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Facts: In 1994, the parents of several students in the Baltimore City Public School System (*Bradford* Plaintiffs) filed a complaint in the Circuit Court for Baltimore City on behalf of "at-risk" students, alleging that the State Board of Education (State) was in violation of Art. VIII, § 1 of the Maryland Constitution, which requires the General Assembly to "establish throughout the State a thorough and efficient System of Free Public Schools [and] provide by taxation, or otherwise, for their maintenance." "At-risk" students were defined, in part, as students who, because of social and economic disadvantage, are likely to fail to obtain an adequate education.

In September, 1995, Baltimore City (City), filed a separate complaint against the State, alleging that the State had been underfunding the City, resulting in its inability to properly maintain its educational resources and facilities. The State later filed a third-party complaint against the City in the *Bradford* case. The circuit court joined the two cases and entered partial summary judgment that the Baltimore City schoolchildren were not being provided with an adequate education as measured by "contemporary educational standards." The court reserved the question of liability for trial.

In November, 1996, the parties entered into a Consent Decree that provided for: 1) a restructuring of the school system; 2) additional funding by the State for fiscal years 1998-2002; 3) the creation of a plan to increase student achievement; 4) the continuing jurisdiction of the circuit court over the case; and 5) subsequent review of progress. The decree became effective after the Governor signed legislation substantially similar to the decree and the General Assembly approved the additional funding. The legislation also had the effect of replacing the City Board of School Commissioners with the new Board of School Commissioners (Board).

Paragraph 53 of the decree provided for a process by which the Board could request more funding from the State. In conformance with this paragraph, the Board, after its negotiations with the State failed, filed a petition with the circuit court seeking a declaration that the school system required approximately an additional $260 million for operating expenses and $600 million in capital funding. In June, 2000, after conducting extensive fact-

finding, the circuit court declared that the State was required to provide an additional $2,000 to $2,600 per pupil. The State appealed this order, but later withdrew that appeal.

In 2002, the circuit court continued its jurisdiction over the case to monitor compliance with the decree. In 2004, the Board informed the court that it had accumulated a deficit of about $58 million and that it had entered into a financing agreement with the City, in which the City agreed to loan the Board $42 million to alleviate its cash-flow problem. In exchange for the loan, the Board agreed to adhere to a fiscal plan that would render it solvent by June 30, 2006. In the same year, the General Assembly, concerned about the deficit, enacted the "Education Fiscal Accountability and Oversight Act of 2004" (the Act). The Act prohibited any school district from carrying a deficit, but, through § 4 of the Act, provided that the Board had until June 30, 2006 to pay down its deficit. In response, the *Bradford* plaintiffs filed a motion with the circuit court, complaining that the Act would further exacerbate an already unconstitutionally underfunded system. After another round of extensive fact-finding, the circuit court issued an order, stating that, among other things, the State had not come close to complying with its funding requirements and that § 4's requirement that the Board eliminate its deficit by June 30, 2006 was unconstitutional because it would have the effect of further detracting from necessary funding. The court also declared the similar provision in the financing agreement void on the grounds that it contravened public policy.

Held: Vacated in part. The Court of Appeals held that very little of the 2004 order was actually before the Court because there was no final judgment in the case. There are only three exceptions to the general rule that a final judgment is required to trigger the right to seek appellate review: appeals from interlocutory orders specifically allowed by statute; immediate appeals allowed under Maryland Rule 2-602(b); and interlocutory appeals permitted under the collateral order doctrine. There is not, as the State argued, a fourth exception to this rule based on a claim that a court has acted "in excess of jurisdiction."

Several components of the order are injunctive in nature, proceeding from declarations that § 4 of the Act is unconstitutional and that the City/Board financing agreement contravenes public policy. They direct the Board *not* to pay down its deficit by June 30, 2006. Injunctions are immediately appealable under Cts. & Jud. Proc. § 12-303(3)(i). Statutes are generally presumed to be constitutional and Maryland courts are reluctant to invalidate contracts on public policy grounds. Moreover, the enactment of § 4 was based on the General Assembly's responsibility under Art. VIII of the Constitution and cannot be said to divert funds from educational purposes anymore than may be said about hundreds of other obligations imposed on school districts. For these reasons, the circuit court erred in declaring that § 4 is unconstitutional, as it did in declaring void the

similar requirement imposed by the City/Board financing agreement.

Maryland State Board of Education, et al. v. Keith A. Bradford, et al., No. 85, September Term, 2004, filed June 9, 2005. Opinion by Wilner, J.

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APPEALS - INTERLOCUTORY ORDERS

ARBITRATION - HEALTH CARE MALPRACTICE CLAIMS ACT - AWARDS

Facts: Pursuant to the Health Care Malpractice Claims Act (Act), respondents filed a claim with the Health Care Arbitration Office (HCAO) against petitioners for damages arising from negligent surgery on Mr. Frew's right ankle, loss of consortium, and lack of informed consent, although the negligence claim was eventually dismissed. Respondents failed to name expert witnesses by the deadline set by the arbitration panel chair and petitioners filed a motion to dismiss, arguing that respondents could not establish a prima facie case for lack of informed consent without expert medical testimony. Citing Dr. Salvagno's uninformative interrogatory responses, respondents requested additional time to name an expert witness, but also asserted that they could rely on the doctor as an expert witness. The panel chair granted the motion to dismiss and denied respondents' motion for reconsideration. Respondents filed a notice of rejection of the arbitration award and, in the Circuit Court, a petition to nullify the award, which the court granted. Petitioners appealed, arguing that, because respondents failed to arbitrate, the lower court exceeded its jurisdiction, making its order appealable. Without addressing the appealability issue, the Court of Special Appeals concluded that respondents could indeed rely on Dr. Salvagno as an expert witness and that the Circuit Court correctly vacated the panel chair's order. The court also concluded, however, that there was no "award" to be nullified since there was no resolution of the claim on the merits, and directed that the case be remanded to the HCAO to proceed with arbitration.

Held: *Judgment of the Court of Special Appeals vacated; case remanded to that court with instructions to dismiss; costs to be paid by petitioners.* There is no right to an immediate appeal from

an interlocutory order merely on the claim that the order exceeds the jurisdiction of the lower court. The right to seek appellate review ordinarily must await the entry of a final judgment that disposes of all claims against all parties and there are only three exceptions to that rule: appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals from interlocutory rulings allowed under the common law collateral order doctrine. Furthermore, a court's actions cannot be assailed for lack of subject matter jurisdiction unless jurisdiction is lacking in a "fundamental sense," and Circuit Courts possess fundamental subject matter jurisdiction over claims that fall under the Act. In addition, the order by the arbitration panel chair dismissing the only remaining claim in the action constituted an arbitration "award" under the Act, even though there was no final resolution on the merits. The order of the panel chair clearly disposed for the claim and constituted an award in favor of the defendants. By filing their complaint and request for a jury trial, the Frews elected to waive arbitration and therefore remand to HCAO is not necessary.

Ralph T. Salvagno, M.D., et al. v. William M. Frew, et al., No. 105, Sept. Term 2004, filed June 10, 2005. Opinion by Wilner, J.

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ATTORNEYS - MISCONDUCT - INTENTIONAL DISHONESTY - APPROPRIATE SANCTIONS

Facts: Jerry D. Jordan, licensed to practice law in the State of Maryland, discovered extensive damage resulting from a water leak in her Baltimore County, Maryland home. Under the terms of her homeowner's insurance policy, she could be reimbursed for rental expenditures while not residing at her "water-damaged" home. Ms. Jordan indicated to her insurance company, St. Paul Traveler's Insurance Company ("Traveler's"), that she had located a place to rent for $2,000.00 per month in Berlin, Maryland. In fact, Ms. Jordan owned the home located in Berlin, Maryland that she purported to be renting. Ms. Jordan never told Traveler's that she owned the house for which Traveler's was supplying rent money.

Subsequently, Traveler's learned that Ms. Jordan owned the property and reported her fraud to the Maryland Attorney

General's office. While the Attorney General's Office investigated the matter and decided not to prosecute, the Attorney Grievance Commission initiated disciplinary proceedings for violation of MRPC 8.4(b) and 8.4(c). During the course of the disciplinary proceedings, Ms. Jordan admitted that she owned the "rental property" located in Berlin, Maryland, that she never paid any rent to a landlord, and that she never had a real rental agreement with a landlord.

Ms. Jordan argued that her state of mind and physical condition were both fragile when she realized the extent of damage caused to her home by the water leak. She argued that she was on various medications and had many concerns regarding her family and plans for the holidays when she was forced to find a place to live after the damage to her home, and that all of these circumstances made her particularly vulnerable. Ms. Jordan also asserted that because she was not been prosecuted for a crime, her dishonest act had not been proven. In addition, Ms. Jordan contended that she should not be subject to a sanction as severe as disbarment, due to the fact that her actions were not committed in conjunction with her practice of law.

Held: Disbarred. Ms. Jordan presented no testimony that would cause the Court to question the hearing judge's findings of fact and conclusions of law. Ms. Jordan's dishonesty was willful, intentional and for her own personal gain, and there are no extenuating or mitigating circumstances as her apparent medical "condition" occurred subsequent to her acts of dishonesty. Ms. Jordan violated Rules 8.4(b) and 8.4(c) by submitting fraudulent documents to her insurance company. Therefore, the appropriate sanction for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation is disbarment.

Vanderlinde requires that the disability be nothing "less than the most serious and utterly debilitating" mental condition and that the condition be not only the "root cause" of the misconduct but also result in the attorney's "utter inability to conform his or her conduct in accordance with the law and with the MRPC." On this record, it is probable that her medical "condition" resulted from the stress of her dishonesty than from her dishonesty being a consequence of her medical "condition." When a medical condition "developed or occurred subsequent to . . . criminal activity," it does not necessarily mitigate the misconduct. Therefore, Ms. Jordan's claim that the stress in her life and the medications prescribed, standing alone on this record, are not sufficient to constitute extenuating circumstances.

The Attorney General declined to prosecute Traveler's claim for fraud. However, conviction of the crime is not a necessary predicate to support a finding of dishonesty. It does not matter

whether the dishonest act is corroborated by admission or conviction. Ms. Jordan's willful submission of false documentation to Traveler's to line her own pockets was dishonest. That she was not convicted of insurance fraud does not diminish the act of dishonesty.

Vanderlinde also holds that "only if the circumstances are . . . compelling, will we even consider imposing less than the most severe sanction of disbarment in cases of stealing, dishonesty, [or] fraudulent conduct . . . whether occurring in the practice of law, or otherwise." Although Ms. Jordan's actions were not committed in conjunction with the practice of law, in the absence of compelling circumstances, disbarment is the appropriate sanction for her dishonesty.

Attorney Grievance Commission of Maryland v. Jerry Deneise Jordan, No. AG 37, September Term, 2003, filed May 10, 2005, Opinion by Judge Greene.

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ATTORNEYS – MISCONDUCT - RECIPROCAL PROCEEDINGS – APPROPRIATE SANCTIONS

Facts: R. Scott Scroggs, a member of the Oklahoma Bar, was admitted to the Maryland Bar in 1988. The Supreme Court of Oklahoma, in a previous disciplinary proceeding, suspended Mr. Scroggs from the practice of law for one year for violations of the Rules of Professional Conduct. While additional disciplinary proceedings were pending in Oklahoma, Mr. Scroggs filed an Affidavit of Resignation from membership in the Oklahoma Bar, which the Supreme Court of Oklahoma approved. Subsequently, the Maryland Attorney Grievance Commission initiated disciplinary proceedings against Mr. Scroggs, alleging that he engaged in misconduct by failing to report his discipline in Oklahoma to Bar Counsel in violation of Rule 16-773 and various provisions of the MRPC.

Mr. Scroggs contended that the suspension order and the order approving resignation issued by the Supreme Court of Oklahoma were not remedial or disciplinary orders. In addition, although acknowledging that resignation pending disciplinary proceedings is tantamount to a disbarment in Oklahoma, his view was that that statement of the law refers only to the procedural similarities in applying for readmission to the bar. Moreover, he argued that Rule 16-773(a) was not intended to cover resignations pending disciplinary proceedings because that type

of proceeding does not result in an order to disbar, thus, the show cause order that was issued was improper.

Held: Disbarred. In Oklahoma, the effect of an attorney's resignation pending disciplinary proceedings is the equivalent of disbarment. Therefore, Mr. Scroggs violated Rule 16-773(a) by failing to inform the Bar Counsel of his resignation in another jurisdiction. In a reciprocal discipline case the Court is inclined, but not required, to impose the same sanction as that imposed by the state in which the misconduct occurred. The Court must assess the propriety of the sanction imposed by the other jurisdiction and that recommended by the Commission. The Court is also required to consider "the particular facts and circumstances of each case, the outcome being dependent upon the latter, but with a view toward consistent dispositions for similar misconduct." The allegations of misconduct giving rise to Mr. Scroggs's resignation involved eight separate clients and involved matters of neglect, incompetence, lack of communication, and dishonesty. The complaint filed against him also contained allegations of misconduct for violation of Rules 8.1 and 8.4(c). If Mr. Scroggs' misconduct had occurred in Maryland, ordinarily the Court would have imposed the sanction of disbarment.

Mr. Scroggs acknowledged the misconduct alleged and waived any right to contest the allegations. His overall consent to resignation pending disciplinary proceedings was the equivalent of consent to disciplinary action in Maryland. The Court holds that the proceedings held in Oklahoma with regard to Mr. Scroggs' suspension and resignation pending disciplinary proceedings were, in fact, disciplinary or remedial actions subjecting Mr. Scroggs to the imposition of reciprocal discipline in Maryland, and that the appropriate sanction is disbarment. After five years, Mr. Scroggs may apply for readmission to the Oklahoma bar. If granted admission there, he may apply for readmission to the Maryland bar.

Attorney Grievance Commission v. Scroggs, No. AG 16, September Term, 2004, filed May 16, 2005, Opinion by Judge Greene.

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ATTORNEY MISCONDUCT - MISCONDUCT - INTENTIONAL DISHONESTY - MISAPPROPRIATION OF FUNDS - APPROPRIATE SANCTION

Facts: Robert Zakroff, respondent, operated a private practice from 1986 to the present. From at least 2000 through 2002, he misappropriated client funds, disbursing settlement proceeds up to a year and a half after they were received. Further, respondent instructed his staff to misrepresent the status of settlements to both clients and medical practitioners in order to delay disbursements. In addition, respondent intentionally failed to amend a bankruptcy schedule to include a claim the debtor had against an Estate.

Held: Disbarred. The facts of this case support a finding of both intentional dishonesty and misappropriation on the part of the respondent. The hearing judge specifically found that respondent "knowingly used client funds for unauthorized purposes." During the years 2000-2002, an audit by petitioner revealed shortfalls in the Trust account ranging from $174,000 to approximately $421,000. The hearing judge found respondent's claims of ignorance regarding the Trust balance to be not credible given respondent's "pattern of conduct," "careful methodology," and his "sole control" over the Trust account.

Although respondent suffers from "significant" depression, a mood disorder "not otherwise specified," and a personality disorder, the appropriate sanction is disbarment. *Attorney Grievance Commission v. Vanderlinde* requires that the disability be nothing "less than the most serious and utterly debilitating" mental condition and that the condition be not only the "root cause" of the misconduct but also result in the attorney's "utter inability to conform his or her conduct in accordance with the law and with the MRPC." Nothing in the record indicates that respondent suffered from a disorder that rendered him "utterly [unable] to conform [his] conduct in accordance with the law and with the MRPC." On the contrary, respondent maintained a very successful law practice during the relevant period of time. His depression did not result in an "utter inability to conform his . . . conduct in accordance with the law and with the MRPC."

Having concluded that respondent engaged in intentional dishonesty and misappropriation of client funds and that there are no "compelling extenuating circumstances" to justify a lesser sanction, we hold that the appropriate sanction is disbarment.

Attorney Grievance Commission of Maryland v. Robert Joel Zakroff, No. AG 19, September Term, 2003, filed on June 23, 2005, Opinion by Judge Greene.

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ATTORNEYS' FEES - 42 U.S.C. § 1988(b)

Facts: Appellants Dewitt Thomas (Thomas) and his wife filed a complaint in the Circuit Court for Baltimore City against the Mayor and City Council of Baltimore (the City), the Baltimore City Police Department (the Department), and Keith Gladstone, a Baltimore City Police Officer, to recover damages arising from an incident in which Thomas was allegedly accosted, assaulted, and arrested by Officer Gladstone, all without legal justification. In support of his claim under the Local Government Tort Claims Act, Thomas alleged that Gladstone's conduct deprived him of various state and federal constitutional rights. The case was removed to the United States District Court, but the District Court granted appellants' motion for leave to file an amended complaint and a motion to remand the matter to the Circuit Court. In their amended complaint, appellants removed the City as a defendant as well as all averments of federal constitutional violations. The District Court remanded the case to the Circuit Court for Baltimore City, noting that the amended complaint removed all federal claims. On remand, appellants removed the Department as a defendant and proceeded against Gladstone. The court granted summary judgment to Gladstone on multiple counts and the jury found for Gladstone on all but one of the remaining counts (Abuse of Process). Appellants filed a motion to revise in which they sought attorneys' fees under 42 U.S.C. § 1988(b). Appellants averred that because Article 2 of the Maryland Declaration of Rights makes Federal law "the Supreme Law of the state," they were entitled to attorneys' fees for having prevailed on the abuse of process claim. The court denied the motion, the appellants appealed to the Court of Special Appeals, and the Court of Appeals granted *certiorari* on its own initiative, prior to any adjudication by the intermediate appellate court.

Held: *Judgment affirmed, with costs*. A prevailing party is entitled to seek attorneys' fees under 42 U.S.C. § 1988(b) in an action to enforce a provision of 42 U.S.C. § 1983. To state a claim under § 1983, the plaintiff must allege that there was a violation of a right secured by Federal law and that the violation was committed by someone acting under color of State law. Here, Appellants deleted all allegations of violations of Federal law when they amended their complaint, thereby withdrawing any cognizable claim under § 1983. Appellants' attempt to avoid that result by claiming that the abuse of process claim constituted a "constitutional tort" under Maryland law is unavailing, since Appellants have failed to demonstrate how the misuse of process, after its issuance, violates the Maryland Constitution. Even if the claim did constitute a "constitutional tort," it would only support a common law action for damages, not a recovery under 42

U.S.C. § 1983.

Dewitt Lavon Thomas, et al. v. Keith Gladstone, No. 130, Sept. Term 2004, filed May 11, 2005. Opinion by Wilner, J.

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CONTEMPT - CIVIL CONTEMPT - SUPPORT ENFORCEMENT - Md. Rule 15-207(e)

Facts: In February, 1997, the Circuit Court for Howard County declared appellant to be the father of Jasmine B. and ordered him to pay monthly child support and arrearage payments. When appellant failed to comply, the Howard County Department of Social Services initiated contempt proceedings. On May 12, 2002, the court ordered appellant to pay monthly child support and arrearage payments, but postponed the contempt hearing. At the June 27, 2002 contempt hearing, the Court entered an Order of Probation for a suspended sentence for the offense of contempt and placed appellant on supervised probation. The court attached an addendum to the Order that required appellant to pay all fines/costs, abstain from drugs/alcohol, submit to drug/alcohol testing, attend N/A self help meetings, and obtain a sponsor/home group. The next day, the court entered an Order in which it found appellant in contempt of its May 12, 2002 Order, declared an arrearage of $12,189, imposed a 180 day sentence, suspending all but 30 on the condition that appellant resume his monthly payments, released appellant from serving the remainder of his sentence upon payment of $1,000, and directed appellant to comply with the addendum. On October 9, 2003, the court entered an Order finding appellant in contempt of the June 28 Order for violating the drug testing and self-help conditions in the addendum, but directed no further incarceration, terminated the addendum conditions, and declared the remaining conditions in the June 28 Order to be valid. Appellant appealed. The Court of Appeals granted *certiorari* on its own initiative.

Held: *Order for Constructive Civil Contempt filed October 9, 2003 vacated; costs to be paid by appellee.* The October 9 Order constitutes an appealable judgment and is not moot since 1) neither appellant or his counsel consented to the Order and appellant's consent to the June 27 Order for Probation and addendum cannot be considered valid if the conditions imposed were impermissible criminal sanctions; 2) the view that a finding of contempt devoid of any immediate injury or punishment is not appealable has been somewhat modified, and a finding of contempt is considered to be a form of punishment, even if there is no immediate imposition of punishment or sanction, and; 3) Md. Code, Cts. & Jud. Proc. § 12-304 permits appeals from contempt findings regardless of whether a sanction is imposed. Md. Rule 15-207(e) permits a finding of contempt for nonpayment of child support, even if the defendant cannot pay a purge on the day of the hearing or order. The Rule also permits the court to enter coercive directives reasonably

designed to produce income for the payment of support, which the court can enforce through criminal or civil contempt proceedings. The court, however, cannot order things that are inherently or potentially punitive, and the court cannot merge civil proceedings and criminal proceedings or convert one into the other. The June 26 and June 27 Orders and directives in the addendum were criminal in nature and, together, constituted an unlawful criminal sentence imposed in a civil contempt proceeding that could not serve as a lawful basis for the Order filed on October 9, 2003.

Joseph David Bryant v. Howard County Department of Social Services ex rel. Cassandra Costley, No. 93, Sept. Term 2004, filed May 12, 2004. Opinion by Wilner, J.

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CRIMINAL LAW - EVIDENCE - EXPERIMENTS AND TESTS - SCIENTIFIC EVIDENCE - PARTICULAR TESTS OR EXPERIMENTS - IN CERTAIN CIRCUMSTANCES, TESTIMONY THAT THE DEFENDANT'S DNA PROFILE "MATCHED" THE PROFILE OF THE DNA EVIDENCE AND THAT THE DEFENDANT WAS THE SOURCE OF THE DNA EVIDENCE IS ADMISSIBLE WITHOUT ACCOMPANYING CONTEXTUAL STATISTICS.

CRIMINAL LAW—EVIDENCE—EXPERIMENTS AND TESTS; SCIENTIFIC EVIDENCE—PARTICULAR TESTS OR EXPERIMENTS—DNA ANALYSIS USING THE POLYMERASE CHAIN REACTION METHOD AND SHORT TANDEM REPEAT MARKERS ALONG THIRTEEN LOCI PRODUCES A SUFFICIENTLY MINUSCULE RANDOM MATCH PROBABILITY TO MAKE EXPERT TESTIMONY OF UNIQUENESS ADMISSIBLE, SUBJECT TO MD. RULE 5-702.

Facts: Petitioner Anthony Eugene Young appealed his conviction for second degree sexual offense on the grounds that the Circuit Court for Prince George's County erred in admitting expert testimony of a DNA "match" without accompanying statistical testimony.

At trial, the State called a forensic DNA analyst as an expert witness. The expert testified, over Young's objection, that Young's DNA profile "matched" the profile of the DNA evidence taken from the victim. The Circuit Court, again over Young's objection, admitted the expert's report, in which the expert concluded to a reasonable degree of scientific certainty that Young was the source of the DNA obtained from the victim. The witness did not testify

to the probability that a random person's profile would have matched the profile taken from the victim.

Young noted a timely appeal to the Court of Special Appeals. The Court of Special Appeals affirmed. The Court of Appeals granted Young's petition for a Writ of Certiorari.

Held: Affirmed. The Court held that in certain circumstances, testimony that the defendant's DNA profile "matched" the profile of the DNA evidence and that the defendant was the source of the DNA evidence is admissible without accompanying contextual statistics. The Court reasoned that recent scientific advances have produced testing methods that, when employed with certain DNA markers tested along a minimum number of loci, yield DNA profiles with sufficiently minuscule random match probabilities so as to be deemed unique. In such circumstances, instead of statistics, the expert may inform the jury of the meaning of the match by identifying the person whose profile matched the profile of the DNA evidence as the source of that evidence.

The Court concluded that the methodology employed by the State's expert—DNA analysis using the polymerase chain reaction method of DNA amplification and short tandem repeat markers along thirteen loci—produces a random match probability sufficiently minuscule to make expert testimony of uniqueness admissible, subject to Md. Rule 5-702.

Anthony Eugene Young v. State of Maryland, No. 99, September Term, 2004, filed July 19, 2005. Opinion by Raker, J.

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CRIMINAL LAW - RESTITUTION—DIRECT RESULT - Restitution may be imposed upon a defendant as a condition of probation or as part of a sentence if the damages are a direct result of the crime committed. Damages are a direct result of a crime if there is no intervening agent or occurrence, or there is no lapse between the criminal act and the resulting damage.

RESTITUTION - TENANT PROPERTY INTEREST -The fact that the landlord also suffered a loss to his property does not change the fact that the tenant suffered a loss to his possessory property right, for which restitution may properly be granted pursuant to §11-603.

RESTITUTION - REPLACEMENT VALUE — The trial court did not abuse its discretion in determining that the State's estimate to replace the shower was fair and reasonable under the circumstances.

Facts: On February 28, 2003, James Paul Goff knocked down Mr. Hadley's door and demanded to see his then girlfriend, Dana Karen Barnes. Goff forced his way into his apartment and began to strike Hadley repeatedly with a closed fist. Hadley stated that Goff pinned him in the shower and struck him several times in the face. Officer Warehime stated that Hadley had a bloody face and that the shower insert in the bathroom had been broken due to the assault.

On April 25, 2003, the State charged Goff with a number of crimes, including *inter alia*, burglary, assault, trespass, and malicious destruction of property. The court found him guilty of second-degree assault and trespass. The State dismissed the remaining counts and ordered Goff to pay a fine in the amount of $150.00 for the trespass. In addition, the court sentenced Goff to eighteen months incarceration for the assault, suspended that sentence, and placed him on two years of supervised probation. The court also ordered, as a condition of probation, that Goff pay restitution, in an amount to be determined.

At the hearing on restitution, the State introduced an estimate of the cost to replace the shower in the amount of $2,156, obtained by Hadley from Caton Plumbing. The written estimate, signed by an estimator named Kevin Ohl, did not differentiate between costs of labor and materials but did provide a list of materials needed and work expected to be completed. Hadley testified that he reported the damage to the shower to his landlord, who did not replace it because he considered it Hadley's responsibility.

Goff testified that he had obtained an estimate from Lowe's for the cost of a "surround kit," in the amount of $111.30. Goff also testified that he obtained an estimate from a contractor named Blizzard for the cost of repairing the shower in the total amount of $513.00, including $88.00 for the shower kit and $425.00 for labor. The State called Kevin Ohl as a rebuttal witness. He testified that the estimate from Lowe's was for a "shower and wall set" and that there was no listing of a base or the actual wall kit itself. He also mentioned that the Lowe's estimate did not account for replacement of the green wallboard or replacement of the drain and some of the piping. Ohl testified that a competitive hourly rate for plumbing work is $122.00 per hour and that the Blizzard estimate included an hourly rate of approximately $50.00 per hour. Moreover, the Blizzard estimate contained no mark up on the supplies needed to replace the shower.

Held: The Circuit Court's order of restitution was proper. The court did not err by ordering Goff to pay restitution to the victim of the assault because the damage to the property was a

direct result of the assault and that the property was the property of the victim.

Goff's assaultive behavior directly caused the damage to the shower, in addition to causing physical injury to Hadley. A direct result between the qualifying crime committed and the damages inflicted should be present before restitution may be ordered. The natural and ordinary meaning of the term "direct result" most certainly includes the damage done to the shower in the instant case. It is clear that Goff damaged the shower during and because of the assault on Hadley. No intervening agent or occurrence caused the damage. Therefore, the order to pay restitution was proper.

While it is true that Hadley does not own the apartment in which he lives, it is equally true that as a tenant he had a property interest in the nature of a possessory property right in the apartment. The fact that the landlord also suffered a loss to his property does not change the fact that the tenant suffered a loss to his possessory property right, for which restitution may properly be granted pursuant to §11-603.

In view of the testimony presented at the restitution hearings, the trial court did not err or abuse its discretion in determining that the State's estimate to replace the shower was fair and reasonable under the circumstances. The Defendant failed to meet his burden of showing that the State's estimate was not reasonable.

James Paul Goff v. State of Maryland, No. 102-04, September Term, 2003, filed on June 6, 2005, Opinion by Judge Greene.

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EVIDENCE - ORAL PROOF OF FORMER TESTIMONY - *DE NOVO* APPEALS - TIME DEADLINE AS TO WHEN A DEFENDANT MAY WITHDRAW HIS *DE NOVO* APPEAL TO THE CIRCUIT COURT

Facts: Based on evidence that he inserted his finger into the vagina of a client during a massage, petitioner was convicted in the District Court of second degree assault. He appealed his conviction to the circuit court where he received a *de novo* trial before a jury. Petitioner sought to impeach the chief witness against him, the victim, by showing that she had given testimony in the District Court that was inconsistent with her Circuit Court testimony.

Because of a malfunction in the recording equipment during the District Court trial, petitioner was without the benefit of a trial transcript with which to prove the victim's former testimony. He therefore called two persons who were present at the District Court trial to testify to what the victim's testimony had been.

After voir dire examination of one of the witnesses, outside the presence of the jury, the Court disallowed the testimony on the grounds that the witness's recollection was insufficient to prove the former testimony. While the witness recalled the victim's testimony regarding the alleged inconsistency, she did not recall the *exact words* used. The testimony of the other witness was disallowed on the same grounds.

After the ruling, petitioner moved for a mistrial, which was denied, and then attempted to withdraw his appeal under Maryland Rule 7-112(f)(1), which does not contain a time deadline on when a defendant may withdraw his appeal from a District Court conviction. The trial court prohibited petitioner from withdrawing his appeal and he was again convicted of second degree assault, but received a greater sentence than he had in the District Court.

Held: Reversed. The Court of Appeals declined to address the question whether there is a time deadline on when a defendant that appeals his District Court conviction to the circuit court may withdraw his appeal. This question was referred to the Court of Appeals Standing Committee on Rules of Practice and Procedure.

Regarding the issue of proving former testimony, the Court, in synthesizing a number of cases stretching back to 1821, prior to the advent of the modern recording equipment currently used to create trial transcripts, held that a witness who was present for, and heard, the former testimony of a witness, may recount that testimony if he/she can recall all of the facts relevant to the particular matter at issue; a verbatim recollection is not required.

Gonzalez v. State, No. 103, September Term, 2004, filed July 15, 2005. Opinion by Wilner, J.

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LEASES - LANDLORD TENANT - FEDERAL FAIR HOUSING ACT - LANDLORD SATISFIED REASONABLE ACCOMMODATIONS REQUIREMENT TO DISABLED TENANTS PURSUANT TO LEASE AND THE FEDERAL FAIR HOUSING ACT, 42 U.S.C. § 3601 *et seq.*

Facts: In September, 1999, appellants entered into a 24-

month lease for a single-family dwelling which was evidenced by a Dwelling House Lease and a U.S. Department of Housing and Urban Development (HUD) Section 8 Lease Addendum. Section 13 of the lease required tenants to allow the landlord or her agent to enter the premises for purposes of inspection at any reasonable time and Section 27, which by its terms prevailed over any conflicting provisions in the lease, recited that the landlord had received "official medical testimony regarding tenants' requirement for special adaptations to accommodate to their handicapping conditions" and that appellants were on the Department of Agriculture's pesticide sensitive list. The landlord agreed to allow "reasonable accommodations and modifications for Tenants' disabilities" and to create "the least chemical impact/load to Tenants' health." It was agreed that persons entering the unit for repairs would adhere to disability guidelines as per Tenant instructions and medical advice, unless the repairs were on an emergency basis to prevent damage to the property. Section 27 also precluded the landlord from terminating the lease except for certain causes, including "serious or repeated violations of the terms and conditions of the lease."

The landlord lived in Colorado and in June 2001, the landlord entered into a property management agreement with Majerle Management, Inc. The agreement required Majerle to make inspections of the property as it felt necessary, "but approximately twice annually." Although Majerle requested numerous times to inspect the property from August 2001 through February 29, 2004, Majerle was only successful one time – August 2001 – in actually inspecting the property. All other times, Tenants cancelled and rescheduled the appointment, citing health problems due to neighbors' pesticide applications.

In March 2002, Majerle filed a notice to vacate and when tenants failed to vacate, Majerle filed a tenant holding over action in District Court. Majerle voluntarily dismissed the action when he discovered that he had failed to provide sufficient notice to Montgomery County Housing Opportunities Commission (HOC), as required by law. In March 2003, the District Court held that the lease had not terminated and the tenants were not holding over. Majerle attempted to inspect the property in May 2003, but the Tenants cancelled the inspection, citing that the Tenants were both ill due to recent pesticide applications on neighbors' lawns. Majerle responded with a notice to vacate and a hearing was held in November 2003. At the hearing, the parties placed on the record an agreement that an inspection would take place prior to February 28, 2004 and Tenants would remain in the property until May 2005. Thereafter, Majerle scheduled an inspection, but the Tenants rescheduled again, citing illness. In March 2004, Majerle filed a motion seeking a judgment of possession, which the District Court granted. Appellants appealed to the Circuit Court for Montgomery County which affirmed, holding that the landlord "has provided reasonable accommodations with an effort to allow for rescheduling but each time that has happened, a roadblock has been thrown up by

the tenant." Appellants *writ of certiorari* was granted.

Held: Affirmed. Although the Court accepted that the Tenants were handicapped and were entitled under both Federal law and the lease to a reasonable accommodation in the rules and practices relating to their dwelling, it concluded that what they insisted upon was not reasonable. There was substantial evidence in the record to support the Circuit Court's conclusion that the landlord did attempt to make reasonable accommodations and that the tenants' refusal to permit scheduled inspections by the landlord's agent constituted a breach of the lease.

Solberg & Sossen v. Majerle Management, No. 138, Sept. Term 2004, filed July 18, 2005. Opinion by Wilner, J.

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REAL PROPERTY - CONDOMINIUM ASSESSMENTS - A DEBTOR WHO SEEKS TO FORESTALL THE FORECLOSURE OF A LIEN ON HIS CONDOMINIUM UNIT FOR NONPAYMENT OF CONDOMINIUM ASSESSMENTS MUST FILE A MOTION TO ENJOIN THE SALE PRIOR TO THE SALE'S OCCURRENCE. EXCEPTIONS TO THE SALE OR TO ITS AUDIT MAY CHALLENGE ONLY PROCEDURAL IRREGULARITIES IN THE SALE OR THE AMOUNT OF THE DEBT, RESPECTIVELY.

Facts: In June 1975, Clifford A. Brooks, respondent, purchased a condominium in the Greenbriar Condominium Development in Greenbelt, Maryland and was thus subject to the provisions of the various by-laws and declarations of covenants governing the condominium.

Beginning in at least the late 1980s, Brooks, a practicing Maryland attorney, was regularly delinquent in the payment of his monthly condominium assessments. Over several years, Greenbriar Condominium, Phase I, Council of Unit Owners, Inc. ("Council"), petitioner, recorded against Brooks numerous liens pursuant to the Maryland Condominium Act, Md. Code (1974, 2003 Repl. Vol.), § 11-110 and the Maryland Contract Lien Act, Md. Code (1985, 2003 Repl. Vol.), §§ 14-201 *et seq.* of the Real Property Article, for unpaid assessments plus late fees, interest, collection costs and attorney's fees. Brooks satisfied some liens, but continued to be delinquent in the payment of his monthly installments. In May 1995, Council sought to foreclose on a lien, but stayed that action. In February 1996, Council recorded another lien and Council's Board of Directors resolved to foreclose on Brooks' condominium unit. Ultimately, Council had to schedule a foreclosure sale for January 15, 1999.

On December 21, 1998, Brooks submitted a check for $3,411.00,

the total of the delinquent assessments contained in the February 1996 lien. Council rejected the tender as insufficient to fulfill the outstanding liens, plus late fees and collection costs. Brooks requested a statement of specific charges and Council filed a supplemental statement of indebtedness showing a total outstanding debt of $31,114.64.

The foreclosure sale took place on January 15, 1999, and Council successfully bid the sum of $21,600.00. Shortly after the sale was held, Brooks filed in the Circuit Court for Prince George's County an "Emergency Motion for Temporary Restraining Order and for Preliminary Injunction," attempting to enjoin the already-held sale. The circuit court heard the motion and requested from both parties a suggested final accounting as well as ordered the auditor's report. Both parties filed exceptions to the auditor's report. Ultimately, the circuit court signed an order on September 23, 2002, invalidating the second foreclosure sale, awarding counsel fees to Brooks and holding that Brooks' December 1998 proffer of $3,411.00, as well as his later offer of some amount of interest, constituted the amount of the lien on which the foreclosure sale had proceeded. The circuit court did not address the discrepancy between the amount of the lien and the amount Council asserted as the full debt amount.

Both parties appealed to the Court of Special Appeals, which affirmed the circuit court's invalidation of the foreclosure sale, but vacated the lower court's award of attorney's fees, noting that Brooks was not actually the prevailing party because he had not cured his default and satisfied the lien until the enforcement proceedings were underway. Both parties then filed a petition for writ of certiorari and the Court of Appeals granted only Council's petition on January 12, 2005. *Greenbriar Condominium, Phase I Council of Unit Owners, Inc. v. Brooks*, 384 Md. 581, 865 A.2d 589 (2005).

Held: Reversed. Prior to the sale, a debtor may seek to enjoin the foreclosure sale of his property by filing a motion to enjoin as provided in Maryland Rule 14-209. Should a foreclosure sale occur, the debtor's later filing of exceptions to the sale may challenge only procedural irregularities at the sale. The debtor also may challenge the statement of indebtedness by filing exceptions to the auditor's statement of account. It is generally inappropriate to overturn a foreclosure sale at the ratification stage based on the creditor's rejection of the debtor's attempt at redemption.

Greenbriar Condominium, Phase I Council of Unit Owners, Inc. v. Clifford A. Brooks. No. 126, September Term, 2004, filed June 22, 2005. Opinion by Cathell, J.

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COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - ADMISSIBILITY OF EVIDENCE IN AGENCY PROCEEDINGS - ADMINISTRATIVE AGENCY INVESTIGATION PROCEDURES - HEARSAY IN ADMINISTRATIVE AGENCY PROCEEDINGS - FAILURE TO SUBPOENA WITNESS - RELEVANT EVIDENCE - MARYLAND RULE 5-401 - MD. CODE. ANN., HEATH OCC. § 4-315 - MARYLAND DENTISTRY ACT

Facts: Appellant, Howard L. Rosov, D.D.S., appealed the affirmance of the decision of an Administrative Law Judge ("ALJ"), affirming the decision of the Maryland State Board of Dental Examiners ("the Board"), which issued an Order for Summary Revocation of Rosov's license to practice dentistry in the State of Maryland. The circuit court found the ALJ committed no errors of law.

Rosov has been a licensed dentist in the State of Maryland since 1973, was previously disciplined by the Board prior to the events which gave rise to the instant case, and was charged with multiple violations of the Maryland Dentistry Act. In 1998, he entered into a Consent Order by which he was placed on probation for 3 years for violation of Md. Code Ann., Health Occ. § 4-315(s)(6) and (a)(16). The Board summarily suspended Rosov's license after investigation of two patient complaints in October 2002, and Rosov represented at a Show Cause Hearing that, through training and consultation, his errors had been permanently corrected. The Board stayed the summary suspension until December 31, 2003, pending Rosov's compliance with certain conditions, including the observation of his practice by an expert in Centers for Disease Control ("CDC") compliance and inspections of his dental practice throughout 2002 and 2003.

Rosov's license was again summarily suspended by the Board on June 18, 2003 as a result of a needle stick while treating a minor patient who saw Rosov on February 26, 2003 for root canal therapy and an extraction of a baby tooth. The incident occurred when Rosov picked up a syringe that contained an anesthetic, and which had been used for the root canal therapy. Rosov asked Dental Assistant Kimberly Hickman to help calm the patient who was seated with Hickman standing to the patient's left. Rosov was sitting on Patient A's right side, behind her head with Hickman to his right. When Rosov attempted to inject the patient, she moved frantically and Rosov then pulled the needle away from the patient's mouth. The hand holding the needle went in a downward motion to Rosov's right side and came into contact with Hickman's left leg, sticking her in the left thigh. Rosov immediately thereafter injected Patient A with the same needle which had stuck Hickman. Rosov then handled the communication of the needle stick to the patient and her mother in a matter inconsistent with the Maryland Dentistry Act. Rosov raised several issues on appeal, (1) Rosov argued that the report prepared by the Board's investigator was biased and

included non-evidentiary and highly prejudicial material; (2) Rosov contended that a police report detailing a theft that had occurred at Rosov's office prior to the needle stick incident was improperly excluded; (3) Rosov asserted that the denial of admission of personnel records from Hickman's employment with another doctor constituted error; and (4) Rosov argued that the Board's investigation was based entirely on Hickman's statements, and not credible evidence.

Held: Affirmed. Appellant's objection to the investigator's report was unsubstantiated as there is no requirement, either in law or investigative technique, requiring participation of the investigation target or target's counsel prior to charging. The interviews taken under oath and the ability to subpoena the investigator served as safeguards for appellant during the investigation. An administrative agency report that is credible and probative is admissible, even when containing some hearsay. A Police Report of a theft not involving a witness and unrelated to a witness's credibility was not relevant. The personnel records of Hickman cannot be admitted based on pure speculation of its contents. The decision of the Board to revoke appellant's dental license was supported by substantial evidence.

Rosov v. Maryland State Board of Dental Examiners, No. 540, September Term 2004, filed July 6, 2005 Opinion by Sharer, J.

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CIVIL PROCEDURE - CLASS ACTION - MD. RULE 2-231 - EQUITABLE TOLLING - STATUTE OF LIMITATIONS - INQUIRY NOTICE - C.J. § 5-301 - ELEMENTS OF A CAUSE OF ACTION - SUMMARY JUDGMENT - SURVIVAL ACTION - WRONGFUL DEATH ACTION.

Facts: Russell E. Christensen ("Christensen" or the "Decedent") was diagnosed with lung cancer in mid 1998. Although Christensen had been a cigarette smoker for thirty years, he had ceased smoking more than twenty years before he was diagnosed with lung cancer. Christensen died of lung cancer on January 17, 2001, at the age of seventy-three.

On August 13, 2001, Nona Christensen, the Decedent's widow,

individually and as Christensen's personal representative, brought a survival and wrongful death action against Philip Morris USA Inc. ("Philip Morris"); Lorillard Tobacco Co.; Liggett Group, Inc. ("Liggett"); Giant Food, LLC ("Giant"); Crown Service, Inc.; George J. Falter Co., Inc.; and A & A Tobacco Company, Inc. Ms. Christensen sought compensatory and punitive damages based on strict liability (failure to warn), fraudulent misrepresentation, fraud by concealment, loss of consortium, and conspiracy. The suit was amended on September 25, 2002, to add as plaintiffs the Decedent's two adult children: Eric Lowell Christensen and Lisa Marie Christensen.

With the exception of Giant, all of the defendants had previously been sued in a class action brought in Maryland by smokers, former smokers, and their families. In May 1996, the case of *Richardson v. Philip Morris Inc.* was filed in the Circuit Court for Baltimore City, and in September 1997, the *Richardson* plaintiffs moved for class certification, which was subsequently approved by the circuit court in January 1998. The *Richardson* defendants filed a petition in the Court of Appeals for a writ of mandamus or prohibition, asking that Court to instruct the circuit court to vacate the class certification. Although Christensen was not a named party in *Richardson*, he was a potential class member. On May 11, 1999, Christensen provided an affidavit for the plaintiffs in *Richardson*, and in June 1999 he provided a videotaped *de bene esse* deposition. In an opinion dated May 16, 2000, the Court of Appeals granted the relief of mandamus and ordered the circuit court to decertify the class in the *Richardson* case. *Philip Morris Inc. v. Angeletti*, 358 Md. 689 (2000).

In the action filed by Ms. Christensen, the defendants moved for summary judgment, alleging that suit was barred by limitations because the Decedent knew in the Spring of 1998 that he had lung cancer, and thus was on inquiry notice at that time. In response, the plaintiffs claimed that the Decedent's claim did not accrue when he learned in May 1998 that he had lung cancer. Rather, they claimed that Christensen's claim accrued in September 1998, when he learned from a cell biopsy that his particular type of lung cancer was caused by cigarette smoking. Further, they argued that, because Christensen was an ex-smoker for more than two decades, he lacked sufficient knowledge at the time he learned he had lung cancer to link his lung cancer to smoking. The plaintiffs also claimed that limitations was tolled during the pendency of the *Richardson* class action. The circuit court granted the defendants' motion. It concluded that the claims accrued more than three years before suit was filed. Moreover, the court determined that limitations was not tolled during the pendency of the unsuccessful class action suit.

Held: Summary judgment vacated as to Giant; summary judgment in favor of all other defendants reversed. The Court determined

that, based on federal and state cases construing class action rules similar to the class action rule in Maryland, the doctrine of equitable tolling applies with respect to class action litigation in Maryland.

The Court noted that Maryland Rule 2-231 is almost identical to Rule 23 of the Federal Rules of Civil Procedure ("FRCP"), from which it derives. The applicable statute of limitations, found in §5-101 of the Courts & Judicial Proceedings Article ("C.J.") of the Maryland Code (1974, 2002 Repl. Vol.), does not mention class action tolling. However, the Court found that, when, as here, a Maryland procedural or evidentiary rule is derived from, and closely mirrors, a federal rule, our appellate courts have looked to federal law to interpret the corresponding Maryland rule.

Consequently, the Court reviewed various Supreme Court cases, including *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), which held that "the commencement of a class action" pursuant to FRCP 23, "suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* At 554. Moreover, the Court looked to numerous other state court cases that have adopted the concept of class action tolling.

The Court acknowledged that the many federal and state cases recognizing class action equitable tolling are informative but not controlling. Further, the Court noted that Maryland courts "have long maintained a rule of strict construction concerning the tolling of the statute of limitations." *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 333 (1994). Nevertheless, the Court concluded that it could not ignore the wealth of cases that have applied the doctrine of class action equitable tolling. In its view, the class action tolling doctrine effectuates the goals of the class action rule, because it fosters the efficiency and economy of litigation. Accordingly the Court held that, during the pendency of a class action initiated in Maryland, limitations is tolled with respect to class members, until such time as class certification is denied. Therefore, the circuit court erred in granting summary judgment based on limitations.

Because there was no equitable tolling as to Giant, however, the Court also considered the trial court's ruling that the plaintiffs' claims were barred by limitations. The Court noted that under C.J. §5-101, civil litigants generally have three years from the date their action accrues to file suit. Further, the Court explained that Maryland now applies the discovery rule to the concept of accrual, which provides that a "cause of action accures when a plaintiff in fact knows or reasonably should know of the wrong." *Hecht*, 333 Md. At 334.

Citing to *Pennwalt Corp. v. Nasios*, 314 Md. 433 (1988), among others, the Court explained that numerous Maryland appellate cases

have recognized that a claim accrues when the plaintiff knows or should know of the harm and its probable cause. However, the Court stated that because the lower court did not have the benefit of the Court's recent opinion in *Benjamin v. Union Carbide Corp.*, ___ Md. App. ___, No. 959, September Term 2004, slip op. At 22 (filed May 3, 2005), the Court would neither affirm nor reverse the lower court's disposition of the survival and wrongful death claims based on limitations. Accordingly, as to Giant, the Court vacated the summary judgment and remanded the case for further proceedings, to enable the circuit court to reconsider its limitations ruling in light of *Benjamin*.

Nona K. Christensen, et al. v. Philip Morris USA Inc., et al., No. 2136, September Term, 2003, filed June 8, 2005. Opinion by Hollander, J.

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CONTRACT - BREACH OF CONTRACT

DEFAMATION - ELEMENTS OF PRIMA FACIE CASE - BURDEN OF PROOF

TORTS - INTERFERENCE WITH BUSINESS RELATIONS - ELEMENTS - IMPROPER MEANS - INTENT

PUNITIVE DAMAGES - ACTUAL MALICE

EVIDENCE - ADMISSIBILITY - DISCRETION OF TRIAL COURT

JURY INSTRUCTION - SPOLIATION

Facts: Arthur H. Spengler, appellant, opened a credit card account with appellee, Sears, Roebuck, & Company in 1989. Per the account user agreement, appellant added his wife to the account as an authorized user in 1996. In 1997, appellant destroyed the account credit cards and paid off the balance, in an attempt to terminate the account. Appellant did not notify Sears of his actions. In 2001, appellant and his wife separated, and appellant moved away from the marital residence.

Shortly thereafter, Sears sent a campaign mailer out to the

couple's marital residence, where appellant's wife still resided. The mailer provided for an upgraded credit card through the previous account, which permitted a cardholder greater purchasing and balance transfer power. Appellant's wife received the mailer, activated the new card, and accrued significant debt on the account.

Appellant, as primary cardholder, received notice of the debt and refused to pay. In response, Sears notified credit agencies of appellant's payment delinquency, thereby affecting appellant's credit rating. Litigation commenced.

Appellant filed a four-count complaint in the Circuit Court for Wicomico County, alleging, in part: (1) breach of contract; (2) defamation; and (3) interference with business relations. The Circuit Court granted Sear's motion for judgment as to the breach of contract and defamation counts; the case went to jury on the single count of interference with business relations. During trial, the Circuit Court made certain evidentiary and jury instruction rulings. The jury then awarded appellant damages in the amount of $145,000. Sears filed a timely motion for judgment notwithstanding the verdict, which was granted. This appeal followed.

Held: Grant of motion for judgment on breach of contract and defamation counts AFFIRMED. As to the breach of contract, the evidence was insufficient to demonstrate a breach of the credit card user agreement by Sears. Appellant neither notified Sears of his unilateral attempt to terminate the credit card account in 1997 nor did he remove his wife from the account as an authorized user. Nor did appellant disclose to Sears his change of address following his separation from his wife. Through the agreement, Sears, without notice of termination or change of address, was permitted to send a mailer to appellant's marital address. Consequently, appellant is responsible for charges incurred by his wife. As to the defamation count, appellant failed to prove falsity of the report, or statements contained therein, made by Sears to credit agencies.

The grant of the motion for judgment notwithstanding the verdict on interference with business relations AFFIRMED. As appellant failed to demonstrate either breach of contract or defamation, he, in turn, could not establish the element of "improper means." Even assuming he had established "improper means," appellant failed to demonstrate unlawful purpose in reports to credit agencies. Appellant is not entitled to punitive damages because he could not demonstrate the element of actual malice.

Questions related to evidentiary issues and jury instruction AFFIRMED. As to evidentiary issues, the Circuit Court did not abuse its discretion in excluding evidence of other lawsuits filed by Sears, where Sears filed a motion *in limine* seeking such

exclusion. Admission of other lawsuits would lead to considerable delay and confusion of the issues. As to the jury instruction, the Circuit Court appropriately denied appellant's request for a spoliation instruction because that instruction was not supported by the facts of the case.

Arthur H. Spengler v. Sears, Roebuck & Company, No. 798, September Term, 2004, filed July 11, 2005. Opinion by Sharer, J.

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CRIMINAL LAW - CONFESSIONS - MIRANDA - WAIVER

Facts: Appellant, Brian Christopher Cooper, was charged with, *inter alia*, first degree murder, wearing and carrying a concealed weapon, and carrying a deadly weapon with intent to injure. On the night of April 16, 2002, appellant, who was then 18 years old, stabbed 21-year-old Elliott Scott in Baltimore City, following an altercation earlier that evening between the two men. Scott died two days later, and the investigation into his murder led the police to suspect appellant as the assailant.

Appellant was arrested on a warrant, approximately one month after the crime. At the police station following his arrest, appellant was subjected to a two-stage interrogation. At the first stage, the police did not warn appellant of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and obtain from him a waiver of these rights. Only after appellant gave a statement did the police issue *Miranda* warnings and obtain a waiver. The second stage of the interrogation continued until appellant gave a second statement.

On learning that the State planned to use the second statement at trial, appellant filed a motion to suppress it. Appellant argued, *inter alia*, that it was obtained in circumvention of *Miranda*.

The court denied the motion. The statement was introduced at trial, over appellant's objection, and he was convicted of first degree murder and related weapons offenses.

Held: Reversed and remanded for new trial. In *Missouri v. Seibert*, __ U.S. __, 124 S. Ct. 2601 (2004), the Supreme Court struck down the two-stage, "question first" interrogation strategy employed by some police. This strategy is one in which the police purposefully withhold *Miranda* warnings during a custodial interrogation until after an incriminating statement is obtained, then administer proper *Miranda* warnings, secure a proper waiver, and elicit a second confession, ostensibly admissible in court. The Court held in *Seibert* that, when such a technique is used, the second confession must be suppressed because the "midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement." 124 S. Ct. at 2605.

In the present case, the police engaged in the question first strategy condemned by *Seibert*. Appellant did not voluntarily waive his *Miranda* protections; consequently, the post-warned statement should have been suppressed.

Cooper v. State, No. 1353, September Term, 2003, filed July 6, 2005. Opinion by Barbera, J.

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CRIMINAL LAW – WAIVER OF JURY TRIAL – MARYLAND RULE 4-246(b):
Court will not set aside waiver of jury trial on ground that transcript does not specifically reflect that court's Rule 4-246(b) inquiry was simultaneously translated for defendant where record establishes that defendant was represented by counsel who affirmatively requested a waiver of the jury trial, and a skilled court appointed interpreter was available to defendant at all times during the court's questioning.

CRIMINAL PROCEDURE – WAIVER OF JURY TRIAL – MARYLAND RULE 4-246(b):
Trial court is not required to ask any specific questions regarding duress or coercion so long as the trial court satisfies itself that the defendant's waiver of the right to be tried by a jury is made knowingly and voluntarily.

TRIAL PRACTICE – APPEALS – PRESERVATION OF ISSUES:
A party cannot claim on appeal that an error in admitting evidence

of prior consistent statements was prejudicial if similar testimony was subsequently admitted through another witness without any objection.

TRIAL PRACTICE – OBJECTIONS TO EVIDENCE – CONTINUING OBJECTIONS – MARYLAND RULE 4-323(b):
A continuing objection to evidence is not effective unless a continuing objection is specifically granted by the trial court, and, when granted, is effective only as to questions clearly within its scope.

CRIMINAL LAW – SENTENCING GUIDELINES:
Sentencing court does not violate defendant's Sixth Amendment rights by imposing a sentence that is within the statutory limit but in excess of the term recommended by the guidelines.

CRIMINAL LAW – SENTENCING – CREDIT FOR TIME SERVED:
Defendant is entitled to credit for time served for period defendant was on home detention pending trial.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Montgomery County. The defendant, Shin Kang, was indicted on charges of first degree attempted murder, second degree attempted murder and first degree assault for a hanging incident involving his wife as well as a charge of second degree assault on an additional incident of physical contact against his wife. Defendant waived a jury trial and was found guilty by the trial judge of first degree assault for the hanging incident and second degree assault for the physical contact incident. Kang was sentenced to a term of 15 years incarceration for the first degree assault, and a consecutive five year term for the second degree assault. At sentencing, defendant asked the court for credit for time served on home detention. The court refused.

On appeal to the Court of Special Appeals, Defendant asserted that 1) the trial court failed to insure that the jury waiver was knowing and voluntary pursuant to Maryland Rule 4-246(b); 2) the trial court erred by admitting evidence of prior consistent statements; 3) the trial court erred in calculating and exceeding the sentencing guidelines applicable to this case; and 4) the trial court erred in denying credit for time served in pretrial home detention.

Held: Judgments affirmed. Case remanded to the Circuit Court for issuance of an Order directing the Division of Correction to give Appellant credit for time served on home detention.

The Court of Special Appeals held that the trial judge had properly determined, pursuant to Maryland Rule 4-246(b), that Kang's waiver of trial by jury was made knowingly and voluntarily. The Court of Special Appeals rejected Kang's claim that his conviction should be reversed because the transcript did not

affirmatively specify that the waiver was translated into Korean. It was clear that the Defendant had the services of a skilled interpreter available at the time he waived his right to a jury trial.

The Court of Special Appeals concluded that the Defendant's objection to evidence of prior consistent statements was not preserved for appellate review. The Defendant failed to renew his objection to such evidence at the time similar testimony was elicited from subsequent witnesses. Even though the Defendant had "offered" a continuing objection when the evidence was first offered, the trial judge did not grant a continuing objection pursuant to Rule 4-323(b). Consequently, the objection was not preserved.

With respect to the argument regarding exceeding the sentencing guidelines, the Court of Special Appeals found no error, citing *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738, 750 (2005), in which the Supreme Court clarified that if the subject sentencing guidelines could be read as merely advisory provisions rather than mandatory provisions, then exceeding the guidelines would not implicate the Sixth Amendment.

With respect to credit for time served on home detention, the Court held that the Defendant was entitled to such credit pursuant to *Spriggs v. State*, 152 Md. App. 62, 69 (2003).

Shin H. Kang v, State of Maryland, No. 1526 September Term, 2004, filed June 30, 2005. Opinion by Meredith, J.

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CONSTITUTIONAL LAW - DEFENDANT'S RIGHT TO BE PRESENT AT ALL STAGES OF TRIAL — WITNESSES — EXCLUSION BY COURT ON BASIS OF PROFFER OF THEIR ANTICIPATED TESTIMONY — JURY — INCONSISTENT VERDICT — POLLING

Facts: Appellant, Francesco Alexjandre Kelly, was charged with, *inter alia*, two counts each of attempted first degree murder, attempted second degree murder, first degree assault, and use of a handgun in the commission of a felony or crime of violence. The

evidence at trial disclosed that around 11:00 p.m. on October 31, 2002, Ibrahim Sidibe, his fiancee, Melissa Wainwright, and Sidibe's best friend, Nicholas Watson, were riding together on a public transit bus.

During the bus ride, Wainwright noticed appellant seated across from them, and made a remark about him that caused Watson and others on the bus to laugh. Appellant responded with a derogatory comment about Wainwright, precipitating an angry exchange between Watson and appellant. The episode ended within a minute and a half, without further trouble at that time.

Shortly thereafter, Sidibe, Wainwright, and Watson got off the bus at the stop in front of a 7-Eleven Store in the White Oak area of Silver Spring. Appellant remained on the bus, but he and Watson made "eye contact" as Watson left the bus.

The three friends went into the 7-Eleven to get something to eat and drink, then returned to the bus stop to await the arrival of the next bus. After ten minutes or so, appellant came upon them and began to shoot at them.

Appellant shot Sidibe in the head, paralyzing him. He also shot Watson six times. He fired at, but did not injure, Wainwright.

At trial, the court conducted a bench conference on an alleged violation by the State of the rules of discovery. Over defense counsel's objection, appellant was not present at the conference.

During the defense case, counsel advised the court that one defense witness, who had not been subpoenaed, was not present at trial. The court required counsel to proffer the witness's testimony and, based on the proffer, declined to delay trial to await the witness's attendance. The court also required the defense to proffer the expected testimony of certain other defense witnesses, who were present and available to testify. Based on the proffers, the court did not permit the witnesses to be called.

Following deliberations, the jury returned to the courtroom to deliver its verdict. As the clerk was taking the multi-count verdict from the foreperson, it became evident to the court that the verdict, as rendered by the foreperson, was inconsistent. Defense counsel argued that the court should accept the verdict as rendered, and counsel requested that the jury be polled. The court declined. The court reasoned that the jury was confused about the relationship among the charges and the verdict sheet. The court re-instructed the jury, then sent the jury for further deliberations. Shortly thereafter, the jury returned to the courtroom and the foreperson delivered the jury's verdict of guilty on all counts. The jury was polled and expressed its unanimous agreement with the verdict. The jury convicted appellant of two

counts each of attempted first degree murder, attempted second degree murder, first degree assault, and use of a handgun in the commission of a felony or crime of violence.

Held: Affirmed. A criminal defendant's right to be present at every stage of his trial is protected by the federal and Maryland Constitutions, Maryland common law and Maryland Rule 4-231. The right is not absolute and does not entitle a defendant to be present, for example, "at a conference or argument on a question of law." Md. Rule 4-231(b)(1). Whether a particular proceeding is "a conference or argument on a question of law" turns on whether the content of the proceeding relates to the function of the defendant's right to be present, that is, to confront the witnesses against him and otherwise defend his case. Even when there is no confrontation right at stake, due process requires the defendant's presence at the conference if what occurs at the conference bears a "reasonable and substantial relationship" to the defense of the case.

The trial court did not err by excluding the defendant from a bench conference because it was one in which the court and counsel addressed a question of law. The conference involved whether the State violated discovery by not informing the defense of the identity of one of its witnesses before trial, and if so, what remedy there should be for the violation. The State's proffer of the expected testimony of its witness did not implicate appellant's Sixth Amendment right of confrontation. Moreover, appellant's presence could not have assisted his counsel in argument on the discovery question; consequently, the discussion did not bear a reasonable and substantial relationship to his opportunity to defend this case.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights afford a criminal defendant the rights to compulsory process and to present a defense. The defendant was not deprived of either right when the court required him to proffer the expected testimony of a missing defense witness, and of other available defense witnesses. The court's requiring the proffers came within the broad authority trial judges have over the course and conduct of trial. The court likewise did not abuse its discretion when it concluded, based on the proffers, that the witnesses' testimony would be inadmissible, and ruled the witnesses would not be permitted to testify.

Finally, the court did not err in denying the defense's request to poll the jury until after the court carried out its duty to have the jury resolve an ambiguity in the verdict, by directing it to return to its deliberations. Once the jury resolved that ambiguity and the verdict was announced, the jury was polled before being discharged, as required by Maryland Rule 4-327(e) and the case law.

Kelly v. State, No. 1444, September Term, 2003, filed May 2, 2005. Opinion by Barbera, J.

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FAMILY LAW - CHILD IN NEED OF ASSISTANCE - WAIVER OF THE RIGHT TO A CONTESTED ADJUDICATORY HEARING

Facts: On September 2, 2003, appellant, Tynetta H., was present and represented by counsel at a combined Child In Need of Assistance ("CINA") adjudication and disposition hearing concerning her daughter, Blessen H. At the hearing, appellant's counsel stated that appellant agreed to the facts contained in the CINA petition prepared by the Montgomery County Department of Health and Human Services ("MDHHS"), and further agreed that those facts were sufficient to sustain a finding that Blessen should be declared a CINA.

The court accepted this representation and, based on the facts presented, adjudged Blessen a CINA. Then, accepting the parties' recommended disposition, the court ordered that Blessen remain in the care of MDHHS, and that, following the appropriate investigation, she be placed in the home of her paternal grandmother, with visitation by her father, Sheldon A., and appellant.

Appellant appealed this decision, arguing that a court may not declare a child a CINA, on the parties' agreed upon facts, without an on-the-record knowing and intelligent waiver by the parent of the right to a contested adjudicatory hearing.

Held: Affirmed. A parent is entitled to a contested hearing on a petition to have a child adjudicated a CINA. Md. Code (1973, 2002 Repl. Vol.), § 3-817(a) of the Courts and Judicial Proceedings Article. Because a parent faces the possible loss of temporary custody of the child upon such adjudication, due process requires a waiver of the right to a contested hearing. Due process does not require, however, that the waiver be "knowing and intelligent," as that phrase is understood in the law. *See Johnson v. Zerbst*, 304 U.S. 458 (1938); *Hersch v. State*, 317 Md. 200, 205-06 (1989). Rather, due process is satisfied by the court's ascertaining, from the totality of the circumstances, that the parent desires to

forego a contested hearing.

When, as in this case, the parent is present and represented by counsel, it is presumed that counsel has informed the parent of his or her right to a contested adjudicatory hearing. In the absence of evidence that rebuts this presumption, the court may rely on counsel's representation that the client wants to proceed on an agreed statement of facts. Nothing in this case rebutted that presumption. Therefore, the court did not err when it accepted appellant's waiver of the right to a contested adjudicatory hearing.

In re Blessen H., No. 1641, September Term, 2003, filed June 30, 2005. Opinion by Barbera, J.

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TORTS - LOCAL GOVERNMENT TORT CLAIMS ACT - NOTICE REQUIREMENT - C.J. § 5-304 - SUBSTANTIAL COMPLIANCE - GOOD CAUSE

Facts: Thomas C. White, appellant, was arrested by Prince George's County Police officers in April 2001, and was charged with first degree burglary. The arrest led appellant to file suit in the Circuit Court for Prince George's County on March 18, 2004, against Prince George's County (the "County") and four of its police officers, appellees, which was later amended, alleging police brutality during the arrest.

The defendants moved to dismiss the suit, asserting that the Amended Complaint failed to allege compliance with the statutory notice requirement in Md. Code (1974, 2002 Repl. Vol.), § 5-304 of the Courts and Judicial Proceedings Article ("C.J."). Appellant responded by filing a "Motion to Entertain Suit," in which he claimed substantial compliance with the notice requirement and good cause for failing to follow "the strict requirements of C.J. § 5-304(a)" of the Local Government Tort Claims Act ("LGTCA"). Specifically, appellant asserted in a later affidavit that, in July 2001, he filed a complaint for police brutality with the Prince George's County Police Department (the "Department"). In response to his complaint, on July 18, 2001, the commander of the

Department's Internal Affairs Division ("I.A.D."), wrote a letter to appellant, on letterhead stating: "The Prince George's County Government." Across the bottom of the letter, it stated: "HEADQUARTERS: 7600 Barlowe Road, Palmer Park, MD 20785," which is the primary address for the Department. In the letter, the commander informed appellant that his complaint could not be investigated unless it was "duly sworn to" by him, as the aggrieved person.

Thereafter, on July 24, 2001, an I.A.D. investigator met with appellant and took a recorded statement about the events pertaining to the arrest.

On July 31, 2001, appellant completed and signed a notarized form pertaining to the events of his arrest, titled "Prince George's County Police Department Complaint Against Police Practices." In the space provided to describe the incident, appellant wrote: "I've Already Provided a Statement!" Two pre-printed addresses were printed at the top of the form; one was for the Headquarters located in Palmer Park and the other was for the I.A.D, unit in Clinton. On August 1, 2001, the I.A.D. investigator returned to photograph appellant.

Appellant also averred that the I.A.D. investigator told him "to take no action while the investigation was taking place." According to appellant, he "took no action as instructed and awaited action to be taken by the police."

In a "Memorandum Opinion of the Court" dated July 7, 2004, the court granted the Motion to Dismiss, without a hearing. Viewing the evidence in the light most favorable to appellant, the court found that appellant "offered no direct evidence of specific dates, times, or communications to support his allegations so that the court could justifiably infer" that any of the appellees "were put on notice within the statutorily prescribed time limits" under the LGTCA. The court also found that appellant did not establish good cause.

Held: Judgment affirmed.

The Court reiterated that the purpose of the notice provision of the LGTCA is to "'provid[e] a mechanism whereby the ... county would be apprised of its possible liability at a time when it could conduct its own investigation, *i.e.*, while the evidence was still fresh and the recollection of the witnesses was undiminished by time[.]'" (Citation omitted). The Court further noted that the notice requirement is a "condition precedent to maintaining an action" against the County and its employees.

The Court was mindful of the circumstances under which a litigant is excused from strict compliance with the notice obligation of C.J. § 5-304, so long as "the purpose of the notice

statute was fulfilled by substantial compliance with the statutory requirements." Nevertheless, the Court was satisfied that "appellant did not substantially comply with the statutory notice requirement by filing a complaint with I.A.D. about police brutality." Indeed, the Court noted that I.A.D. was not an entity with responsibility for investigating tort claims asserted against the County. Moreover, the Department's investigation was conducted under a wholly separate procedure, pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR"), Md. Code (1999 Repl. Vol.), Art. 27, §§ 727-734D.

The Court also addressed appellant's assertion that he showed good cause for any delay in notice, under C.J. 5-304. The Court noted that the issue of good cause for waiver of a condition precedent is within the discretion of the trial court, which the appellate court will not disturb absent an abuse of that discretion. The Court explained that "Maryland courts evaluate good cause based upon whether the claimant acted with the '"'degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.'"' (Citations omitted).

The Court assumed that the I.A.D. investigator told appellant to withhold any action during the pendency of the Department's investigation. Nevertheless, it rejected appellant's claim that he was induced by the I.A.D. investigator's statements. The Court was persuaded by the lack of evidence that appellant claimed he had any communications with I.A.D. after August 1, 2001, or that he ever inquired about the status of the police investigation. Conversely, the Court was not persuaded that the trial court abused its discretion with regard to its good cause ruling. It held: "In our view, appellant's lack of follow up with I.A.D. belies any justification for his delay in giving notice to the County." The Court stated: "Based on [the I.A.D. investigator's] alleged representation to appellant, it may have been reasonable for appellant to delay any action for a period of months, but not years." It was satisfied that appellant's "inaction did not amount to the requisite diligence of any ordinarily prudent person."

Thomas C. White v. Prince George's County, Maryland, et al., No. 1293, September Term, 2004, filed July 6, 2005. Opinion by Hollander, J.

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ZONING - FLAG LOTS - ADMINISTRATIVE LAW - CODE OF MARYLAND REGULATIONS § 21.90.030(B)- ZONING LAW - CITY OF ANNAPOLIS ZONING CODE SECTIONS 21.04.405, 410 AND 415 - FRONT LOT LINE - FLAG LOT - ADMINISTRATIVE INTERPRETATION

Facts: Appellant, John C. Bennett, is the owner of the property located at 5 Silopanna Road in Annapolis, Maryland ("the Bennett Property"). Appellant's property is characterized as a "flag lot," defined by the Board of Appeals as a lot with a narrow width (the flag pole), bordering a street, which widens at the rear (the flag). The "flag" portion of the lot is then behind another lot, the full width of which borders on the same street. The "pole" portion of the lot, because of side yard requirements, cannot be built upon. The portion of the Bennett Property that is able to be built upon (the "flag") is located behind 7 Silopanna Road, ("the Zelinsky Property"), the lot owned by appellee, Kara Zelinsky.

The dispute originated in May 2002, when Bennett applied for a building permit to demolish a one-story structure on the "flag" portion of his property and to build in its place, on the same "footprint," a two story house. Zelinsky opposed the issuance of the permit, because a new house on the same footprint would be uncomfortably close to her house. The issue faced by the Director of Zoning and Planning was determination of the "front lot line" to accommodate the building setback requirements.

In September 2002, the Planning Director of the Department of Planning and Zoning recommended to the Board that the permit be granted. It was his interpretation of the zoning code that the front lot line of the Bennett Property consisted of that portion of the property that actually abuts Silopanna Road at the bottom end of the "pole." On the basis of the Director's recommendation, the permit was approved.

Zelinsky appealed the Director's decision with respect to, *inter alia*, the determination of the front lot line. On September 3, 2002, a hearing was held before the City of Annapolis Board of Appeals ("the Board"), and the Board subsequently issued an opinion reversing the decision of the Director. Bennett sought judicial review in the Circuit Court for Anne Arundel County on November 22, 2002, raising several issues in addition to the determination of the lot lines. Following argument on the record, the circuit court reversed the Board. Zelinsky appealed to this Court, which reversed (on grounds not involving the merits) and remanded. The circuit court, on the same evidence, affirmed the Board and Bennett noted this appeal.

Held: Reversed and remanded with instructions to reverse the decision of the Board of Appeals. Section 21.04.405 of the City of Annapolis Zoning Code provides a clear and unambiguous definition of "front lot line" as the "boundary of a lot which is along an

existing or dedicated public street." The Board has all the powers of the officer from whom an appeal is taken pursuant to the Code of Maryland Regulations § 21.90.030(b), however the Board does not have the power to expand statutory definitions which are clear and unambiguous. The Board's interpretation of the definition of "front lot line" effectively rewrote the definition to create an exception for flag lots. This is impermissible as the term "flag lot" was not defined in the City of Annapolis Zoning Code, and the words of the code defining "front lot line" are clear and unambiguous.

Bennett v. Zelinsky, No. 1246, September Term 2004, filed July 12, 2005 Opinion by Sharer, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated July 8, 2005, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

JOHN HENRY PARTRIDGE
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By an Opinion and Order of the Court of Appeals of Maryland dated July 21, 2005, the following attorney has been disbarred from the further practice of law in this State:

ADA ELIZABETH CHERRY-MAHOI
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