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Facts: In April of 1999, Edwin Lewis purchased two tracts of land in Wicomico County entirely inside the county's Chesapeake Bay Critical Area. The eastern tract is comprised of marshland and "three upland areas," of which the largest upland area, Phillips Island, is 5.30 acres in size and is the subject of this litigation. At the time of purchase, the only man-made improvements located on the property were an old boat pier and storage building on Phillips Island and 12-15 duck blinds in the western tract of marshland. Lewis testified that he wanted to use the property just for recreational hunting.

Lewis began to build a seasonal hunting camp on Phillips Island without gaining approval or permits from the County. The camp was to consist of six buildings. Five of these buildings were not built on a conventional foundation and are supported on wood posts about two to three feet above the ground. For the purposes of this appeal the effect of the fact that Lewis built the structures without permits, was not a necessary issue for resolution.

Phillips Island is shaped relatively like a boot. Because of the island's irregular shape, nearly the entire island, except for "three narrow, irregularly-shaped, and unconnected areas," lie within the Critical Area Buffer, as defined by the Wicomico County Code; 5.06 of the 5.30 acres, or 95.5 percent, of the island is within the protected Buffer. Of the 10,463 square feet not located within the Buffer, 10,073 square feet was required as an area for the location of sewage disposal for the hunting camp. The County staff persuaded the State Health Department to reduce the area needed for sewage disposal. As a result of that reduction, the County staff suggested that Lewis move four of the six buildings from the Buffer to the non-Buffer area. Lewis then applied for a variance for a hunting camp consistent with this change.

At the suggestion of the County, Lewis retained experienced environmental consultants to assess whether his hunting camp would have adverse impacts on the

surrounding habitat and water quality. After conducting experiments and observations, the consultants suggested that Lewis leave all of the camp's buildings in their current location and not to relocate four buildings into the non-Buffer area salvaged from the prior sewage disposal area. Pursuant to these expert opinions, Lewis modified his variance request, thereby requesting the Board to allow him to leave the buildings "where they sit," while moving only one building, the storage shed, partially into the non-Buffer sewage disposal area.

At the Zoning Board hearing reviewing Lewis's variance request, Lewis's experts testified that the environmental impacts of the hunting cabins themselves would be minimal, as their construction was placed to minimize any adverse impact on the forest, the buildings have little, if any, adverse impact on the tree canopy and that the type of soil on the island is of a consistency that would potentially absorb rain run-off from the rooftops of the cabins. The Critical Areas Commission's expert witnesses did not testify as to any empirical evidence to support the argument that the hunting cabins presented an increase in the volume or velocity of run-off on the roofs, thus adversely affecting the environment.

At the conclusion of the testimony, several members of the Board indicated the evidence and standard they used in determining their decisions. Many of the members' comments illustrated that they considered self-created hardship and cumulative impacts arguments in making their decisions.

Held: The Court of Appeals held that the Wicomico County Zoning Board committed several errors of law in its decision denying Lewis's variance request, including not considering all of the County Code's variance criteria and misapplying the unwarranted hardship standard. Accordingly, the Court of Appeals vacated the judgment of the Court of Special Appeals, directed that court to vacate the decision of the Circuit Court with directions to vacate the decision of the Wicomico County Board of Zoning Appeals and to remand the case to the Board to reconsider Lewis's variance request in light of its holding. An unwarranted hardship sufficient to obtain a property owner a variance within a Critical Area Buffer occurs when a property owner is being denied a reasonable use of property within the critical area buffer. Additionally, the Court held that overgeneralized cumulative impact arguments are irrelevant in determining whether an unwarranted hardship exists in regard to a specific variance application case because once a zoning board accepts that the cumulative impact of further development within the critical area reaches a point where it would harm the environment, no variance could be granted in the future as to that watershed.

Edwin Lewis v. Department of Natural Resources. No. 114, September Term, 2002, filed July 31, 2003. Opinion by Cathell, J.

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ATTORNEYS - DISCIPLINE - MISCONDUCT AS TO CLIENT - MISAPPROPRIATION - DISBARMENT ORDERED WHEN ATTORNEY MISUSED CLIENT ESCROW FUNDS AND IMPROPERLY DISTRIBUTED CLIENT FUNDS.

Facts: Scott Smith, a Maryland lawyer, acted as an escrow agent for several clients by receiving various deposits of large sums of money to be held in escrow. The money he received was to be returned to the various depositors if funding for the depositors' various real estate and/or business transactions was not secured. Contrary to the escrow agreements, Smith improperly disbursed the funds out of the escrow account to other individuals for unauthorized purposes. Smith's actions regarding the funds held in the escrow account originated the petition for disciplinary or remedial action filed against him by Bar Counsel.

Smith, at the request of one of his clients, Stateline Capital Corporation (hereafter "Stateline"), a company engaged in funding high-risk loans, opened an escrow account entitled "Scott Smith PC Escrow Account" and agreed to act as escrow agent for Stateline. Stateline's principals and Smith, on behalf of Stateline, signed a Client-Counsel Agreement that called for Smith "to receive funds for and on behalf of" Stateline and to disburse the funds at Stateline's direction. Stateline, in turn, had various clients, including the five complainants in this case, who deposited money into Smith's escrow account. Smith was to be paid $30,000 for his services. The escrow agreements with the various complainants, were in conflict with the Smith-Stateline agreement.

Stateline was purported to be in the business of obtaining large monetary sums of venture capital to fund various real estate and business projects. As a result, individuals or groups interested in real estate development and/or other business interests were told to place a commitment fee in escrow with Smith. The complainants testified that they were told that their commitment fees would be held in escrow by Smith until Stateline secured the money needed for the various projects or, if the loans and funding did not go through, the commitment fees would be returned to the complainants. In essence, the commitment fees were to be held in escrow until the loan was funded and if the loan was not funded, the money was to be returned. The escrow terms were set out in multiple Escrow and Disbursing Agreements between Stateline and the various complainants. Several of those documents contained language to the effect that "funds will be held in escrow until the closing of the loan."

Smith opened an escrow account at Nations Bank of America on January 8, 1999. The account remained open until June 5, 2000, when Smith withdrew the balance of $245.97. During the time that the escrow account was open, Smith received deposits of commitment fees totaling more than $1.9 million. Each commitment fee was held for a short time and then was disbursed to entities, including Stateline principals and Smith, having no connection to the entities depositing the commitment fees.

Stateline failed to fund any loans and some customers have not received refunds of their commitment fees. The hearing court found that the facts established that Smith played an active role in the Stateline scheme involving these commitment fees. The hearing court found that the complainants relied upon Smith's reputation as a lawyer in good standing when agreeing to deposit money into the escrow account. The court found that, although Smith may not have known what Stateline originally expected of him when he agreed to act as Stateline's escrow agent, Smith soon discovered that Stateline's customers were being misled as to the escrow agreements and he made a conscious decision to assist Stateline in deceiving Stateline's customers into thinking that the commitment fees were being held in escrow.

Smith testified that he was an AV-rated Maryland lawyer and that he has practiced law for over thirty years without reprimand or allegations of misconduct. Smith also presented evidence that he repaid some of the commitment fees from his personal funds resulting in his suffering financial loss because of his relationship with Stateline.

Held: Disbarment Ordered. The hearing court found that Smith was in violation of

Maryland Rules of Professional Conduct (MRPC)1.15(a) and (b), 8.1(b), 8.4(a), (b) and (c) and Maryland Rule 16-609, and sections 10-306 and 10-606(b) of the Business Occupations and Professions Article of the Maryland Code. The Court of Appeals, after an independent review of the record, concluded that the hearing court's findings of fact as to the named complainants were supported by clear and convincing evidence and thus not clearly erroneous. The Court of Appeals upheld the hearing court's findings that Smith violated several rules of professional conduct including MRPC 1.15(a) and (b), by failing to keep the clients' funds properly in the escrow account, MRPC 8.1(b) by failing to hand over pertinent financial records to Bar Counsel upon request and committing professional misconduct under MRPC 8.4(a), (b) and (c), by misappropriating funds under Md. Rule 16-609 and by violations of sections 10-303 and 10-606 of the Business Occupations and Professions Article of the Maryland Code. The Court held that Smith's depletion and misappropriation of his clients' funds, which were to be held in escrow and later returned to his clients, warranted disbarment.

Attorney Grievance Commission v. Scott G. Smith. No. 16, September Term, 2002, filed July 30, 2003. Opinion by Cathell, J.

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CIVIL PROCEDURE- DEMAND FOR JURY TRIAL - RES JUDICATA - COLLATERAL ESTOPPEL- LAW OF THE CASE DOCTRINE

Facts: Petitioner, Goldstein & Baron, Chartered (G&B) and respondent, Chesley, were involved in litigation surrounding the sale of a parcel of real estate, the payment of broker commissions resulting from that sale, and indemnification of legal fees surrounding the brokerage litigation. Disputes arose over the payment of legal fees, which resulted in G&B filing suit in the Circuit Court for Prince George's County seeking monetary relief. Respondent answered the complaint and later filed a counterclaim against G&B as well as a third party claim against a principal of G&B. Attached to the counterclaim was a demand for jury trial.

The Circuit Court determined that the counterclaim was barred by limitations and granted summary judgment on that claim to G&B. The Circuit Court then tried the remaining issues non-jury and found that the amounts billed by G&B were fair and reasonable. Chesley appealed both the judgment as well as the summary judgment entered on the counterclaim.

The Court of Special Appeals initially affirmed the part of the judgment awarding fees but reversed the summary judgment on the counterclaim concluding that the issue was a jury question. The Court also denied Chesley's request to reverse the judgment entered for attorneys' fees on the basis that he was denied jury trial on the counterclaim.

On remand, G&B moved for summary judgment on the counterclaim on the grounds of res judicata and "the law of the case" doctrine. The Circuit Court granted that motion and entered judgment for G&B.

On appeal, the Court of Special Appeals held that neither issue nor claim preclusion applied because the counterclaim was filed in the same action as G&B's underlying claim for fees. The Court of Special Appeals then held that Chesley was entitled to a jury trial on all claims in the earlier action including both the counterclaim and attorneys' fees issues. The Court of Special Appeals explained that although the attorneys fees awarded to G&B had previously been affirmed by the court in a prior decision, the law of the case doctrine was flexible and did not preclude the appellate court from reconsidering an issue previously decided, even in the same case.

G&B sought certiorari raising three issues: (1) whether summary judgment on the counterclaim was appropriate because there was no material facts in dispute and G&B was entitled to judgment as a matter of law; (2) whether the second panel of the court of Special Appeals misapplied the "law of the case" doctrine; and (3) whether that panel erred in failing to find the counterclaim was barred by claim preclusion.

Held: Affirmed. The Court of Appeals held that the timely filing of the demand for jury trial with the respondent's counterclaim entitled respondent to a jury trial on all issues in the action in accordance with Maryland Rule 2-325. The Court explained that summary judgment on the counterclaim was improperly granted because the facts in dispute should have been resolved by a jury rather than a judge. Also, the court explained that the claim and issue preclusion issues were inapplicable because they relied on a prior judgment for attorneys' fees which was inappropriately resolved by the court rather than a jury. Finally, the Court explained that the second panel of the Court of Special Appeals did not err nor violate the "law of the case" doctrine by revisiting and correcting its prior inconsistent decision.

Goldstein & Baron Chartered v. Chesley, No. 94, September Term, 2002, filed June 11, 2003. Opinion by Wilner, J.

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COMMERCIAL LAW – BANK CUSTOMER DEPOSIT AGREEMENT - UNIFORM COMMERCIAL CODE – BANK DEPOSITS AND COLLECTIONS

Facts: Nkiambi Jean Lema, an accountant, had two business checking accounts with Bank of America. Upon opening these accounts, Lema signed a signature card, agreeing that the accounts would be governed by the Deposit Agreement. He also acknowledged that he received the Deposit Agreement. The Deposit Agreement provided, among other things, that the bank reserved the right to charge back Lema's account the amount of any deposited item that was initially paid by the payor bank and was later returned due to a claim of alteration.

On November 24, 1999, a former accounting client and friend deposited a check for $63,000 payable to N.J. Lema Co. into one of Lema's accounts at Bank of America. The check was drawn by an Italian bank on its account at the Bank of New York. From December of 1999 to February 11, 2000, Lema withdrew the funds and gave them to his friend and former client

in seven different transactions.

On January 12, 2000, Bank of New York informed Bank of America that the $63,000 check deposited into Lema's account had been altered. Bank of America returned $60,000 to Bank of New York by cashier's check. It then informed Lema that it was charging his account $60,000 as a result. Lema ultimately filed a complaint for monetary damages in the amount of $60,000. After the Circuit Court entered judgment in favor of Lema, Bank of America appealed, and the Court of Special Appeals reversed. That court concluded that the Deposit Agreement between Lema and Bank of America permitted the Bank to charge back Lema's accounts as it had previously done so.

Held: Affirmed. The Court of Appeals concluded that the Deposit Agreement between Lema and Bank of America altered the effects of Maryland's Uniform Commercial Code ("UCC"), Maryland Code, Sections 1-101 through 10-112 of the Commercial Law Article (1975, 2002 Repl. Vol.), entitling Bank of America to debit Lema's accounts for $60,000.

The Court explained that Titles 3 and 4 of the UCC were applicable because the case involved a negotiable instrument as well as the relationship between a bank and its customer. Title 3, according to the Court, governs negotiable instruments, providing in Section 3-401 that no person is liable on an instrument unless the person or the person's agent signs it. Title 4 governs bank deposits and collections, with Section 4-214 giving collecting banks the right to charge back and to obtain a refund from a customer's account as long as the bank has not received final settlement for an item.

The Court also explained that parties may vary the effect of the terms of the UCC by private agreement, including a deposit agreement between a bank and its customer, so long as parties do not disclaim obligations of good faith and ordinary care. The deposit agreement between Lema and Bank of America, the Court concluded, clearly allowed the bank to debit Lema's account the amount of any item deposited that was initially paid by a payor bank and was later returned due to a claim of alteration, and did not require that Lema sign the item in order for the bank to do so.

The Court further concluded that the deposit agreement did not expressly disclaim the bank's duties of good faith and ordinary care. Because parties are presumed to know the law, and because the deposit agreement stated it was subject to applicable law, the Court determined that good faith and ordinary care could be read into the agreement. The Court also noted that, although Section 4-214 of the UCC limits a bank's right to debit a customer's account before settlement for an item becomes final, no such restriction existed in the deposit agreement between Bank of America and Lema. Finally, the Court rejected Lema's assertion that Bank of America's arguments regarding the effects of its deposit agreement were not preserved for review, noting that the bank had raised its arguments in the lower courts on several occasions, including in its complaint to the Circuit Court and in its brief to the Court of Special Appeals.

Nkiambi Jean Lema v. Bank of America, N.A., No. 93, September Term 2002, filed June 17, 2003. Opinion by Battaglia, J.

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CONTRACTS - ASSIGNMENTS AND DELEGATIONS- NON-ASSIGNMENT CLAUSE

Facts: The Maryland Public Service Commission (PSC) appealed a judgment of the Circuit Court for Montgomery County reversing one if its administrative decisions involving a contract dispute between Potomac Electric Power Co. (PEPCO), Panda-Brandywine, L.P. (Panda), and Southern Energy, Inc. (SEI).

In August, 1991, PEPCO and Panda entered into a lengthy and detailed power purchase agreement which involved the purchase of power as well as the authority of PEPCO to review, influence, and supervise the Panda power facility. In 1999, PEPCO, in an effort to restructure their operations, auctioned its power purchase agreement with Panda through an Asset Purchase and Sale Agreement to SEI. The primary issue was whether certain provisions in an Asset Purchase and Sale Agreement (APSA) between PEPCO and SEI caused that agreement to contravene an anti-assignment clause in the power purchase agreement (PPA) that PEPCO had with Panda.

The issue was first presented to the PSC which declared that the APSA between PEPCO and SEI did not violate the anti-assignment provision of the earlier PPA that PEPCO had with Panda, and that Panda's consent to the APSA was not required. After Panda sought judicial review of that decision, the Circuit Court for Montgomery County concluded that the APSA constituted an impermissible assignment of rights and obligations under the terms of the PPA. The Court of Special Appeals agreed, holding that the APSA constituted an assignment or delegation in contravention of the PPA. However, the Court of Special Appeals stated that the PSC had the authority to validate transactions violating anti-assignment provisions on public policy grounds, and ordered the case remanded to determine whether such public policy grounds existed.

Held: The Court of Appeals held that the APSA constituted an assignment of rights and obligations under the PPA in contravention of the non-assignment terms of that agreement and that it was therefore invalid and unenforceable. The Court explained that the extent to which rights may be assigned and duties of performance may be delegated are subject to any valid contractual provisions prohibiting assignment or delegation. In this case, the APSA between PEPCO and SEI affected Panda's contractual expectations significantly enough to constitute an assignment rather than a "back to back" resell agreement. Because the PPA between PEPCO and Panda prohibited such assignments absent consent, the APSA was invalid and unenforceable.

The Court also declared that the public policy question was improperly addressed in that it was never raised or addressed prior to reaching the Court of Special Appeals.

Public Service Comm. of Maryland v. Panda-Brandywine, L.P., No. 92, September Term, 2002, filed June 10, 2003. Opinion by Wilner, J.

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CONTRACTS - INTERPRETATION - RULES OF CONSTRUCTION - ATTEMPTS TO MODIFY A CUSTOMER AGREEMENT BY A PARTY VOLUNTARILY INCLUDING AN UNAMBIGUOUS NOTICE OF CHANGES PROVISION IN A CUSTOMER AGREEMENT IT AUTHORED AND HAS UNILATERAL AUTHORITY TO AMEND, ARE INVALID WHERE THE AUTHORING PARTY DOES NOT COMPLY WITH ITS ORIGINAL NOTICE PROVISION.

Facts: John Mattingly subscribed to DirecTV's satellite service in the course of purchasing the necessary satellite television equipment and, on February 20, 1997, he made an oral agreement to accept DirecTV's satellite television service subject to the terms and conditions of a written customer agreement to be mailed to him thereafter. As a result of Mattingly's acceptance of the customer agreement, DirecTV immediately activated Mattingly's satellite service.

DirecTV then mailed Mattingly an invoice for his purchase of the satellite service and included the aforementioned initial customer agreement with that invoice. This customer agreement, the initial customer agreement, included a notice of changes provisions stating, "If any changes are made, we will send you a written notice describing the change and its effective date. If a change is not acceptable to you, you may cancel your service." The initial customer agreement was silent as to arbitration.

Within a month of Mattingly's subscribing to DirecTV's satellite service, DirecTV mailed the first of several proposed modified customer agreements, the "1997 modified document," to Mattingly. While that document differed significantly from the initial agreement, it was not accompanied by any separate notice of the changes, or by any comparison of the existing agreement and new proposed agreement. While appearing nearly identical to the initial customer agreement, the 1997 modified document differed from its predecessor in that it contained unhighlighted and otherwise undescribed changes, including the addition of a twenty-third provision, entitled "ARBITRATION." The terms of the new document merely contained the arbitration provision while the initial agreement did not; no separate explanation or notice of the addition was given. Upon receipt of this new modified document, Mattingly did not cancel his service with DirecTV and thus continued to receive DirecTV's satellite services.

In an invoice dated July 17, 1999, Mattingly was assessed a late fee by DirecTV for a total of $2.81 for a "Past Due" amount of $56.12. Mattingly paid this late fee and the accompanying outstanding balance. Then, on August 6, 1999, he filed a class action complaint against DirecTV for the purpose of challenging the legality of DirecTV's late fee.

DirecTV sought to remove the case to the U.S. District Court for the District of Maryland, but that court remanded the case because the lawsuit did not satisfy the subject matter jurisdiction requirement that in diversity claims in federal court the amount in controversy must exceed $75,000. The case was then returned to the Circuit Court for St. Mary's County. DirecTV immediately moved for dismissal of Mattingly's complaint, alleging that his specific claims should be dismissed, or, in the alternative, that the circuit court proceedings must be stayed and arbitration compelled. The Circuit Court, after a hearing, found that Mattingly was required to arbitrate his claims against DirecTV pursuant to the 1997 modified document and subsequent customer documents. That court then granted DirecTV's motion to dismiss without prejudice and Mattingly appealed to the Court of Special Appeals. The Court of Special Appeals reversed the trial court's dismissal of Mattingly's complaint against DirecTV and DirecTV appealed to the Court of Appeals.

Held: Affirmed. The Court of Appeals held that under the plain language of a company-authored initial customer agreement between the company and a customer, the company was contractually obligated to provide its customer with "written notice describing" any change made in all subsequent attempts to modify the customer agreement. DirecTV merely provided the customer with a copy of a new modified document and did not include any description or

mention, of which specific provisions were being amended or added. As DirecTV voluntarily included the notice provision in the initial customer agreement and had the unilateral power to amend that customer agreement, DirecTV's subsequent attempts to modify the initial customer agreement were not valid. Thus the changes, including the addition of an arbitration provision, contained within subsequent modified documents, are invalid.

DirecTV, Inc. v. John A. Mattingly, Sr. No. 130, September Term, 2002, filed July 31, 2003. Opinion by Cathell, J.

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CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - FAILURE TO RAISE VIOLATION OF MARYLAND RULE 4-212(F) IN SEEKING TO HAVE PETITIONER'S STATEMENTS SUPPRESSED

Facts: On March 20, 1995, petitioner was arrested as a robbery suspect and taken to the robbery unit of a Prince George's County police station. He was charged at 11:00 p.m. Petitioner was handcuffed to a one-foot cable connected to a wall of the interrogation room while the police prepared the charging documents. These documents were completed by 3:30 a.m. on March 21st, and although a District Court Commissioner was on duty in the same building, petitioner was left alone in the room until approximately 7:15 a.m. He was then taken to the hospital for treatment of a minor wound and returned to the interrogation room at 8:35 a.m. He was questioned and written statements were obtained throughout the day and evening. By 6:00 p.m., questioning had been turned over to detectives from Anne Arundel and Howard Counties, as petitioner was also a suspect in those counties. At 10:30 p.m., 23 hours and 32 minutes after he was brought to the station, petitioner was taken before a District Court Commissioner.

The Prince George's County case was tried first and defense counsel submitted a general omnibus motion, in which he failed to specify what, in particular, he wanted suppressed or why suppression was justified. The motion was denied and was renewed at the end of the State's case and again at the close of all evidence. Defense counsel never argued that there was a violation of Maryland Rule 4-212, or what effect any unnecessary delay had on inducing petitioner's confession. Both renewed motions were denied. Petitioner was found guilty in the Prince George's County case and sentencing was delayed until after his trial in Howard County. Defense counsel in that case sought suppression based on a violation of Rule 4-212. His motion was denied and petitioner was convicted. On appeal, the Court of Special Appeals held that although length of delay is not dispositive, the record as a whole indicated that petitioner's statements were involuntary. *Hiligh v. State*, Nos. 314 and 315, Sept. Term 1996, Slip Opinion at 15-16. The Court of Special Appeals Opinion was filed in January, 1997 and in March, the petitioner moved for a new trial in the Prince George's County case based on the action of the Court of Special Appeals in the Howard County Case. The motion was denied.

After being sentenced, petitioner appealed and raised the issue of delay in presentment. A different panel of the Court of Special Appeals rejected his claim that his statements in the Prince George's County case were involuntary. *Hiligh v. State*, No. 1227, Sept. Term 1997, Slip Opinion at 15-16. In April, 1999, petitioner filed a petition for post conviction relief in the

Circuit Court for Prince George's County, arguing that he was denied the effective assistance of counsel because defense counsel failed to raise a Rule 4-212 violation. In July, 2000, petitioner was granted a new trial. The State was granted leave to appeal and in June, 2002, the Court of Special Appeals, in a split decision, reversed. *State v. Hiligh*, No. 1378, Sept. Term 2000 Slip Opinion at 26.

Held: Reversed. There was violation of Rule 4-212 and under *Strickland v. United States*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), counsel's deficient performance prejudiced petitioner. Had counsel raised and argued the delay in presentment in his argument for suppression of petitioner's statements, there is a substantial possibility that the suppression judge or the jury would have concluded that the statements were involuntary.

Hiligh v. State, Case No. 77, September Term 2002, filed on June 13, 2003. Opinion by Wilner, J.

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CRIMINAL LAW – SEARCH & SEIZURE - DRIVER'S CONSENT TO SEARCH A VEHICLE FOLLOWING A ROUTINE TRAFFIC STOP

Facts: On March 26, 2000, at around 7:30 p.m., while on "stationary uniform patrol," Deputy Mark Meil stopped a car driven by Green for speeding. Deputy Meil approached Green, advised him that he had been stopped for speeding, requested to see his license and registration, and asked him "if he had any points on his license." After Green responded that he did have points and handed over the documents, Deputy Meil returned to the police car, where he ran a check of Green's license and a "criminal check for any caution codes for officers' safety." He learned that Green's license was valid. As he was walking back to Green's car, police "communications" radioed to Deputy Meil that Green had "prior caution codes for armed and dangerous and . . . drugs."

When he arrived at Green's car, Deputy Meil issued the warning citation, returned the driver's license and registration, and stated to Green that he was "free to go." Deputy Meil then asked Green if he would mind answering a few questions before leaving. Green replied, "Sure." Based on this positive response, Deputy Meil asked Green "if he had any guns, drugs or alcohol in the vehicle." Green answered, "No." He then asked Green "if he would consent to a search of his person and vehicle." Green responded, "Sure. Go ahead."

Deputy Meil requested that Green step out of the car, because he was not sure "whether there might be a hand gun in the vehicle." Concerned that, by himself, he would not be able to search the car and watch Green at the same time, Deputy Meil called for another officer to assist him. He was concerned especially because of the "area," "it was extremely dark out," and Green was physically much larger than he with a "history of violence with hand guns." Green stepped out of the car. Deputy Meil then frisked him for weapons, found none, and then scanned the open areas of the car that were "in plain view" and saw no weapons or drugs. Green and the deputy walked to the front of Green's car and engaged in a "casual

conversation," during which Deputy Meil explained to Green the reasons he had called for another officer.

Corporal Tim Riggleman responded to Deputy Meil's call for backup and arrived at the scene of the traffic stop approximately 15-20 minutes after being called. Corporal Riggleman watched Green while Deputy Meil searched the interior of Green's car. During Deputy Meil's search, he discovered marijuana. Deputy Meil then walked back to Green and Corporal Riggleman and arrested Green. Corporal Riggleman placed Green in the back seat of Deputy Meil's vehicle. Meanwhile, Deputy Meil returned to Green's car, and found approximately 110 zipper bags and suspected cocaine.

Green was charged with possession of cocaine and marijuana with intent to distribute, and possession of cocaine and marijuana. Green filed a motion to suppress evidence of the cocaine and marijuana, claiming in part that it was obtained in violation of the Fourth Amendment's guarantee against unreasonable searches and seizures. The Circuit Court denied the motion, because it concluded that Green had consented to the search of the car and never withdrew that consent. Green proceeded to trial and was found guilty of possession of cocaine and possession of marijuana with intent to distribute.

The Court of Special Appeals reversed the convictions in *Green v. State*, 145 Md. App. 360, 802 A.2d 1130 (2002). The court held that the search of Green's car did not emanate from a consensual encounter but, rather, from an unlawful seizure. *Id*. at 398, 802 A.2d at 1152. The court held that, "[o]nce the back-up unit was called, a reasonable person in Green's situation would not have believed he could terminate the encounter," and "there was no evidence that Green consented to wait some fifteen or twenty minutes for the arrival of the back-up unit." *Id*. at 392-93, 802 A.2d at 1149. Therefore, the court concluded, the search that uncovered the illegal drugs "occurred well beyond the period of any consent that [Green] may have given." *Id*. at 398, 802 A.2d at 1152.

The Court of Appeals granted the State's petition for a writ of certiorari to determine (1) whether Green voluntarily consented to the search of his car and, if so, (2) whether that consent remained valid during the search that uncovered the illegal drugs.

Held: Reversed. Guided by the factors set forth in *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (1999), the Court held that under the totality of the circumstances, Green voluntarily consented to prolonging the police encounter beyond the lawful traffic stop so that the officer could search the vehicle. The Court cited various reasons for reaching this conclusion: the encounter took place early in the evening; only one officer was on the scene when Green consented to the search; the officers did not demonstrate threatening behavior; and, the officer had returned Green's license registration and told him he was free to leave before asking to prolong the encounter and search the car.

Green's consent also remained valid during Deputy Meil's search of the car that uncovered illegal drugs, despite the passage of 15-20 minutes between Green's expression of consent and the search. This delay was reasonable because its purpose was to wait for backup when officers were in short supply. Consequently, the search did not violate the Fourth Amendment.

State of Maryland v. Richard Brandon Green, No. 80, September Term, 2002, filed June 17, 2003. Opinion by Battaglia, J.

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CRIMINAL LAW - SENTENCING – CORRECTION OF ILLEGAL SENTENCE – STATE'S RIGHT OF APPEAL

Facts: Muhsin R. Mateen was convicted in the Criminal Court of Baltimore of first degree murder. His sentence, commencing on September 9, 1972, was "to the jurisdiction of the Commissioner of Correction"and was to continue for the "balance of his natural life." Mateen thereafter filed a petition for post-conviction relief, claiming that the judge had "failed to consider a suspension of the sentence as a possible alternative to incarceration." The post-conviction judge agreed, remanding the case to the trial court for resentencing.

The parties ultimately disputed the terms of Mateen's new sentence. To complicate matters, transcripts of the resentencing were not available. A docket entry, a Criminal Court of Baltimore Commitment Record, and a Division of Correction Sentence and Detainer Status Change Report indicated, however, that Mateen's sentence was fifty years from September 9, 1972.

Seven months after resentencing, the Chairman of the Maryland Parole Commission wrote to the sentencing judge, asking him to clarify the sentence and noting that "the Annotated Code of Maryland mandates if a person is found guilty of First Degree Murder the sentence must be life imprisonment." The judge responded that it "was [his] intention to sentence [Mateen] to life and suspend all but fifty years." The Division of Correction then issued a second Sentence and Detainer Status Change Report stating that Mateen's "total sentence now reads: Life suspend 50 yrs."

Mateen thereafter sought clarification from the sentencing judge of his sentence. Three days later, the Circuit Court issued a Commitment Record stating, "Sentence changed to read: Balance of Natural Life and all but Fifty (50) years suspended." Two days after that, the sentencing judge wrote Mateen, stating that "[t]he sentence I gave you at your resentencing on March 19, 1982 was life with all but fifty years suspended."

Between 1986 and 1995, Mateen sought and was denied parole on several occasions, prompting him to file a Petition for Writ of Habeas Corpus in the Circuit Court for Baltimore City seeking, "Declaratory Judgement for Suspended Life sentence, Release on Parole and/or to Participate in Pre-Release, Work Release, and Family Leave Programs." The Circuit Court denied Mateen's Petition; he appealed. The Court of Special Appeals affirmed, concluding that Mateen was resentenced to an illegal term of 50 years imprisonment, but that the illegal sentence was corrected to a term of life with all but 50 years suspended.

Held: Reversed and remanded for further proceedings consistent with this opinion. The Court of Appeals agreed with the Court of Special Appeals that Mateen was resentenced to a flat 50 year sentence. The Court of Appeals disagreed with that court, however, that Mateen's illegal 50 year sentence had been corrected. Rather, the Court declared that the written correspondence between the sentencing judge and the Chairman of the Maryland Parole Commission, copies of which had not, apparently, been provided to Mateen, were insufficient to correct an illegal sentence. According to the Court, Maryland Rule 774 (the rule in effect at the time of Mateen's resentencing), required that "[a] modification or reduction or striking of sentence shall be made on the record in open court after notice to the defendant and the State's Attorney." The Court determined that these requirements were not met.

The Court of Appeals also found that the State had no right to challenge the legality of Mateen's sentence on appeal. The only statute, the Court explained, providing the State with the right to appeal was Maryland Code, Section 12-302(c)(2) of the Courts and Judicial Proceedings Article (1973, 2002 Repl. Vol.). That Statute stated that the State had a right to appeal from a final judgment "if the State alleges that the trial judge failed to impose the sentence specifically mandated by the Code." Because a life sentence for first degree murder was not "specifically mandated" by the Code, the statute did not apply and thus the State had no right to appeal. According to the Court, when a judge has the discretion to suspend a sentence, or similarly, to grant probation before judgment, the Code does not specifically mandate a sentence.

Finally, the Court concluded that the State could not evade the limitations of Section 12-301(c)(2) by making arguments under Maryland Rule 4-345(a) in the nature of a motion to correct an illegal sentence. Because it could not do indirectly what the State could not ask for directly, the Court determined that it would not correct the sentence on its own initiative.

Muhsin R. Mateen v. Mary Ann Saar, et al., No. 121, September Term 2002, filed August 4, 2003. Opinion by Battaglia, J.

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HEALTH - HMO REGULATION - REGULATION OF HEALTH MAINTENANCE ORGANIZATIONS AND ADMINISTRATIVE SERVICE PROVIDERS - CAPITATION AGREEMENTS - OBLIGATIONS TO NON-CONTRACTUAL HEALTH CARE PROVIDERS.

Facts: United Health Care of the Mid-Atlantic, Inc., a health maintenance organization, entered into two capitation agreements with administrative service providers (ASPs). An ASP essentially acts as an intermediary between the HMO and the doctors and hospitals that actually provide medical services to the HMO's members. Under the ASP agreements, the administrative service providers were obligated to provide or arrange for the provision of health care services for United's HMO members. In return, United agreed to make monthly capitation payments to the ASPs. The ASPs then entered into contracts with health care providers, including Dimensions Health Corporation and Mercy Medical Center, Inc., under which the health care providers were to be paid by the ASPs for actually providing medical services to United's HMO members. When the ASPs became unable to pay for claims for medical services provided by the health care providers, Dimensions and Mercy looked to United for payment. The Insurance Commissioner ordered United to pay "all claims for health care services covered under subscriber contracts and rendered by providers, except claims of providers who are employees, shareholders, or partners of the administrative service provider contractors." The Commissioner later found that, because Dimensions and Mercy were affiliated with the ASPs with which they had contracted, they were not "external providers" as defined by the Maryland Code, and that United was accordingly not liable for the medical services provided by Dimensions and Mercy to United's HMO members. On appeal, the Circuit Court affirmed.

Held: Affirmed. Maryland Code, Health-General Article § 19-712 and 19-713.2 provide

that, if an ASP defaults on its obligations to a health care providers, the HMO is ultimately responsible for those payments. That liability, however, is limited to services rendered by "external providers." The term "external providers," as defined by the Maryland Code, excludes providers who are employees, shareholders, or partners of the ASPs. Because Dimensions and Mercy were both affiliated, in various ways, with the ASPs, they were not entitled to payment from the HMO.

Dimensions Health Corporation, et al. v. Maryland Insurance Administration, et al., No. 86, September Term, 2002, filed April 7, 2003. Opinion by Wilner, J.

* * *

STATUTE OF LIMITATIONS - WHEN CAUSE OF ACTION ACCRUES FOR LIMITATIONS PURPOSES - DISCOVERY RULE - INQUIRY NOTICE.

Facts: Martha Pappano and her husband applied for a home equity loan with the Chevy Chase Bank. In connection with that loan, Ms. Pappano also requested joint credit life insurance. After her husband died, Ms. Pappano learned that only an individual credit life insurance had been issued, on her life alone, and that she was not entitled to insurance benefits resulting from the death of her husband. Ms. Pappano filed suit against Chevy Chase Bank, alleging that the bank had negligently failed to procure joint credit life insurance for Mr. and Ms. Pappano. Ms. Pappano later amended her complaint to include as defendants various insurance companies whom Ms. Pappano believed were responsible for the failure to obtain insurance. The Circuit Court held that Ms. Pappano was on inquiry notice of her cause of action on the day of her husband's death, that she had filed her lawsuit more than three years after that time, and that her suit was thus time-barred. The Court of Special Appeals reversed, holding that Ms. Pappano's cause of action accrued when she in fact knew or reasonably should have known of the wrong suffered. Because that notice could have occurred after Mr. Pappano's death, when Ms. Pappano inquired with the bank as to her life insurance, the Circuit Court improperly granted summary judgment against Ms. Pappano. The court found that the reasonableness of Ms. Pappano's conduct in not making immediate inquiry was an issue of fact.

Held: Affirmed in part, reversed in part. The Court of Appeals found that the intermediate court correctly described the law regarding the statute of limitations. A cause of action accrues for limitations purposes when that person in fact knew or reasonably should have known of the wrong. Ms. Pappano did not actually discover the wrong until she inquired with the bank as to the existence of life insurance on her husband's life. Whether she should have known of the wrong at an earlier time - on the date of her husband's death - was a triable issue of fact, and thus the intermediate court correctly reversed the summary judgment as to the bank. However, because the insurance company defendants were made parties to the suit more than three years after the day Ms. Pappano inquired with the bank, the Circuit Court correctly dismissed the suit as to those defendants. Even though Ms. Pappano was not aware of the involvement of these companies until a later date, the statute of limitations does not wait for her investigations to bear fruit. The statute of limitations allows for ample time to discover the identities of all responsible defendants.

American General Assurance Company v. Pappano, No. 97, September Term, 2002, filed May 6, 2003. Opinion by Wilner, J.

* * *

TORTS – LANDLORD DUTY TO PREVENT CRIMINAL ACTIVITY WITHIN A LEASED PREMISES

Facts: Suzette Hemmings, with her husband, Howard Hemmings, entered into an agreement with Pelham Wood Limited Liability Limited Partnership and RLA Management, L.L.P. (the "Landlord") to lease an apartment at Pelham Wood, an apartment complex in Baltimore County. Their two-bedroom apartment unit was located on the second floor, and a sliding glass door in the Hemmings' apartment allowed access to a rear patio balcony overlooking a wooded area.

At approximately 1:17 a.m. on June 13, 1998, an unidentified intruder entered the Hemmings' apartment through the sliding glass door and shot him. Howard Hemmings died from gunshot wounds later that morning. After the attack, the Baltimore County Police Department initiated an investigation. The police incident report of the investigation noted that the intruder, who was not known to Mr. Hemmings, entered the apartment by forcing open the sliding glass door from the patio.

In an attempt to deter criminal activity at Pelham Wood, the Landlord had implemented several security devices, such as "exterior lighting around the property." Nevertheless, several tenants of the apartment building where the Hemmings lived recalled the lighting around the back of the building as "dark." The Pelham Wood property manager at the time of the shooting stated that she was not sure whether the exterior lighting behind the apartment was working "at the time Mr. Hemmings was shot." The Landlord's corporate designee also declared that he could not tell "one way or the other" whether the exterior lights of the apartment building were functioning on June 13, 1998. He was certain, however, that no lights were in place on the balcony of the apartment building on that date.

The Police Department had filed crime reports for twenty nine burglaries or attempted burglaries and two armed robberies that had occurred at Pelham Wood over the two-year period preceding the incident involving Mr. Hemmings. A call report list, which the Police Department maintains to track telephone calls requesting police service, listed several violent crimes that had occurred at Pelham Wood. In addition, the Landlord maintained files with tenant complaints about criminal activity in and around the apartment complex, which included armed robbery, robbery, threats at gunpoint, theft within apartment units, vandalism, apartment break-ins, burglaries and attempted burglaries, theft from a balcony, theft in common areas, and drug use in common areas..

Other than the tenant complaints, the Landlord did not keep records of criminal activity at Pelham Wood. Nonetheless, the Police Department, on two occasions, had requested the Landlord's assistance in conducting surveillance for suspected criminal activity and that, on "three or four [occasions] in 17 years," police officers had stopped by the rental office to report incidents of crime that had occurred on the premises. Additionally, about four or five times per

year, tenants had complained to the rental office about break-ins at Pelham Wood.

Ms. Hemmings filed wrongful death and survival claims against the Landlord in the Circuit Court for Baltimore County. Among Ms. Hemmings' allegations, she stated that the Landlord "failed to exercise reasonable care in taking sufficient precautions to prevent harm from occurring to [the Hemmings]" and "negligently allow[ed] dangerous conditions to remain unaddressed at the Hemmings' apartment." The Circuit Court decided that summary judgment in favor of the Landlord should be granted because the Landlord acted within the standard of care by providing working locks on the apartment doors.

Ms. Hemmings appealed to Court of Special Appeals, which affirmed the summary judgment, holding that "[f]rom the facts presented, a fact finder would be constrained to conclude that there could be no showing that [the Landlord's] failure to maintain the common areas was the proximate cause of the fatal event." *Hemmings v. Pelham Wood*, 144 Md. App. 311, 323-24, 797 A.2d 851, 859 (2002). Although the intermediate appellate court recognized that the Landlord had a duty to provide reasonable security against criminal acts in the common areas of the apartment complex, it refused to apply this duty to require protection from criminal acts that occur within the leased premises. *Id*. at 319 & n.6, 797 A.2d at 856 & n.6.

Ms. Hemmings' petition for a writ of certiorari was granted to decide whether a landlord has a duty to repair a known dangerous or defective condition under its control to prevent a foreseeable third party attack upon a tenant within the leased premises, and whether was there sufficient evidence of such condition to make summary judgment inappropriate.

Held: Reversed. The Circuit Court insufficiently contemplated the relevant considerations for whether the Landlord owed a duty and, thereafter, breached that duty. A landlord has a legal duty to take reasonable security measures within the common areas when: (1) the landlord had knowledge or should have had knowledge of criminal activity having taken place on the premises, and (2) a landlord of ordinary intelligence, based on the nature of the past criminal activity, should have foreseen the harm suffered. This duty applies whether the injury occurred in the common areas or within the leased premises. Additionally, once the landlord takes measures to eliminate conditions that might contribute to criminal activity on the premises, it has a continuing obligation to properly carry out those security measures by maintaining and regularly inspecting the devices implemented to deter criminal activity.

Suzette Hemmings v. Pelham Wood Limited Liability Partnership, et al., No. 56, September Term, 2002, filed June 16, 2003. Opinion by Battaglia, J.

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COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - APPEALS FROM DECISIONS OF ADMINISTRATIVE AGENCIES - MOOTNESS – PUBLIC SERVICE COMMISSION - APPEAL FROM DECISION OF PUBLIC SERVICE COMMISSION REGARDING BGE CUSTOMER'S FAILURE TO PAY DISPUTED PORTION OF BILL NOT RENDERED MOOT BY CUSTOMER'S FAILURE TO PAY UNDISPUTED PORTION OF BILL – CODE OF MARYLAND REGULATIONS SETS FORTH MANDATORY GUIDELINES FOR PUBLIC SERVICE COMMISSION'S INVESTIGATION AND REVIEW OF BILLING DISPUTES WHERE DISPUTE COULD RESULT IN TERMINATION OF SERVICES, AND COMMISSION'S FAILURE TO FOLLOW MANDATORY REGULATIONS NECESSITATES THAT COMMISSION'S DECISION BE VACATED AND

REMANDED.

Facts: The appellant, Calvin B. Spicer, was a former customer of Baltimore Gas and Electric Company ("BGE"), and proceeded *pro se* on appeal. Spicer suffers from a permanent disability – presumably schizophrenia. He was assisted in his appeal by another person, James Reid, who was not a party to the case and whose relationship to appellant was not clear from the record. The appellees were BGE and the Maryland Public Service Commission ("the Commission").

In March of 2001, Spicer applied to have BGE's services to a home at 5517 Haddon Avenue in Baltimore transferred to his name. In effectuating the transfer, BGE purportedly ascertained that Spicer had been living in the house since October of 2000, and that payment for BGE's services had not been made from October of 2000 through February of 2001. Although the services for that period of time were in the name of another person, BGE billed Spicer for them.

Spicer contacted BGE and complained that the bill was in error, but a BGE employee refused to change it. Spicer then filed an "Inquiry/Dispute Form" with the Commission. A Commission employee reviewed BGE's records and determined that the bill was proper. Spicer requested further review, and another employee determined that the initial decision by the Commission was correct. Finally, Spicer filed a formal complaint with the Commisison. Again, the Commission responded that, based on the information it had received from BGE, it believed the bill was correct.

Spicer petitioned for judicial review by the Circuit Court for Baltimore City, and a hearing was held. Spicer attempted to offer evidence that he did not live at 5517 Haddon Avenue until March of 2001, and that another person admitted responsibility for the bills prior to that time. At the hearing, the Commission argued that the controversy was moot in that Spicer had failed to pay his BGE bills accrued *after* March of 2001. The Commission asserted that BGE had therefore terminated the services to 5517 Haddon Avenue, and that the termination was proper regardless of who was responsible for the bills accrued prior to March of 2001.

The trial court ultimately affirmed the Commission's decision. The Court did not comment on the mootness argument, but determined that there was substantial evidence to support the Commission's decision that the bill was proper.

On appeal to the Court of Special Appeals, Spicer argued that the trial court erred in that, *inter alia*, the Commission's decision was "made upon unlawful procedure" and was "unsupported by substantial evidence." The Commission again asserted that the controversy was moot.

Held: Judgment reversed and case remanded to the Circuit Court for Baltimore City with instructions to vacate the decision of the Public Service Commission and remand the case to the Commission for further proceedings.

The Court of Special Appeals rejected the Commission's argument that the controversy was moot. It pointed out that even if Spicer were to pay the undisputed amount that accrued after March of 2001, his services would not be restored because of the outstanding disputed amount.

As to the procedures followed by the Commission in determining that the disputed bill was correct, the Court pointed out that the Code of Maryland Regulations sets forth mandatory guidelines for resolving disputes that could result in the termination of a customer's services. Among other things, the Commission must give both the utility and the customer the opportunity to respond to information supplied by the opposing party. It must also attempt to mediate between the parties. In this case, the Commission did neither.

The Court of Special Appeals also suggested that, in responding to Spicer's initial complaint regarding the bill, BGE may have failed to follow mandatory guidelines set forth in the Code of Maryland Regulations.

The Court thus reversed the decision of the trial court and remanded the case to that court. It instructed the trial court to vacate the decision of the Commission and to remand the case to the Commission "to make a full investigation of the facts, following the regulations set forth in COMAR 20.32.01.04F and G."

Calvin B. Spicer, et al. v. Baltimore Gas and Electric Company, et al., No. 1578, September Term, 2002, filed July 2, 2003. Opinion by Smith, J. (retired, specially assigned).

* * *

APPEALS - MOOTNESS - ATTORNEYS FEES – WHERE HOMEOWNERS' ASSOCIATION OBTAINED COURT ORDER ENJOINING HOMEOWNER FROM ENGAGING IN CERTAIN CONDUCT AND AWARDING ATTORNEYS FEES TO ASSOCIATION, BUT HOMEOWNER SUBSEQUENTLY MOVED FROM COMMUNITY GOVERNED BY ASSOCIATION, HOMEOWNER'S APPEAL FROM ORDER WAS MOOT AS TO INJUNCTION BUT NOT AS TO ATTORNEYS FEES – ATTORNEYS FEES MAY NOT PROPERLY BE AWARDED ABSENT AUTHORIZING STATUTE OR AGREEMENT OF PARTIES, AND AWARD WAS INVALID WHERE MADE PURSUANT TO IMPROPERLY ADOPTED AMENDMENT TO DECLARATION OF COVENANTS OF HOMEOWNERS' ASSOCIATION.

Facts: The appellants, Brian and Elizabeth Campbell, were former residents of the Lake Hallowell community in Olney, Maryland. The appellee was the Lake Hallowell Homeowners'Association.

A dispute arose between the parties as to where the Campbells could properly park their third car. The Association informed the Campbells that they were violating the Association's "Declaration of Covenants, Conditions, and Restrictions" by parking the car in a space designated for visitors, and that they should park it on their "own property." In response, the Campbells parked the car on their front lawn. The Campbells indicated a willingness to move the car if the Association were to offer a suitable alternative. The Association failed to do so, so the car remained on the Campbells' lawn.

The Association filed suit in the Circuit Court for Montgomery County, seeking an order enjoining the Campbells from parking the car on their lawn and an award of attorneys fees. The Association also asked that the Campbells be enjoined from keeping a portable basketball net in the front portion of their property. The court granted the injunction and awarded the Association $12,500 in attorneys fees.

The Campbells noted an appeal to the Court of Special Appeals. Thereafter, they moved out of the Lake Hallowell community. In their appeal, the Campbells argued, *inter alia*, that the award of attorneys fees was improper because it was made pursuant to an improperly adopted amendment to the Association's Declaration. The Campbells made additional arguments

regarding the injunction. The Association responded that the arguments as to the injunction were moot in light of the Campbells' move.

Held: Judgment of the Circuit Court for Montgomery County vacated as to the award of attorneys fees; remaining issues on appeal dismissed as moot.

The Court of Special Appeals agreed with the Association that the Campbells' move rendered moot their arguments regarding the injunction. It explained that, although an appellate court may address the merits of a moot case if the case presents unresolved issues in matters of important public concern that, if resolved, will establish a rule for future conduct, this case was not such a case.

As to the award of attorneys fees, the Court of Special appeals pointed out that in Maryland attorneys fees may not be awarded absent an authorizing statute or agreement of the parties. Here, there was no authorizing statute. The Association posited that a corporate resolution purporting to authorize awards of attorneys fees reflected an agreement of the parties. The Court disagreed.

The Court of Special Appeals reasoned that the Declaration of Covenants, Conditions, and Restrictions authorized the Association to enforce the restrictions and covenants set forth therein. The Declaration contained no provision regarding attorneys fees, however. By its own terms, the Declaration could be amended by an instrument signed by 90-percent of the lot owners and filed in the land records office of the county. The Court determined that any provision regarding attorneys fees would have a direct bearing upon the provision authorizing the Association to enforce the restrictions and covenants. Thus, any provision regarding attorneys fees would be an amendment to the Declaration.

The corporate resolution that purported to authorize attorneys fees was not signed by 90-percent of the lot owners. Rather, it was approved and signed by the five members of the Association's Board of Directors. The resolution was filed in the county's Homeowners Association Depository, but not in the land records office. Therefore, the resolution was not a proper amendment and could not authorize an award of attorneys fees to the Association.

Brian Campbell, et ux. v. Lake Hallowell Homeowners Assoc., No. 1197, September Term, 2002, filed June 30, 2003. Opinion by Smith, J. (retired, specially assigned).

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CRIMINAL LAW - CONFESSIONS - LOWER COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS BASED ON CLAIM THAT OFFICER HAD OFFERED IMPROPER INDUCEMENT TO EXTRACT CONFESSION; SUFFICIENCY OF THE EVIDENCE PRESENTED BY WAY OF AGREED STATEMENT OF FACTS TO SUSTAIN CONVICTION OF ATTEMPTED MURDER IN THE SECOND DEGREE; CONVICTION COULD NOT BE SUSTAINED UNDER DOCTRINE OF DEPRAVED HEART SECOND DEGREE MURDER BECAUSE OF LACK OF REQUISITE INTENT NOR COULD IT BE SUSTAINED UNDER DOCTRINE OF TRANSFERRED INTENT; APPELLANT'S CONVICTION WAS PROPERLY SUSTAINED UNDER THEORY OF CONCURRENT INTENT WHERE HE AND HIS

ACCOMPLICE CREATED "KILL ZONE," SHOOTING UNINTENDED VICTIM, ASSEMBLED ON STREET WITH FRIENDS, IN THE NECK.

Facts: On July 27, 2001, appellant and an unidentified individual fired numerous shots into a group of people standing on a basketball court. Although their intended victim was unscathed, an unintended victim was struck in the neck by one of the bullets.

Appellant was advised of his rights and gave a taped statement to the police admitting that he and another individual were firing onto a basketball court at an intended party known as Valentine but later learned that someone else was injured instead.

Held: The detective's statements do not constitute an improper inducement under *Boyer v. State*, 102 Md. App. 648 (1995). The doctrine of transferred intent does not apply to the facts of the instant case. Further, attempted depraved heart murder is inappropriate because an attempt to commit a crime requires a specific intent and the *mens rea* required for depraved heart murder only requires a wanton disregard for human life. Nevertheless, a fact finder could reasonably infer that appellant and his accomplice put all those who were gathered at the scene of the crime at risk of being fatally injured. The evidence was more than sufficient to show directly and inferentially that they created a "kill zone" to accomplish the death of their intended victim. Therefore, the conviction of attempted second degree murder will stand on the theory of concurrent intent.

Gerard Harrison v. State of Maryland, No. 1037, September Term, 2002, decided June 27, 2003. Opinion by Davis, J.

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CRIMINAL LAW - HOMICIDE - FIRST-DEGREE MURDER - THE EVIDENCE WAS LEGALLY SUFFICIENT TO CONVICT APPELLANT OF FIRST DEGREE MURDER FOR THE DEATH OF A SIX-MONTH-OLD CHILD BASED ON THE TOTALITY OF THE EVIDENCE, INCLUDING EVIDENCE AS TO THE NUMBER, SEVERITY, AND BRUTALITY OF THE BLOWS, THE CIRCUMSTANCES LEADING UP TO THE BEATINGS, AND APPELLANT'S VERSION OF THE EVENTS.

Facts: At the time of his death, Ta'mar Hamilton was six months old. Appellant, Walter Pinkney, was the boyfriend of Ta'mar's paternal grandmother, Renita Williams. Appellant and Ms. Williams cared for Ta'mar and his brother, Davon, many times during his short life. They were caring for both boys during the Thanksgiving weekend of 1999.

On the evening of November 27, 1999, officers of the Baltimore City Police Department went to The Johns Hopkins Hospital in response to a call of suspected child abuse of six- month-old Ta'mar Hamilton. David Peckoo, one of the investigating officers, interviewed Ms. Williams and appellant, who, he had been told, were responsible for the care and custody of Ta'mar, before Ta'mar was rushed to the hospital earlier that day.

Ta'mar died from his injuries on December 1, 1999. On December 3, 1999, after an autopsy had been performed on Ta'mar, police investigators again interviewed Ms. Williams and

appellant. The autopsy revealed that the cause of Ta'mar's death was blunt force trauma as a result of four injuries to his head. On December 14, 1999, appellant was arrested and charged with first degree murder and child abuse.

Testimony at trial detailed the chronology of events that took place that weekend, beginning with appellant and Ta'mar and Davon's paternal grandfather picking the boys up from their mother's home on Thanksgiving evening. There was conflicting testimony about how the boys were transported into the home of appellant and Ms. Williams by their father, Larry Hamilton, Jr. Ms. Williams and appellant also detailed the children's whereabouts during the remainder of the weekend up until the time that Ta'mar was taken to the hospital, much of which focused on Ta'mar's continuous crying and crankiness. It was undisputed that appellant was the only person with Ta'mar when he suffered the fatal blows to his head.

At appellant's trial, doctors from Johns Hopkins testified that violent force, similar to the force when someone is thrown through the windshield in a car crash or falls from a third floor window, was required to inflict the type of injuries that Ta'mar had sustained to his head, and that such violent blows would have rendered Ta'mar immediately unconscious.

Appellant attempted to introduce testimony about Ta'mar's parents' drug use and poor parenting skills, much of which was excluded by the court. Appellant also introduced testimony suggesting that Ta'mar's parents physically abused him and Davon, most of which was admitted by the court.

Appellant testified in his own defense, describing the events of November 25-27, emphasizing Ta'mar's continuous crying, as well as his efforts to calm him by walking him, patting his back, attempting to feed him a bottle, and changing his diaper. He also described how Ta'mar stopped breathing and how he immediately called 911 for assistance and tried to resuscitate him by performing CPR.

After a four-day trial on the merits, appellant was convicted by a jury of first degree murder and child abuse and sentenced to life imprisonment for the first degree murder conviction, and 30 years incarceration for the child abuse conviction, to be served consecutively. On appeal, appellant challenged the sufficiency of the evidence with regard to his first degree murder conviction and alleged two errors with respect to the court's admission or exclusion of certain evidence.

Held: Affirmed. The Court upheld appellant's conviction based on the totality of the evidence, including evidence as to the number, severity, and brutality of the blows, the circumstances leading up to the beatings, and appellant's version of events. Concluding first that there was sufficient evidence to support a finding that appellant was the person who delivered the fatal blows, the Court then reviewed cases discussing the requirements for first degree murder and, giving great deference to the jury's fact-finding role, sustained appellant's conviction for the wilful, deliberate, and premeditated murder of Ta'mar. The Court also rejected both of appellant's evidentiary objections.

Walter Pinkney v. State of Maryland, No. 2529, September Term, 2000, filed June 20, 2003. Opinion by Eyler, James R., J.

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CRIMINAL LAW - SEARCH & SEIZURE - INVENTORY SEARCH EXCEPTION APPLIES WHEN SEARCH IS CONDUCTED BY POLICE OF PROPERTY LAWFULLY IN POLICE CUSTODY, PURSUANT TO STANDARD POLICY OF THE LAW ENFORCEMENT AGENCY. TO ESTABLISH THAT A SEARCH FALLS WITHIN THAT EXCEPTION, THE STATE MUST SUBMIT PROOF THAT THE SEARCH IN FACT WAS CONDUCTED PURSUANT TO SUCH A STANDARD POLICY, WHICH MEANS THE EXISTENCE OF THE POLICY MUST BE SHOWN. FAILURE TO SUBMIT EVIDENCE OF THE EXISTENCE OF A STANDARD POLICY FOR INVENTORY SEARCHES AND THAT THE SEARCH WAS CONDUCTED PURSUANT TO THE POLICY WAS FATAL TO THE STATE'S ASSERTION THAT THE EXCEPTION APPLIED.

POLICE OFFICER'S PERSONAL ROUTINE FOR CONDUCTING SEARCHES OF AUTOMOBILES WAS NOT A STANDARD INVENTORY SEARCH POLICY OF A LAW ENFORCEMENT AGENCY.

MOTION TO SUPPRESS; PRESERVATION; SEARCH AND SEIZURE ISSUE DETERMINED AT TRIAL.

DEFENDANT DID NOT WAIVE SEARCH AND SEIZURE ISSUE WHEN HE FILED PRE-TRIAL MOTION RAISING IT BUT THE ISSUE WAS NOT DETERMINED BY THE COURT IN A PRE-TRIAL SUPPRESSION HEARING. WAIVER PROVISION OF RULE 4-252(A) APPLIES ONLY TO RAISING A SEARCH AND SEIZURE ISSUE -- NOT TO A FAILURE BY THE COURT, EVEN DUE TO INACTION OF COUNSEL -- TO HOLD A PRETRIAL SUPPRESSION HEARING UNDER RULE 4-252(G). ALSO, FAILURE OF STATE TO OBJECT TO THE COURT'S DECIDING THE SEARCH AND SEIZURE ISSUE DURING THE TRIAL WAS ITSELF A WAIVER OF THE ISSUE OF THE PROPRIETY OF THE COURT'S DOING SO.

Facts: A police officer on patrol spotted a "hatchback" vehicle with a blue front signal light and a cracked windshield, both in violation of the Maryland Transportation Code. The officer made a traffic stop and found that the appellant was the sole occupant of the car. The appellant told the officer that his license was suspended and that he did not know where the vehicle registration was located because the car belonged to his cousin. A motor vehicle check revealed the appellant's license was revoked in 1993 and that there was an outstanding "pickup order" for the car and its tags, which were expired.

The officer placed the appellant under arrest for driving after his license had been revoked. He performed a pat-down of the appellant's person, which revealed nothing, and then placed him in the front passenger seat of the police cruiser with the seatbelt buckled around him. The officer called for a tow truck and searched the vehicle. In a red nylon bag in the hatchback area of the vehicle, the officer found a handgun and 24.34 grams of marijuana.

The appellant was charged with transporting a handgun, possession of a controlled dangerous substance, driving while suspended, and driving while revoked. No suppression hearing was held, but the court made the suppression ruling during the bench trial based upon the testimony of the officer. The court granted the appellant's motion for judgment of acquittal on the driving while suspended charge and found the appellant not guilty of transporting a handgun. The court found the appellant guilty of possession of marijuana and driving after his license had been revoked.

The appellant appealed, asking whether the court erred in denying his motion to suppress the evidence found in the hatchback and whether the evidence was sufficient to support his possession conviction.

Held: Judgment reversed as to marijuana conviction and affirmed as to driving while license revoked conviction. The appellant's failure to request a suppression hearing prior to trial

does not waive the search and seizure issue, because the appellant had timely filed a motion under Rule 4-252. The language of Rule 4-252 states that, "to the extent practicable," the issue should be decided prior to trial, but does not require that the issue be decided prior to trial. Further, the State did not raise the issue of the appellant's failure to request a pre-trial suppression hearing prior to this appeal, and therefore cannot raise the issue for the first time in response to the appellant's appeal.

The police conducted an illegal search of the hatchback area of the vehicle because, based upon the evidence submitted through the officer's testimony, neither the inventory search exception to the warrant requirement or the search incident to arrest exception are applicable. The facts do not suggest that the inventory search of the vehicle was a pretext to the arrest. Nevertheless, based upon the evidence submitted to the court, there is no proof that the search was carried out pursuant to a standardized police procedure. The existence of standardized police procedures are required because such external, objective, and routine controls remove the individual police officer's discretion. While the officer stated that he searched the vehicle front to back according to his own personal routine, such evidence is not sufficient to show that standardized police procedures exist and were employed during the search. Further, the evidence presented showed that the contents of the hatchback were not accessible or in some manner reachable by the occupant. Thus, the search of the hatchback area of the vehicle was not a valid search incident to arrest because the hatchback in this instance is analogous to a trunk.

Sellman v. State, No. 1627, September Term, 2002, filed July 7, 2003. Opinion by Eyler, Deborah S., J.

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OPEN MEETINGS ACT - TIME AND METHOD OF ENFORCEMENT - "OTHER AVAILABLE REMEDIES"

Facts: Ocean Downs, LLC, appellee, filed with the Board of Zoning Appeals of the City of Cambridge an application for a special use permit authorizing an off-track betting ("OTB") facility. After holding a public meeting, the Board approved the special use permit. Thereafter, Mary Handley, Cheryl Michael, Barry Miller, and George Wheatley, Jr., appellants, filed a petition for judicial review of the Board's decision, arguing, *inter alia*, that the Board and the Planning and Zoning Commission did not follow proper procedure in reviewing and granting the permit. They alleged violations of the Open Meetings Act as part of their petition for judicial review. The circuit court affirmed the Board's determination, and did not address appellants' Open Meetings Act claims because it concluded that they were not properly raised in the manner required by the Act. Specifically, the circuit court ruled that these claims must be brought through a separately filed petition under Md. Code (1984, 1999 Repl. Vol.), section 10-510 of the State Government Article ("SG").

Held: Judgment reversed and case remanded. SG section 10-510(b) authorizes an aggrieved party to file in the circuit court a petition asserting violation of the Open Meetings Act by a public body. Such petitions must be filed within 45 days of the alleged violation. The statute makes clear, however, that section 10-510 "does not affect or prevent the use of any

other available remedies." This "other available remedies" language evidences the legislature's intent that a petition under section 10-510 is not the exclusive remedy for an Open Meetings Act violation, and alleged violations may be raised in the course of a petition for judicial review of an agency's decision. The 45-day limitations period for section 10-510 petitions does not apply to Open Meetings Act claims brought as part of a petition for judicial review. Therefore, the circuit court erred in ruling that appellants' Open Meetings Act claims were improperly raised.

Mary Handley, et al. v. Ocean Downs, LLC, et al., No. 1013, September Term, 2002, filed June 27, 2003. Opinion by Adkins, J.

* * *

WORKERS' COMPENSATION - "HEART PRESUMPTION" - PRINCE GEORGE'S COUNTY DEPUTY SHERIFFS - REQUIREMENT OF BASELINE MEDICAL REPORT

Facts: Md. Code (1991, 1999 Repl. Vol.), section 9-503 of the Labor and Employment Article ("LE") establishes a presumption, for workers' compensation purposes, that the heart disease or hypertension condition of certain firefighters and law enforcement personnel is an occupational disease arising out of or in the course of their employment. This presumption is commonly known as the "heart presumption."

For Prince George's County deputy sheriffs, however, the presumption does not apply to pre-existing heart disease or hypertension. Rather, only heart disease or hypertension "that is more severe" than existed prior to their employment is subject to the presumption. An uncodified section of the statute requires Prince George's County deputy sheriffs employed with the department on or before September 30, 1996, to submit, by December 31, 1996, a "medical report disclosing and describing any existing heart disease or hypertension from which the deputy sheriff may be suffering[.]" 1996 Md. Laws, Chap. 637, Sec. 2 ("House Bill 840").

James J. Maringo, appellee, a Prince George's County deputy sheriff, had been employed by Prince George's County ("the County"), appellant, as a deputy sheriff since 1985. He did not timely file a medical report with the department. In March 2000, Maringo underwent a physical examination, after which he was informed by his doctor that he had high cholesterol, and was advised to watch his diet and to exercise. His physical examination yielded no signs of heart disease or hypertension. On April 16, Maringo experienced chest pain. After being transported to the hospital, Maringo was diagnosed with a heart condition, which caused him thereafter to be absent from "full duty" status at work.

In May 2000, the month after his diagnosis, Maringo filed a claim for benefits with the Workers' Compensation Commission, asserting that he was entitled to the heart presumption, despite the fact that he never had submitted a medical report in 1996 disclosing any heart condition. The Commission ruled that Maringo indeed was entitled to the presumption, and awarded him benefits.

The County appealed the Commission's decision to the Circuit Court for Prince George's

County. There, both parties filed motions for summary judgment. The parties agreed that Maringo "was a Deputy Sheriff before 12-1-96; that he was not aware of any heart disease prior to April of [2000] when he had the heart attack, and [that] . . . [h]e had a physical in March of [2000] that failed to reveal any heart disease or hypertension." Based on these stipulations, the circuit court ruled from the bench that the legislation required existing deputy sheriffs to file a medical report before 1996 only if they had a known existing heart condition, and thus that Maringo was entitled to the presumption. The County appealed the circuit court's grant of summary judgment to Maringo, which effectively approved the Commission's decision that the heart presumption applied.

Held: Reversed and remanded for further proceedings. Both the legislation's plain language, and its legislative history, support interpretation of the legislation to require existing Prince George's County deputy sheriffs desiring to benefit from the heart presumption to submit a baseline medical report in 1996 disclosing either the presence or the absence of any heart condition. Therefore, in failing to timely submit the medical report necessary to "opt-in" to the heart presumption, Maringo did not fully comply with the requirements of the statute. This failure to qualify for the presumption through full compliance, however, does not foreclose Maringo's reliance on the presumption through substantial compliance. The trial court was directed on remand to make certain factual findings necessary to determine whether Maringo substantially complied with the statute by submitting his 2000 medical report, which revealed no signs of a heart condition.

Prince George's County v. James J. Maringo, No. 1354, September Term, 2002, filed June 30, 2003. Opinion by Adkins, J.

ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective July 16, 2003:

DANIEL S. CHANG

*

By an Order of the Court of Appeals of Maryland dated July 22, 2003, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

ARTHUR F. JACOB

*

By and Opinion and Order of the Court of Appeals of Maryland dated July 30, 2003, the following attorney has been disbarred from the further practice of law in this State:

SCOTT G. SMITH

*

By an Order of the Court of Appeals of Maryland dated August 4, 2003, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

MURRAY LEONARD DEUTCHMAN

*

By an Order of the Court of Appeals of Maryland dated August 21. 2003, the following attorney has been reprimanded be consent:

WINSTON W. TSAI

*