached the Detective soon after arriving at the retreat in violation of the court's order for jurors to avoid all contact with witnesses, and said something to the effect of, "Look, you don't know who I am, but I'm a juror in a case that you testified in, and I can't have any dealings with you," to which Pikulski later replied, "Oh, did you, you know, did you find him guilty?" Juror McDonald testified that he thought this comment meant that Detective Pikulski thought that he was a juror from a different, completed trial and that he then informed her that the trial remained in progress.

The two testified that they did not discuss the matter further, although, in further violation of the court's order, they continued contact with each other, discussing only general, non-trial, topics. The following day, testimony revealed that the two sat next to each other during the seminar. After the early completion of the seminar, the two, at McDonald's invitation, went to lunch together where they were alone for most of the meal. According to them, their conversation included the sharing of personal information about each other and their families. Following their lunch, Detective Pikulski offered to give Juror McDonald a ride to his car, which was being repaired at a dealership a short distance from the restaurant. They stated that after the Detective took the juror to his car, the two had no more contact.

On Monday, March 26, 2001, while the trial was ongoing, Detective Pikulski informed another detective, Detective Penrod, about her contact with Juror McDonald, yet neither Juror McDonald, Detective Penrod or Detective Pikulski brought the matter to the attention of the court at that time.

Held: Reversed. On appeal to the Court of Special Appeals the judgment of the Circuit Court was affirmed. The Court of Appeals held that, under the highly unusual and egregious circumstances of this case, in a criminal prosecution, when a juror and a witness have significant and intentional mid-trial personal conversations and contact in violation of court orders, such as the two of them having lunch together, there is an inherent, and given the

constraints of Maryland Rule 5-606, virtually irrefutable, prejudice to the defendant when the conduct is not disclosed until after the verdict has been rendered and accepted and the jury discharged. The Court limited their holding to the egregious facts of the defendant's case, stating that their holding would not necessarily apply to purely incidental contact between a juror and a witness. The Court of Appeals held that the prejudice in this case was not sufficiently rebutted by the State and noted that it is virtually always improper for witnesses, particularly police witnesses, to go to lunch with a juror during the middle of a trial. Finally, the Court stated that, because this misconduct was left uncorrected, the defendant did not receive an impartial jury trial as mandated by the United States Constitution and the Maryland Declaration of Rights. Accordingly, the Court reversed the decision of the Court of Special Appeals.

Marvin Jenkins v. State of Maryland. No. 107, September Term, 2002, filed June 12, 2003. Opinion by Cathell, J.

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TORTS – LIMITATIONS OF ACTIONS – TOLLING OF STATUTE OF LIMITATIONS – PURSUANT TO MARYLAND CODE (1998, 2001 REPL. VOL.) § 5-201 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE, THE RUNNING OF THE STATUTE OF LIMITATIONS FOR A PERSON UNDER A DISABILITY OF INFANCY, IS TOLLED UNTIL THREE YEARS OR THE APPLICABLE PERIOD OF LIMITATIONS AFTER THE DATE THE DISABILITY IS REMOVED. IN COMPUTING A PERSON'S AGE, A PERSON REACHES THE NEXT YEAR IN AGE AT THE FIRST MOMENT OF THE DAY PRIOR TO THE ANNIVERSARY DATE OF THE PERSON'S BIRTH. THE THREE YEAR PERIOD UNDER § 5-201 ENDS ON THE DAY BEFORE THE PERSON'S TWENTY-FIRST BIRTHDAY.

Facts: Petitioner was born on April 4, 1979. She and her mother filed a complaint on April 4, 2000, against the Board of

Education of Baltimore County, the school principal and a school teacher alleging negligence and breach of duty when petitioner was a minor, 14 years old. The court granted summary judgment in favor of the Board of Education on the grounds that the action was barred by limitations because it had been filed one day late. Applying the common law rule, the Circuit Court held that Petitioner became of age on April 3, 1997, and that she had until three years after that date, April 3, 2000, to file suit.

Petitioner noted a timely appeal to the Court of Special Appeals. That court affirmed, holding, *inter alia*, that within the meaning of § 5-201, the disability of infancy is removed the day prior to the anniversary of the person's birth.

Held: Affirmed. The Court of Appeals held that, for the purposes of computing a person's age, the day on which that person was born is included, and thus the person becomes a year older on the day before the anniversary of his birth. The Court left undisturbed the coming of age rule, which is a common law exception to the general rule for computing time, and which reflects that the law takes no notice of fractions of a day in computing the age of an individual. Under Maryland Rule 1-203, time is computed such that "the day of the act, event or default after which the designated time period begins to run is not included." Under the coming of age rule exception, however, which was adopted in the Seventeenth Century for the sake of expediency and uniformity of interpretation, a person's age is computed by including the day on which that person was born.

The Court noted that this State adopted the common law of England, including the principle that the law does not recognize fractions of a day, in Article 5 of the Maryland Declaration of Rights. The Court rejected Petitioner's argument that the coming of age rule creates a "pleading trap" for those that § 5-201 was designed to protect. The Court held that a longstanding common law rule that remains in force in most states cannot be deemed a "pleading trap." The Court further noted that the decision to abandon the common law rule is one more properly left to the Legislature.

Mason v. Board of Education of Baltimore County, No. 44, September Term, 2002, filed June 16, 2003. Opinion by Raker, J.

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COURT OF SPECIAL APPEALS

CRIMINAL LAW – ARRESTS – SECTION 2-102 OF THE MARYLAND CRIMINAL PROCEDURE ARTICLE ALLOWS A POLICE OFFICER TO MAKE ARRESTS, CONDUCT INVESTIGATIONS, AND OTHERWISE ENFORCE THE LAWS OF THE STATE WITHOUT JURISDICTIONAL LIMITATIONS WHEN AN EMERGENCY EXISTS.

CRIMINAL LAW – SUPPRESSION OF EVIDENCE – AN ARREST IN VIOLATION OF SECTION 2-102 OF THE MARYLAND CRIMINAL PROCEDURE ARTICLE DOES NOT REQUIRE SUPPRESSION OF EVIDENCE RESULTING FROM SUCH ARREST

Facts: On March 25, 2001, a college student named Rebecca D. from Towson University was raped and subsequently underwent a physical examination where blood samples and vaginal swabs were collected from her.

On June 7, 2001, at 4:16 p.m., a twelve-year-old girl was raped on York Road in Baltimore County. The minor victim provided a Baltimore County Police detective with a description of her assailant and the license plate number of the vehicle in which the suspect fled the scene of the crime. Based on that information, the police arrested appellant an hour and a half later in Baltimore City.

Appellant's post-arrest photograph was shown to the minor victim, who identified appellant as the assailant. This identification allowed the police to obtain a search warrant to collect a penile swab and blood sample from the appellant. Appellant's DNA matched the DNA of Rebecca's assailant, and consequently, appellant was charged with Rebecca's rape as well as that of the minor girl.

Prior to trial, appellant moved to suppress all evidence relating to DNA testing and results. At the suppression hearing, Detective Wayne Jedlowski of the Baltimore County Police Department testified about the events leading up to appellant's arrest. Based on a motor vehicle records check on the license plate given by the minor victim, the vehicle was registered to a woman living on East Belvedere Avenue in Baltimore City, about a quarter mile away from where the minor girl was raped. At 5:15 p.m., Jedlowski and his partner began surveillance at the East Belvedere residence to determine whether the suspect would arrive in the vehicle.

At 5:30 p.m., after seeing the vehicle approach the East Belevedere residence, the detectives began to pursue it. The driver matched the minor victim's description, and a female passenger was riding next to him. The detectives pursued the vehicle, but the driver did not respond to the police officers' holding up their badges and motioning the driver to pull over. An hour and a half after therape, the detectives were able to block and arrest appellant. That arrest led to the search warrant and collection of DNA matching Rebecca's assailant.

Appellant moved to suppress the evidence, but the circuit court denied that motion, finding that the police had probable cause because the vehicle and suspect matched the minor victim's descriptions and the suspect evaded police inducements for thedriver to stop the vehicle. The circuit court found that even without probable cause, under § 2-102 of the Maryland Criminal Procedure Article ("CP"), County police could arrest a suspect within City boundaries in an emergency. The court recognized an emergency in this case because the police did not know whether the female passenger was in any danger, and a possible rapist was on the loose close to the location of the rape.

On appeal to the Court of Special Appeals, appellant contended that the circuit court erred in denying his motion to suppress the evidence leading up to the arrest for Rebecca's rape, specifically his photograph and his DNA. Appellant reasoned that the Baltimore County Police had no legal authority to arrest him in Baltimore City.

Held: Affirmed. The Court of Special Appeals agreed with the circuit court that the evidence of DNA should not be suppressed. An emergency existed under CP § 2-102 allowing County police to arrest a suspect within City boundaries. Section 2-102 provides that "a police officer may make arrests, conduct investigations, and otherwise enforce the laws of the State . . . without limitations as to jurisdiction" when an emergency exists. Under CP 2-102(b), an "emergency" is defined as "a sudden or unexpected happening or an unforeseen combination of circumstances that calls for immediate action to protect the health, safety, welfare, or property of a person from actual or threatened harm or from an unlawful act."

The detectives had reason to believe that a dangerous felon might be a short distance from where a twelve-year-old girl was raped. Once the detectives arrived at the residence to which the vehicle was registered, they spotted the vehicle and driver matching the descriptions given by the minor victim. The emergency existed because a suspected rapist was on the loose, the safety of

his female passenger was unknown, and the driver failed to respond to the officers' request for him to pull over.

Even if the police did not have the authority to arrest the appellant in Baltimore City, CP § 2-102 does not require that resulting evidence be suppressed. The legislative purpose of that section is to promote greater cooperation among law enforcement officers on a multi-jurisdictional level and not sanctions for noncompliance with section 2-102.

Anthony J. Miller v. State of Maryland, No. 652, September Term, 2002, filed May 29, 2003. Opinion by Krauser, P.

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CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - SIXTH AMENDMENT - PREJUDICE

Facts: Appellant, Dwight Evans, appealed the denial of his petition for post-conviction relief. A jury convicted Evans of distribution of cocaine and possession with intent to distribute. Evans asserted that he was denied effective assistance of counsel because his trial counsel failed to move to suppress evidence obtained in a warrantless rectal search of Evans on a public street, in broad daylight, in violation of his Fourth Amendment rights. Evans argued that his counsel's performance fell below *Strickland's* objective standard of reasonableness. In regard to the prejudice prong of *Strickland*, Evans asserted that his sentence was enhanced because of counsel's deficient performance. The Circuit Court for Baltimore City denied Evans's request.

Held: Reversed. Evans satisfied his burden under both prongs of *Strickland*. His counsel's performance fell below objective standards of trial conduct because he failed to seek suppression of evidence obtained by a public rectal search on the street of Baltimore City, which deviated from standard procedural guidelines that protect the integrity and constitutional rights of individuals. This is the case even though Evans's counsel litigated an equally strong argument regarding Evans's arrest and search incident to that arrest. In regard to the prejudice suffered by Evans, had his counsel properly sought suppression of the evidence, the two drug charges would have been merged and the detrimental effects of the nine vials of cocaine found in his "rear end" would have ameliorated his sentence. This satisfied Evans's burden under the prejudice prong of *Strickland*.

Evans v. State, No. 289, September Term 2001, filed June 25, 2003. Opinion by Sonner, J.

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EVIDENCE - ADMISSIBILITY OF DNA PROFILES - MD. CODE (2002), CTS. & JUD. PROC., § 10-915 -

Facts: Appellant, Christian Robinson, was convicted of two counts of second-degree rape and one count of second-degree sex offense. Key to the case against him was the results of DNA testing performed by Cellmark Laboratory. Robinson requested a pre-trial hearing on the admissibility of this DNA evidence, under section 10-915. The State responded with a copy of a letter from Cellmark, stating that the tests had been conducted in accordance with the standards enumerated in section 10-915. The circuit court then denied the request for the hearing.

Held: Affirmed. The circuit court properly denied defendant's pre-trial request to hold a hearing on the admissibility of the DNA evidence, because the letter the State produced was enough to meet the requirements of section 10-915, making the evidence admissible.

The circuit court also did not err in its finding that a fifteen-hour delay in making a statement about a sexual assault was reasonable when admitting it as a "prompt complaint" under Md. Rule 5-802.1(d).

Robinson v. State, No. 871, September Term, 2001, filed June 25, 2003. Opinion by Sonner, J.

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EVIDENCE - HEARSAY - DECLARATIONS AGAINST PENAL INTEREST - TRUSTWORTHINESS - RULE 8-504(b)- WARRANTLESS ARREST; PROBABLE CAUSE.

Facts: Charles Stewart, Jr., appellant, was convicted by a jury in the Circuit Court for Saint Mary's County of first degree murder of John Butler, use of a handgun in a crime of violence, first degree assault of Omega Nunley, second degree assault of John Nunley, and related charges. He was sentenced to life imprisonment for the murder conviction, and a consecutive term of thirty-five years for the other convictions.

On March 5, 2001, Deputy Clayton Safford of the St. Mary's County Sheriff's Office discovered the body of John Butler near the Pegg's View Apartments. Within two to three feet of the body, Safford also located a kitchen knife. John and Omega Nunley were

found a short distance away, severely beaten but still alive. James Locke, M.D., an assistant medical examiner, testified that Butler died as a result of a gunshot wound to the back of the neck.

Appellant and his father, Charles Stewart, Sr. ("Senior"), were charged in the incident but tried separately. Senior made several statements to the police that were incriminating as to him and exculpatory as to appellant. Thus, at his trial, appellant sought to admit Senior's statements as declarations against penal interest. The State moved *in limine* to exclude Senior's statements. Therefore, during trial, but outside the presence of the jury, the court conducted an evidentiary hearing in connection with the State's motion, at which Senior invoked his Fifth Amendment privilege.

At the motion hearing, Corporal Terence Black testified that, while in the holding cell, Senior commented "that he had shot that man, and that his son didn't have anything to do with it." Moreover, Senior stated " . . . this was all my fault, my boy didn't have nothing to do with it." En route to the detention center, Senior again stated that "his boy didn't have anything to do with this, and that he [Senior] was responsible for it, and that it was all his fault." Black also recalled Senior saying, "I guess I'm going to be here a long time this time for killing a man, but I got to pay for what happened, it was my fault."

The court inquired as to what Black believed Senior's motives were in making the statements. Although he conceded that "[a]t first I thought he was being sincere with me," Black explained that he would characterize Senior's statement "as one that you are not going to the bank with." The court then ruled that Senior's statements to Black were inadmissible.

Appellant also called Officer John Bartlett, III, who testified that, on March 9, 2001, while at the detention center, Senior asked Bartlett to read aloud a newspaper article about Butler's death. While Bartlett read the article, Senior interrupted and said: "What else was I supposed to do." Senior also stated that Butler had "started the fight with him" and that Senior "fired a weapon," but that "he just fired one shot." According to Bartlett, Senior also explained: "If I hadn't killed him, he was going to kill me. He was bigger and younger than me." According to Senior: "He hit me upside my head with a bottle" and "I had to protect myself."

The court concluded that Senior's statements to Bartlett were inadmissible, as they were not sufficiently trustworthy. The court

noted that while Senior "says he did it, he's also offering the officer, the correctional officer his defenses." The court was satisfied that "Senior is operating here to shield his son, but also to some degree looking after his own interest."

Appellant also offered the testimony of Detective William Raddatz, who recalled that Senior voluntarily went to the sheriff's headquarters on the morning of March 5, 2001, and orally admitted that he shot Butler and struck the Nunleys with a baseball bat. In two tape recorded statements taken that day, Senior indicated that he had acted in self-defense. For example, in his first recorded statement, Senior explained that when Butler "reached down for a gun," Senior "shot" him.

In his second statement, Senior recalled: "They [i.e., the Nunleys] swung at me with a bat and I snatched back, I hit them back, I hit them with a bat. Cause they swung at me with a bat and I hit the other one with a bat, cause he swung at me." According to Senior, Butler threw a knife at him, and Senior "ducked." Senior added: "He (Butler) tried to stab me with it, he threw it at me." At that time, Senior explained: "I shot him." Moreover, he maintained that, at the time of the shooting, Butler "was coming towards [him]."

The trial court characterized Senior's statements to Raddatz as "untrustworthy." It reasoned: "It is true that he [Senior] was admitting shooting someone, but he also is asserting his own self-defense to that shooting."

Held: Judgments affirmed. Noting that the "trial court's evaluation of the trustworthiness of a statement is 'a fact intensive determination,'" subject to the clearly erroneous standard on appeal, the Court held that the court did not err in failing to admit Senior's statements as declarations against interest. The Court recognized that, with regard to a statement against penal interest offered by the defense to exculpate the accused, the corroboration analysis focuses on the trustworthiness of the out-of-court statement, and not on that of the witness who related the statement. Looking to the factors relevant to a trustworthiness analysis, however, the Court perceived no error in the court's determination.

The Court recognized that, in a murder case in which both a father and son are implicated, the close familial bond between a father and son was a factor for the trial court to consider with respect to motive to fabricate. Additionally, the Court observed that the statement was not entirely inculpatory. Rather, Senior

sought to exculpate himself as well as his son, stating that he (Senior) committed the crimes, but also claiming that he (Senior) acted in self defense. The Court also noted the inconsistencies in Senior's various accounts of the incident. Moreover, the Court perceived no error in the court's implicit finding that Senior's claim that he acted alone in the three attacks was entirely implausible, given that three people, almost half Senior's age, were either seriously wounded or killed.

Charles Henry Stewart, Jr. v. State of Maryland, No. 2594, September Term, 2001, filed June 26, 2003. Opinion by Hollander, J.

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JUDICIAL ESTOPPEL; LEGAL MALPRACTICE; SETTLEMENT; INTENT.

Facts: Appellant, Karen A. Vogel, filed a malpractice action against appellee, T. Joseph Touhey, in connection with his representation of appellant in her divorce case. Appellee filed a motion to dismiss, claiming that appellant's malpractice suit was barred by the doctrine of judicial estoppel. Following a hearing in July 2002, the Circuit Court for Montgomery County granted appellee's motion and dismissed appellant's action.

Appellant is a lawyer who has worked in the Criminal, Asset Forfeiture, and Money Laundering Division of the Justice Department for over seventeen years. She and Dr. Alfert, who is a urologist, were married in 1988, and they separated in June 1999. On March 6, 1999, appellant and Dr. Alfert entered into a property settlement agreement (the "Property Agreement"). Appellant was not represented by counsel in connection with the drafting of the Property Agreement. The Property Agreement provided for the equal division of the couple's marital assets, valued at about two

million dollars under the Property Agreement. Appellant alleged, however, that she subsequently discovered that Dr. Alfert had failed to disclose substantial marital assets.

Accordingly, in January 2001, appellant retained appellee to represent her in the divorce case because she believed the Property Agreement was unfair and had been obtained by fraudulent misrepresentations, due to the lack of full financial disclosure by Dr. Alfert. According to appellant, during her initial consultation with appellee, he assured her that "he had sufficient time to devote to such a complex case."

In the legal malpractice case, appellant claimed that she made numerous written and oral requests to appellee to obtain financial information from Dr. Alfert. Furthermore, appellant claimed that Dr. Alfert telephoned her in April 2001 to inquire why she failed to respond to the settlement offer communicated by his attorney. Appellant, however, was allegedly never informed of the settlement offer.

According to appellant, appellee recommended that appellant settle the divorce litigation for $50,000, i.e., $50,000 in excess of the assets she was to receive pursuant to the 1999 Property Agreement. Appellant authorized appellee to proceed with the settlement. The facsimiles exchanged between appellant and Dr. Alfert made clear that a written agreement was contemplated.

Shortly thereafter, appellant arrived at appellee's office to retrieve the documents pertinent to her divorce case. At that time, appellant discovered a large box in a storage room, with her name on it, which contained supplemental documents produced by Dr. Alfert during discovery. According to appellant, it was clear that the "hundreds of pages of materials" had yet to be reviewed by appellee. Appellant promptly terminated appellee's representation in the divorce case, notwithstanding the impending divorce hearing scheduled for May 4, 2001.

Consequently, appellant appeared without an attorney at the hearing on May 4, 2001, which was conducted by a domestic relations master. Yet, appellant stated that she was fully aware of the issues, and declined to contest the terms of the supplemental settlement agreement or proceed to trial. Although she informed the master of her belief that appellee had failed to review the financial documents, appellant refused to "go back on [her] word" as to the settlement. Significantly, during *voir dire* by the master, Vogel expressly indicated that the terms of the supplemental agreement were "fair and equitable."

Thereafter, the master accepted the supplemental agreement, finding that it was entered into freely and voluntarily by both parties. The master then proceeded with the uncontested divorce hearing. The parties then submitted a waiver of exceptions, in order to expedite the issuance of the divorce decree.

A few months later, appellant filed the malpractice action against appellee, claiming that, due to appellee's negligence, she was forced to settle her divorce case on unfavorable terms. Appellee, moved to dismiss, claiming that the suit was barred by the doctrine of judicial estoppel. He claimed that appellant was precluded from asserting in the legal malpractice case that the settlement was unfair and inequitable, because she represented at the May 4, 2001 divorce hearing that she was satisfied with the settlement agreement and that it was fair and equitable. Appellant countered that, at the time of the May 4, 2001 divorce hearing, she had no reason to believe that the new agreement was fundamentally unfair. Moreover, she contends that she cannot be estopped from raising her malpractice claim, because she did not make intentional misrepresentations to the court.

The court found that the malpractice claim was barred by judicial estoppel.

Held: Judgment affirmed.

The Court applied the judicial estoppel prongs to the facts of the case. First, it noted that, "[b]ased upon appellant's representations to the divorce court, she was successful in persuading the master to accept the supplemental settlement and to recommend the divorce decree, which the circuit court subsequently issued." Appellant then mounted a collateral attack on the divorce settlement. The Court found that appellant's representations to the divorce court were "clearly inconsistent" with her position in the malpractice case.

As to appellant's assertion that she lacked the requisite intent to mislead, the Court acknowledged that it had not uncovered any Maryland cases squarely addressing the issue of whether judicial estoppel requires the intent to mislead the court to obtain unfair advantage. Looking to *Pittman v. Atlantic Realty Co.*, 359 Md. 513 (2000), however, the Court recognized that, in *dicta*, the Court of Appeals stated the standard for judicial estoppel articulated by the Fourth Circuit, which requires an intent to mislead the court to gain unfair advantage.

The Court was satisfied that appellant hired appellee for a particular purpose. The uncontroverted facts revealed that, four days prior to the divorce hearing, she fired appellee because she believed he had not fulfilled that purpose. Thus, at the time appellant discovered the allegedly unreviewed documents and fired appellee, she was aware that he was not in a position to recommend a "fair settlement." Yet, despite the fact that appellant knew she had insufficient information as to an appropriate settlement with Dr. Alfert, she represented to the master that she was "fully aware of the issues," and that the settlement was "fair and equitable."

In addition, the Court recognized that Vogel was not without a choice in proceeding with the settlement. Indeed, the Court noted that the master conducted a thorough *voir dire* at the divorce hearing and gave appellant every opportunity to: 1) renege on the settlement; 2) pursue further discovery; and 3) proceed to trial on the merits. Nevertheless, appellant declined to do so.

The Court also rejected appellant's argument that she was "contractually bound to proceed with the oral, supplemental property agreement." Dr. Alfert never demanded that appellant proceed with the settlement, nor did he argue that appellant was legally bound by it. The court was also satisfied that, based on the facsimiles exchanged between their respective counsel, appellant and Dr. Alfert "clearly contemplated a written settlement agreement." Therefore, appellant could have declined to proceed with the settlement.

Further, the Court concluded that appellant benefitted from the court's acceptance of the property agreement. It reasoned: "Appellant received $50,000 more than she would have received under the terms of the original 1999 Property Agreement; she was able to settle her divorce case without incurring further expense or time; and Vogel avoided the risk of an unfavorable result in a contested divorce proceeding. Additionally, the Court determined that appellant would derive an unfair advantage because appellant's intentional assertion of an inconsistent position "inevitably created the circumstances that culminated in the malpractice claim" that appellee has had to defend.

In regard to appellant's claim that her acceptance of a settlement negotiated by appellee did not bar her from filing a later malpractice suit in connection with the appellee's settlement recommendation, the Court recognized that appellant "was not forced to accept an unreasonably low settlement because of irreparable damage to her case due to appellee's derelictions. Moreover, appellant was not in the position of having to go to trial imminently if she had opted not to settle. The Court, therefore,

was satisfied that the trial court properly dismissed appellant's legal malpractice action against appellee.

Karen A. Vogel v. T. Joseph Touhey, No. 1435, September Term, 2002, filed July 2, 2003. Opinion by Hollander, J.

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LABOR & EMPLOYMENT LAW - DISABILITIES DISCRIMINATION - UNDER THE ADA, AND IMPLIEDLY UNDER THE MONTGOMERY COUNTY CODE, AN EMPLOYER'S DENIAL OF OR LENGTHY DELAY IN PROVIDING A REASONABLE ACCOMMODATION CONSTITUTES DISABILITY DISCRIMINATION.

Facts: Appellant Susan Cohen worked for twenty years as a full-time social worker for the Montgomery County Department of Health and Human Services ("HHS"). In 1995, she was diagnosed with multiple sclerosis. In 1998, she informed the County that her condition caused weakness to her upper and lower extremities.

In the spring of 1998, based on her job performance, appellant was offered a half-time job with the Group Home Licensing Program of HHS's Public Health Services department in a position that required no field work. She accepted that position and continued to work at her job in Assisted Living Services program ("ALS") in a position that required field work. The required field work included driving to various homes and walking up stairs, activities that were difficult for appellant because of her lower extremity weakness caused by her condition.

In August 1998, after appellant underwent a fitness for duty evaluation, it was determined that with a reasonable accommodation, she could perform the essential functions of her job. Two months later, in October 1998, appellant requested an accommodation of job restructuring or job re-assignment to minimize her field work responsibilities. Six months later, having received no accommodation, appellant was asked to submit to another fitness for duty evaluation. She did and it was again determined that there was a medical necessity for the requested accommodation.

In March 1999, appellant discussed with the County's disability manager, a proposal to convert her part-time position with the Group Home Licensing Program to a full-time position. In April 1999, that proposal was denied and as a temporary accommodation, the County instructed appellant to use taxi cab vouchers. This temporary solution, however, forced appellant to wait for an hour or two for cabs in hot and cold weather, exacerbating appellant's symptoms and compounding her fatigue.

In September 1999, a year after she had requested an accommodation, appellant filed an administrative complaint with the Montgomery County Human Relations Commission because she still had not received a reasonable accommodation. A week later the County decided to transfer appellant to the Information and Assistance Unit ("IAU") to a position that required extensive writing and computer entry. In October 1999, at a meeting with her supervisors, appellant declined that offer explaining that the position was unsuitable because she had difficulty writing, a fact the county was aware of from her two fitness for duty evaluations. After the County ordered appellant to undergo a third fitness for duty evaluation, it was determined that she could not perform the duties in the IAU position.

Finally, on February 22, 2000, seventeen months after appellant originally requested an accommodation, the County granted appellant's request to convert her half-time Group Home Licensing position into a full-time position that eliminated her field work duties.

Appellant continued to pursue her claim before the Human Relations Commission. On August 28, 2001, when the parties were unable to reach a resolution, appellant filed a complaint in the Circuit Court for Montgomery County alleging disability discrimination by the County and two departmental supervisors. In that complaint, she alleged violations under § 27-9 of the Montgomery County Code and section § 42 of Article 49B of the Maryland Code Annotated. The County filed a motion to dismiss alleging that appellant's claim was moot. The circuit court granted the County's, finding that because appellant received the accommodation she requested her claim was moot.

On appeal, appellant contends that the circuit court erred in granting the motion to dismiss because the County's seventeen month delay was unreasonable and therefore constituted disability discrimination.

Held: Vacated and remanded for further proceedings consistent with the opinion. The Court of Special Appeals held that the circuit court erred in dismissing appellant's complaint because it sufficiently stated a claim for disability discrimination and, therefore, was not moot.

Article 49B authorizes a civil action by an individual subjected to discrimination, and Chapter 27 of the Montgomery County Code prohibits disability discrimination.

It expressly forbids an employer from discharging a qualified individual and implies that denial of a reasonable accommodation by an employer constitutes disability discrimination. As defined in § 27-6(c), a disability is a physical or mental impairment that substantially limits one or more of an individual's major life activities. A qualified individual, under § 27-6(u), can perform the essential functions of the employment position with a reasonable accommodation. A reasonable accommodation under § 27-6(aa) may include job restructuring, part-time or modified work schedules. The Montgomery County Code is consistent with and modeled after the Americans with Disabilities Act ("ADA").

In order to establish disability discrimination under the ADA, an employee must show: (1) that the employer is subject to the statute under which the claim is brought, (2) that she is an individual with a disability within the meaning of the statute in question, (3) that, with or without reasonable accommodation, she could perform the essential functions of the job, and (4) that the employer had notice of the plaintiff's disability and failed to provide such accommodation. Appellant satisfied the first three criteria because: the employer, the Montgomery County Department of Health and Human Services, is subject to Article 49B and § 27-19; appellant is an individual with a disability due to the disabling effects of multiple sclerosis; and appellant can perform the essential functions with reasonable accommodations.

At issue here is the fourth criteria, whether the employer failed to provide such accommodation. Specifically, whether the County's seventeen month delay in granting her an accommodation is unreasonable and constituted a failure to accommodate. Although not addressed by Maryland appellate courts, various federal decisions established that unjustified and indeterminate delays in providing reasonable accommodations constitute violations of anti-discrimination laws.

In October 1998, appellant requested reassignment or restructuring of her job duties to lessen her field work responsibilities. The County's temporary solution of taxi cab vouchers further exacerbated her condition. Further, the County's attempt to transfer appellant to a writing and computer entry type position was not feasible due to her upper extremity weakness. It was not until February 2000, seventeen months after she first requested an accommodation, that the County converted her half-time job with no field work into a full-time position.

Although the County eventually provided a reasonable accommodation, the claim for disability discrimination was not moot. Holding otherwise would defeat the purpose of anti-

discrimination laws by encouraging employers to avoid timely responses to such requests, and discourage qualified individuals from making such requests after certain time frames.

Susan Cohen v. Montgomery County Department of Health and Human Services, et al., No. 2344, September Term, 2001, filed February 27, 2003. Opinion by Krauser, P.

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WILLS - UNDUE INFLUENCE - CONFIDENTIAL RELATIONSHIP.

Facts: Appellant, Kurt Orwick, challenged the equal share distribution of his father's estate to his half-brother and half-sister. Appellant alleged that his half-sister exacted undue influence over their father when she helped him sign his will a few days before his death from cancer. At the close of appellant's case, the personal representative of the estate, Alan Moldawer, moved for judgment. The Circuit Court for Montgomery County granted the motion because the appellant failed to prove undue influence.

Held: Affirmed. Although the Court of Appeals has articulated several factors that may lead to a finding of undue influence, at least two of those factors, the presence of a confidential relationship and the testator's high susceptibility to the undue influence, are mandatory. Appellant's case fails because he did not prove the existence of a confidential relationship as contemplated by the undue influence factors. To satisfy his burden, appellant had to show that his half-sister's relationship with her father allowed her to influence the disposition of the father's bounty in the will.

Orwick v. Moldawer, No. 61, September Term 2002, filed May 2, 2003. Opinion by Sonner, J.

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ZONING - USE RESTRICTIONS - SUBTITLE 7 OF §13-406 OF THE BALTIMORE CITY ZONING CODE PERMITS THE BOARD OF MUNICIPAL AND ZONING APPEALS TO RESTRICT FUTURE EXPANSIONS OF ADULT ENTERTAINMENT.

Facts: "Club Choices" is a night club, featuring adult entertainment, owned by appellant Trip Associates, Inc. and operated by Anthony Dwight Triplin. On April 14, 2000, a Baltimore City zoning inspector issued a "Code Violation Notice and Order" against Triplin for using a portion of the club's premises for adult entertainment without the proper adult entertainment license.

Triplin appealed the zoning violation to the Board of Municipal and Zoning Appeals ("Board"), seeking to continue using the portion of the premises for adult entertainment. Triplin testified that the Club presented nude dancing prior to Triplin's taking ownership in 1983, and that Triplin replaced nude acts with exotic dancing two nights a week. Further, after the Board approved the Club's premises for an after-hours club in 1992, he continued the exotic dancing exclusively in the after-hours club two nights a week.

On October 12, 2000, the Board found that a nonconforming use of the premises for adult entertainment had been established, and may be continued under section 13-402 of the Zoning Code. On October 27, 2000, Triplin filed a petition in the circuit court for Baltimore City, for judicial review of the Board's decision.

The Circuit Court affirmed the Board's decision, recognizing the Board's authority to restrict Triplin's use of the premises for adult entertainment to two nights a week. The circuit court also ruled that Triplin must obtain all necessary licenses to operate an adult entertainment business, an issue not raised by Triplin or the Board.

On appeal, Triplin contends that the Board erred by placing the two nights per week restriction on Triplin's nonconforming use. Triplin also contends that the circuit court erred in deciding an issue not presented to the Board – namely, whether Triplin was required to obtain an adult entertainment license.

Held: Affirmed as to the Board's restriction, but Order by circuit court for appellant to obtain adult entertainment license vacated. The Court recognized that the Board has the authority to restrict expansion of the Club's use under section 13-406 of the Zoning Code.

The Court focused on section 13-406 of the Zoning Code, which states that …"a Class III nonconforming use may not be expanded in any manner." Triplin's Club meets the definition of a Class III non-conforming use under § 13-609, and is therefore, subject to Class III regulations. Maryland case law permits continuing a non-conforming use, but does not permit unlawful expansions of non-conforming use.

The Court also recognized Maryland's policy against expanding nonconforming uses and of reducing or eliminating nonconforming uses over time. Although Maryland has no case law on whether such restrictions apply to temporal expansions, the Court adopts case law in other jurisdictions that impose restrictions on temporal expansions.

The Court also found that the circuit court erred in ordering Triplin to obtain a license for adult entertainment, because a court reviewing an administrative agency shall not decide an issue for the first time on judicial review.

Trip v. Baltimore City, No. 1733, September Term, 2001, filed May 28, 2003. Opinion by Krauser, P.

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ATTORNEY DISCIPLINE

By and Order of the Court of Appeals of Maryland dated June 17, 2003, the following attorney has been reprimanded by consent:

HENRY W. STEWART

*

By an Order of the Court of Appeals dated June 17, 2003, the following attorney has been placed on inactive status by consent, effective immediately, from the further practice of law in this State:

LAWRENCE L. BOURLAND f/k/a
LAWRENCE L. HEIDT

*

By an Order of the Court of Appeals of Maryland dated June 25, 2003, the following attorney has been placed on inactive status by consent, effective immediately, from the further practice of law in this State:

JOHN W. MOYER

*

By an Order of the Court of Appeals of Maryland dated July 10, 2003, the resignation from the further practice of law in this State of the following attorney has been accepted:

LAWRENCE L. BOURLAND f/k/a
LAWRENCE L. HEIDT