Amicus Curiarum

VOLUME 24
ISSUE 6 June 2007

A Publication of the Office of the State Reporter

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ADMINISTRATIVE LAW AND PROCEDURE – JUDICIAL REVIEW

Facts: Respondent's driver's license was suspended after he refused to take an alcohol concentration test following a traffic stop for speeding. Respondent challenged that suspension before the Office of Administrative hearings. The Administrative Law Judge found that respondent violated §16-205.1 of the Transportation Article and ordered respondent to participate in the Ignition Interlock Program for a period of eighteen months. Respondent filed a petition for judicial review in the Circuit Court for Montgomery County. The Circuit Court vacated the Administrative Law Judge's decision, finding that the ruling was based on incompetent evidence. The Court of Appeals granted the Motor Vehicle Administration's petition for a writ of certiorari. *MVA v. Shepard*, 396 Md. 9, 912 A.2d 646 (2006).

Held: Reversed. The Court of Appeals held that the Administrative Law Judge's decision was supported by substantial evidence to show that the officer possessed reasonable grounds to request an alcohol concentration test under §16-205.1 of the Transportation Article. A court reviews an administrative agency's decision under the substantial evidence test, and where the Administrative Law Judge found that respondent had an odor of alcohol on his breath as well as watery and bloodshot eyes, respondent admitted using alcohol earlier in the evening, respondent was driving at an excessive speed over 132 miles per hour, and respondent performed poorly on field sobriety tests, there was more than sufficient evidence to support that ruling.

The Court of Appeals rejected respondent's contentions that the term "reasonable grounds," as found in § 16-205.1, requires an officer to either possess probable cause to believe a driver is intoxicated or show that the driver is intoxicated by a preponderance of the evidence prior to requesting an alcohol concentration test. Noting that § 16-205.1 requires only a detention and not an arrest in order to request testing, the Court held that the "reasonable grounds" required for an officer to request that a licensee submit to alcohol concentration testing is equivalent to "reasonable articulable suspicion."

Motor Vehicle Administration v. Scott H. Shepard, No. 88, September Term, 2006, filed May 15, 2007. Opinion by Raker, J.

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ATTORNEY DISCIPLINE – INTOLERABLE CONDUCT OF AN ATTORNEY

Facts: The Attorney Grievance Commission of Maryland ("Petitioner"), by Bar Counsel acting pursuant to Maryland Rule 16-751, filed a Petition For Disciplinary or Remedial Action in the Court of Appeals against Daniel Q. Mahone ("Respondent"). Petitioner charged that Respondent violated Rule 8.4(d) (misconduct) of the Maryland Rules of Professional Conduct ("MRPC") in his representation of clients in three cases that were pending in the Circuit Court for Washington County. Respondent defended his actions, claiming mitigating circumstances.

During the hearing in the Circuit Court for Montgomery county, the hearing judge pointed out that he listened to the recording of the September 2, 2005, hearing before Judge Beachley and concluded, contrary to Respondent's assertions, that the record of that hearing demonstrated that Respondent "repeatedly interrupted Judge Beachley and opposing counsel and pursued a pattern of disrespectful behavior to the bench." In addition, the hearing court specifically found "no mitigation to support Respondent's conduct." This is consistent with the hearing court's other findings as to the case involving Judge Wright. According to the hearing judge, "Respondent's blatant interruption of Judge Wright was an overt and public display of disdain for the Court and constituted disrespect for the administration of justice."

We agree with the hearing judge's conclusions of law that Respondent violated MRPC 8.4(d). Not only did Respondent violate the rules of professional responsibility, his behavior, which amounted to a pattern of disrupting the court proceedings and culminating in walking out while the trial judge rendered his oral opinion from the bench, constituted a direct contempt of court.

As to Respondent's theory of mitigation, based upon an "Equitable Grounds Defense," the allegation that the trial judge "goaded" Respondent or that the complaint filed against him was in retaliation, are not sufficient mitigating factors.

Held: The appropriate sanction in this case is a reprimand. Petitioner recommends that we impose a suspension "to send a clear message to the Bar that deliberately disruptive conduct by attorneys in court cannot be tolerated." We can send that message, in the present case, without disrupting Respondent's practice of law.

Fortunately, in this case, Respondent's clients were not prejudiced as a result of his misconduct. There is no record of any prior disciplinary proceedings filed against Respondent, and after pressing him as to the impropriety of his conduct by this Court during oral argument, Respondent should understand from the tenor of that proceeding, as confirmed by this opinion, that his conduct is sanctionable and if repeated could result in a more severe sanction.

Even though we view counsel's conduct as constituting a direct contempt of court, we do not hold that every contempt of court committed by an attorney warrants the sanction of suspension from the practice of law or disbarment.

Attorney Grievance Commission v. Mahone, Misc. Docket AG No. 7, September Term 2006, filed April 10, 2007, Opinion by Greene, J.

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CONSTITUTIONAL LAW – INTERPRETATION – EQUAL RIGHTS AMENDMENT – PARENTAGE

Facts: The appellant, an unmarried male, initiated a medical procedure known as in vitro fertilization, with his sperm being used to fertilize eggs from an egg donor. The procedure resulted in two fertilized eggs. The putative appellee in this case is the

woman with whom the appellant contracted to act as a carrier for any embryo that might be created as a result of his fertilization efforts so that they might gestate in a womb. Fertilized eggs were implanted in the appellee and she delivered twin children. The medical records department of the hospital reported the gestational carrier as the "mother" of the child, submitting the information regarding the births to the Maryland Division of Vital Records (MDVR), who would issue the birth certificates. Neither the appellee nor the appellant, however, wanted the gestational carrier's name to be listed on the birth certificate.

The appellee joined the appellant's petition to the Circuit Court for Montgomery County, asking it to issue an "accurate" birth certificate, i.e., one that did not list the gestational carrier as the children's mother. In the petition, they asked the court to declare that the appellant was the father of the children, and authorize the hospital to report only the name of the father to the MDVR. The trial court rejected the petition, noting that no Maryland case law existed that would give a trial court the power to remove the mother's name from a birth certificate. Second, it noted that removing the name of the surrogate from the birth certificate would be inconsistent with the "best interests of the child" standard. The Court of Appeals, on its own motion, granted certiorari.

Held: Reversed. Case was remanded to the Circuit Court for Montgomery County for proceedings consistent with the opinion. Law already exists that would allow a court of competent jurisdiction to issue an order authorizing a birth certificate that does not list the mother's name. Because Maryland's Equal Rights Amendment forbids the granting of more rights to one sex over the other, the paternity statutes in Maryland must be construed to apply equally to both males and females, to give females an equal opportunity and process to deny parentage. In addition, the "best interests of the child" standard is typically applied when there is a dispute as to a parent's fitness to be a parent, which does not exist in this case.

In re: Roberto d.B, No. 110, September Term 2002. Filed May 16, 2007. Opinion by Bell, C.J.

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CONTRACTS - BREACH OF CONTRACT - JUDGMENT - GROUNDS FOR SUMMARY JUDGMENT - DISPUTE AS TO MATERIAL FACT

Facts: Elba Hildebrant, respondent, was among the candidates that took a standardized test administered by Educational Testing Service ("ETS"), petitioner, on September 11, 2004 at Montgomery College in Rockville, Maryland. Dana Baker, a professor at Montgomery College, administered the test and monitored the room on behalf of ETS. Before taking the test, Hildebrant agreed, by signing an acknowledgment, to the testing rules and procedures set forth in ETS's published "Information and Registration Bulletin." After the test was administered, Baker submitted a "Supervisor's Irregularity Report" to ETS. The report cited Hildebrant for misconduct — not stopping work when time was called — during two of the testing sessions. ETS later canceled Hildebrant's test scores based on this reported misconduct.

Hildebrant filed a complaint in the Circuit Court for Montgomery County, alleging breach of contract and negligence against ETS and alleging malicious defamation by Baker. The Circuit Court for Montgomery County granted summary judgment as to the breach of contract count and dismissed the defamation and negligence counts.

Hildebrant noted a timely appeal to the Court of Special Appeals on the breach of contract claim. Before the Court of Special Appeals, Hildebrant argued that, in deciding whether to cancel the test scores, ETS must exercise its discretion in good faith because there exists an implied covenant in every contract that each of the parties thereto will act in good faith and deal fairly with the others. Hildebrant maintained that an issue of material fact existed as to whether ETS canceled the test scores in good faith. Hildebrant argued that Baker knowingly made a false report and that ETS is bound by the knowledge of its agents; thus, ETS did not act in good faith by relying on a false report when it decided to cancel Hildebrant's test scores. ETS did not dispute Hildebrant's position that it must act in good faith, but argued that Baker's knowledge could not be imputed to ETS because the "Information and Registration Bulletin" expressly reserves to ETS, not to test administrators, the judgment of whether to cancel a test score for misconduct.

The Court of Special Appeals analyzed the law of principal and agent and held that it was proper to impute Baker's knowledge to ETS. *Hildebrant v. Educational Testing*, 171 Md. App. 23, 34, 908 A.2d 657, 663 (2006). The intermediate appellate court held also that summary judgment was granted improperly because there was a dispute of material fact. *Id.* at 37-38, 908 A.2d at 665.

Accordingly, the Court of Special Appeals reversed the entry of summary judgment on the breach of contract claim and remanded for further proceedings. *Id.* ETS filed a petition for writ of certiorari, which the Court of Appeals granted. *Educational Testing v. Hildebrant*, 396 Md. 11, 912 A.2d 648 (2006).

Held: Reversed. Hildebrant did not present a genuine dispute of material fact as to whether ETS breached its contract with Hildebrant because it failed to act in good faith when it canceled her test scores. Even assuming *arguendo* that Baker's knowledge is imputable to ETS, Hildebrant did not establish by any evidence, under oath, that Baker acted in bad faith. Consequently, she made no showing that ETS failed to act in good faith. Hildebrant's affidavit that presents a general, conclusory denial of misconduct is not sufficient to establish a genuine dispute of material fact as to whether a testing proctor acted in bad faith. Assertions of material fact must be supported, in accordance with Maryland Rule 2-501(b), by affidavit, discovery response, transcript of testimony, or other statement under oath that demonstrates the dispute of material fact.

Educational Testing Service v. Elba Hildebrant, No. 115, September Term, 2006, filed May 10, 2007. Opinion by Raker, J.

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CRIMINAL LAW - INDECENT EXPOSURE - PUBLIC ELEMENT

Facts: On July 1, 2005, Brandon James and his fifteen-year-old sister, Jennifer James, visited their neighbor Bridgette Penfield in her home in Germantown, Maryland. Another neighbor also was visiting at the time, Petitioner, Gerald Eugene Wisneski. About twenty minutes into their visit, Wisneski asked Jennifer if she "was on her period," stood up, and exposed his penis and testicles to her, shaking them and repeating the question of

whether "she was on her period." Jennifer immediately turned her head away while Wisneski, who after clothing himself, began grabbing his genitals from outside of his shorts and shaking them in Jennifer's direction. Catching sight of Wisneski's actions, Brandon became enraged and challenged Wisneski to fisticuffs.

After a jury trial, Wisneski was found guilty of common law indecent exposure, as well as various handgun charges, and was sentenced to five years of incarceration for the various handgun charges, in addition to six months, to run consecutively to the five years, for the crime of indecent exposure.

Wisneski noted a timely appeal to the Court of Special Appeals, which affirmed his conviction for indecent exposure in a reported opinion, concluding that Wisneski had exposed himself in the home of a third party, in daylight, while in a room that had a large window pane. The intermediate appellate court determined that, although there was insufficient evidence for the jury to determine whether Wisneski was visible to passers-by outside the window, his conduct still amounted to indecent exposure because, as a guest in a private home, he had exposed himself intentionally, as opposed to inadvertently, to three persons who were not members of his family or household, without their permission or consent, in an area of the house not regarded as private, such as a bathroom, thereby constituting an exposure in a "public place."

Wisneski petitioned the Court of Appeals for writ of certiorari, arguing that there was insufficient evidence at trial to establish that his exposure, which occurred in the living room of his neighbor's home and in the presence of three other individuals, occurred in a "public place."

Held: Affirmed. The Court of Appeals determined that the common law offense of indecent exposure requires a wilful exposure, observed by one or more "casual" observers, those who did not expect, plan or foresee the exposure, and who were offended by it. The Court further determined that there was sufficient testimony at trial establishing that Wisneski's exposure took place in front of two casual observers who clearly were offended by it and therefore affirmed his conviction.

Gerald Eugene Wisneski v. State of Maryland, No. 76, September Term, 2006. Opinion by Battaglia, J., filed April 18, 2007.

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CRIMINAL LAW – RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE – CONFLICT OF INTEREST – WHEN A CRIMINAL DEFENDANT AND THE INDIVIDUAL WHO THE DEFENDANT CONTENDS ACTUALLY COMMITTED THE CRIME ARE BOTH REPRESENTED BY ATTORNEYS FROM THE SAME DISTRICT OFFICE OF THE PUBLIC DEFENDER, A CONFLICT OF INTEREST EXISTS. THE ADMINISTRATIVE JUDGE ERRS IF THE ATTORNEY REQUESTS A CONTINUANCE TO CURE THE CONFLICT AND THE JUDGE DENIES THE REQUEST.

Facts: In June 2003, two masked men broke into the home of Alidad Chacon, with the intent to steal marijuana that he had been selling. Chacon's nephew saw the intruders and chased after one of the men, restrained him, and removed his mask. At trial, Chacon's nephew identified this man as Petitioner, Juwaughn Duvall. After the incident, Chacon and his aunt went to the police to report the incident. Chacon's aunt identified one of the masked men as Duvall, explaining that she had met him on a previous occasion at a nightclub. Chacon told the police that this incident was not the first time that someone had stolen drugs from him. He explained that one of his acquaintances, Adam Muse, had stolen marijuana from his house on a prior occasion.

Duvall was subsequently arrested and charged. He was represented by an attorney from the Montgomery County Office of the Public Defender. His counsel's theory at trial was that Duvall was not the man who broke into Chacon's home, but that Muse was that man. Muse fit the description that Chacon's nephew had given to the police, and Muse had broken into Chacon's home to steal marijuana on a prior occasion. Duvall argued that he was not at the scene of the crime and that it was a case of mistaken identity. Duvall's attorney later learned that Muse was being represented by one of her colleagues at the Montgomery County Office of the Public Defender, in a pending robbery case. She subsequently filed a motion for a continuance with the court, more than two months in advance of the 180 day *Hicks* deadline. The administrative judge denied the written motion. Defense counsel renewed her motion on the scheduled trial date. At the hearing before the administrative judge on the date of trial, defense counsel explained that she filed the motion for a continuance for the purpose of securing a panel attorney because she could not effectively represent Duvall, as she was laboring under a conflict of interest. She reiterated that she had conflicting duties of loyalty - a duty to Duvall, but also a duty to Muse because her office was representing him. The administrative judge denied the motion, explaining that Muse's attorney could file a motion for a continuance if there was a conflict.

The trial proceeded and Duvall was convicted of first degree burglary, conspiracy to commit first degree burglary, attempted

robbery with a dangerous and deadly weapon, and first degree assault.

Duvall filed a timely appeal to the Court of Special Appeals. The intermediate appellate court affirmed the judgment. Duvall filed a petition for writ of certiorari, which this Court granted.

Held: Reversed. Case remanded to the Circuit Court for a new trial. This Court concluded that a conflict of interest existed and, therefore, that the administrative judge erred, as a mater of law, when she denied defense counsel's motion for a continuance. The Court explained that the Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights guarantees to any criminal defendant the right to have effective assistance of counsel free from conflicts of interest. The Court examined defense counsel's situation and acknowledged that as a result of defense counsel's conflicting duties of loyalty, she was not able to interview Muse or speak to Muse's attorney and, furthermore, if she gained information about Muse's role in the robbery at issue, she would not be able to inform the police or elicit the information at trial. The Court determined that an actual conflict of interest existed and that, as a result, the administrative judge erred in failing to allow time for the District Public Defender to panel the case to another attorney and in failing to determine whether Duvall waived the conflict of interest before allowing defense counsel to continue her representation. The administrative judge had two months in which to continue the case before the *Hicks* deadline and, if the trial could not commence within *Hicks*, good cause existed for the judge to go beyond *Hicks*.

Duvall v. State, No. 77, September Term 2006, filed May 15, 2007. Opinion by Greene, J.

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CRIMINAL LAW – VOIR DIRE – EXAMINATION OF JURORS

Facts: Appellant, David Stewart, was indicted by the Grand Jury for Prince George's County on charges of child abuse and second, third, and fourth degree sexual offense. He was convicted of child abuse and second and third degree sexual offense. Appellant noted a timely appeal to the Court of Special Appeals, arguing that the trial court abused its discretion in failing to ask the venire panel certain questions he had requested during voir dire. The Court of Appeals granted certiorari on its own initiative prior to decision by the intermediate appellate court. *Stewart v. State*, 396 Md. 9, 912 A.2d 646 (2006).

Held: Affirmed. The Court of Appeals found that the trial court did not abuse its discretion in declining to ask the questions submitted by defense counsel. The trial court possesses wide discretion in conducting voir dire, and on appeal, its rulings will not be disturbed absent abuse of discretion. A trial court need not ask speculative, inquisitorial, catechizing, "fishing," "open-ended," sentencing related, or law based questions. Appellants requested voir dire all fell into the above categories and were therefore not required to be asked. None of appellant's requested questions that the trial judge refused to ask fell within the mandatory areas of voir dire inquiry the Court of Appeals and United States Supreme Court have previously identified. None of the questions were reasonably likely to reveal cause for disqualification.

The trial court was not required to ask whether a witness will be emotional during testimony. Questions regarding whether a prospective juror would find it difficult to judge a witness' credibility for honesty also do not support challenge for cause. A trial court is not required to ask whether a juror would give greater weight to the arguments of a prosecutor than to those of defense counsel because such an inquiry does not involve the juror's role as factfinder. A voir dire question regarding whether a juror feels "the presumption of innocence or burden of proof should be higher or lower . . . [in] a case involving child sexual abuse" is inappropriate on its face because it is a vague inquiry as to an unstated burden of proof and a reference to the presumption of innocence, which can never be higher or lower.

Most significantly, the Court of Appeals noted that while the trial judge did not abuse his discretion in declining to ask the proposed voir dire questions in this case, it is sound practice, and one trial judges should follow, to ask prospective jurors, when asked to do so, whether the fact that the defendant is charged with a particular crime would affect their ability to be fair and impartial in the case or whether they have such strong feelings about the crime charged that they could not be fair and impartial

and decide the case based solely on the evidence presented.

David Stewart v. State of Maryland, No. 81, September Term, 2006, filed May 11, 2007. Opinion by Raker, J.

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EDUCATION - PUBLIC CHARTER SCHOOLS - SECTION 9-106 (B) WAIVERS

Facts: In 2005, Midtown Academy and Patterson Park Public Charter School, Inc., in addition to eight other Baltimore City public charter schools, submitted applications to the State Board of Education for waivers of various provisions of both local and State educational requirements. All ten of the schools' applications requested waivers of Sections 9-108 (a) of the Education Article, which provides that all charter school employees are public school employees with the right to be collectively represented and the right to all of the benefits deriving from any existing collective bargaining agreements.

The State Board voted in a closed, executive session, on all of the public charter school waiver applications, generally denying all but a limited number of the requests. In its opinions, the State Board granted the requested waivers regarding Section 9-102 (3), which requires that all charter schools be open to all students on a space-available basis, under certain conditions, and with regard to all ten applications for waivers of Sections 9-108 (a), the State Board concluded that:

> [w]ith the exception of positions not currently offered by the Baltimore City Public School System such as that of a karate teacher, all employees of [the public charter school] are public school employees subject to applicable collective bargaining provisions unless modifications are negotiated under Educ. § 9-108 (b).

The Unions filed a Petition for Judicial Review of the State Board's rulings in the Circuit Court for Baltimore City on the grounds that, although they were entitled under Maryland Rule 7-202 (c) to participate in the waiver proceedings, they were not given notice of the administrative hearings concerning the waiver requests. The Baltimore City Board of School Commissioners also filed petitions for judicial review on the grounds that the State's Board improperly exercised original jurisdiction over the applications because Section 9-106 (b) provides that the State Board may only consider waiver requests on "appeal," and that the appeal process, governed by COMAR 13A.01.05.01, *et seq.*, envisions appeals to the State Board from waiver decisions first made by a county board of education or the Baltimore City Board of School Commissioners.

Midtown Academy filed a petition for judicial review of the State Board's denial of several of their requested waivers asserting that the Board erroneously denied its requested waivers of Sections 4-103 (a) and 6-201, provisions which require the Superintendent of the City Board to nominate for appointment all principals, teachers and clerical personnel of the charter school. Patterson Park also filed motions to intervene in both the Unions' and the City Board's actions for judicial review.

All of the petitions for judicial review were consolidated pursuant to a motion filed by the Unions.

A hearing on the petitions was held in the Circuit Court for Baltimore City, and the Court subsequently issued a written order reversing the State Board's grant of waivers pertaining to Section 9-108 (a), determining that the Unions, as necessary parties to the proceedings, were improperly denied their right to intervene, and that public charter school waivers could be granted for provisions founds in Title 9. The court further affirmed all of the State Board's decisions with regard to all other requested waivers, denied the cross-petition of KIPP, Crossroads Academy, Midtown Academy, and Southwest Charter School, and remanded the case to the State Board of Education for further proceedings consistent with its decision.

Patterson Park and Midtown noted timely appeals to the Court of Special Appeals, to which the Unions and the City Board filed cross-appeals. This Court granted a writ of certiorari on its own initiative prior to any proceedings in the intermediate appellate court.

Held: Vacated and remanded to the Circuit Court for Baltimore City. The Court of Appeals determined that, based upon the clear

language of Section 9-106 of the Education Article, the State Board may only grant waivers of provisions applying to *all* public schools, and not those specific to *just* public charter schools, and therefore Title 9's provisions were not subject to waiver under Section 9-106 (b). The Court further concluded that, because local boards of education have no authority to waive State laws and regulations, they had no jurisdiction over Section 9-106 (b) waiver applications implicating State laws or regulations, over which the State Board has original jurisdiction. The Court also held that the Unions, as the exclusive representative of Baltimore City school employees, had a statutory and fiduciary duty to represent the Baltimore City public school employees in the waiver proceedings, and thus the State Board erred by not giving the Unions proper notice or opportunity to be heard in the waiver proceedings. The Court further concluded that the State Board's decision denying waivers requested by Midtown Academy under Sections 4-103 (a) and 6-201 was within its authority and was not inconsistent with law. The Court, therefore, vacated the Circuit Court's ruling and remanded the case for further proceedings before the State Board of Education consistent with its holding.

Patterson Park Public Charter School, Inc. v. The Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO, ET AL., No. 99, September Term, 2006. Opinion by Battaglia, J., filed May 11, 2007.

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INSURANCE - AUTO INSURANCE COVERAGE - CHILDREN OVER 18 NOT RESIDING WITH PARENTS

Facts: Petitioner Richard Mundey, Jr., age 21, was a passenger in a motor vehicle driven by his friend, Amber Burgess. As a result of Burgess' negligent operation of the automobile, a collision occurred and Mundey suffered serious physical injuries which exceeded $20,000.00, the maximum amount of liability coverage on the vehicle in which he was a passenger. At the time of collision, Mundey was temporarily residing at his grandmother's

home and was not permitted to live in the home of his parents. He sought a declaration in the Circuit Court for Prince George's County that his damages were covered under his parents' insurance policy with Respondent Erie Insurance Group as to the underinsured/uninsured motorist endorsement. The parties entered into a stipulation as to the facts regarding Mundey's residence, and the Circuit Court ruled in favor of Erie, finding that Mundey was not entitled to coverage in light of his living arrangements.

To determine whether Mundey was entitled to collect under the uninsured motorist provision of his parents' automobile liability insurance policy, the Court of Appeals stated that it had to interpret Md. Code §19-509 of the Insurance Article, the underinsured/underinsured motorist endorsement, and the definitions of "relative" and "resident," while conforming to the principles of statutory construction. The Court noted that there were three classes of a persons' ability to recover under the Maryland Uninsured Motorist Endorsement. The Court found that this case only concerned "clause 1 insureds," which involved members of the insured's household. The term "insured" meant covered or coverage at the time of the accident, and that §19-509 required automobile liability insurance contracts to provide uninsured motorist coverage, at a minimum, to the named insured as well as any family members who resided with the named insured.

Held: Affirmed. The Court found that the term "resident" in Erie's policy did not conflict with Maryland's Motor Vehicle Insurance law and held that under the totality of the circumstances test enunciated in *Forbes v. Harleysville Mut. Ins. Co.*, 322 Md. 689, Mundey was not considered a resident of his parents' home under the policy. The Court found temporary absence from a household does not alone exclude a person from coverage, but that the facts specific to this case determined that Mundey was not entitled to coverage under his parents' policy.

Mundey v. Erie Insurance Group, et al., No. 28, September Term, 2006, filed January 16, 2007, Opinion by Greene, J.

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INSURANCE – EMPLOYEE EXCLUSION

Facts: Petitioner Taylor F. Wilson suffered serious injuries as a result of an auto collision that occurred while he was a front-seat passenger in a vehicle driven by Daniel Richard McFarland. Both Wilson and McFarland were acting within the scope of their employment with Allegheny Industries, Inc. Wilson filed a Complaint for Declaratory Judgment against McFarland, Nationwide Mutual Insurance Company, and his employer, Allegheny, in the Circuit Court for Carroll County. Wilson requested that the rights and liabilities of the parties with respect to the bodily injuries in the collision be declared under a Nationwide business automobile insurance policy issued to Allegheny. Wilson sought a declaration that the fellow employee exclusion in Nationwide's policy was invalid. Wilson filed a motion for summary judgment declaring that the fellow employee exclusion was invalid and the trial court granted it. Nationwide appealed to the Court of Special Appeals, which reversed the ruling of the Circuit Court. Wilson filed a petition for writ of certiorari in this Court, and Nationwide filed a cross-petition for certiorari. Both petitions were granted.

An exclusion clause could be held invalid if it was contrary to public policy as expressed in Maryland's compulsory automobile liability law. Although the General Assembly did not explicitly mention it in its enactment of §19-504 of the Insurance Article and Title 17 of the Transportation Article, an exclusion can be a valid and enforceable contractual provision as to coverage above the minimum statutory automobile liability insurance amount. The Wilson case is distinguished from *Larimore v. Am. Ins. Co.*, 314 Md. 617 (1989) which that held a fellow employee exclusion in a motor vehicle insurance policy was invalid because it excluded all coverage.

Held: Affirmed. The Court held that in this case, the fellow employee exclusion provision was in compliance with Maryland's compulsory automobile insurance law and not contrary to public policy. The policies in this case only excluded coverage beyond the mandatory minimum coverage, and, unlike the exclusion in *Larimore,* did not exclude all coverage. The Court held that Allegheny and Nationwide did not contract away the rights of Allegheny's employees, and that the fellow employee exclusion is a valid and enforceable contractual provision as it relates to coverage above the minimum statutory liability limits of Maryland's compulsory automobile insurance law.

Taylor F. Wilson v. Nationwide Mutual Insurance Company, No. 22, September Term, 2006, filed November 14, 2006, Opinion by Greene, Jr.

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REAL PROPERTY - RESTRICTIVE COVENANTS - THE STANDARD FOR DETERMINING IF A RESTRICTIVE COVENANT REMAINS VALID IS WHETHER, AFTER THE PASSAGE OF A REASONABLE AMOUNT OF TIME, A CHANGE IN CIRCUMSTANCES HAS OCCURRED, SINCE THE COVENANTS' EXECUTION, RENDERING THE PURPOSE OF THE COVENANT OBSOLETE.

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Facts: Approximately twenty years ago, the corporate limits of the City of Bowie ("the City") were expanded as a result of the annexation of a 466-acre parcel of property ("the Property") located in the northeast quadrant of the intersection of U.S. Route 50 and Maryland Route 3/U.S. Route 301 in Prince George's County. The annexation process was initiated in 1985 by the application of the then-owners of the Property, Carley Capital Group and the University of Maryland Foundation, Inc. ("the Developers"). An Annexation Agreement was executed on 19 August 1985 between the Developers and the City, which, among other things, obligated the Developers to "develop," and the City to "fully support[] the development" of, the Property as "a science and technology, research and office park." The Agreement referred generally to the Developers' "current intention" to "improve the Property and to sell portions thereof for mixed use commercial development . . . to be known as the 'University of Maryland Science and Technology Center' (although the [Developers] may change such name as it from time to time deems appropriate) . . . ." Incorporated into the Agreement was a Declaration of Covenants executed between the Developers and the City, establishing a list of 14 permitted uses for the Property.

Ownership of the Property changed hands several times until, around 2000, MIE, Inc. ("MIE") and its related entities purchased the Property and began developing part of it with 150,000 square feet of "flex-space" buildings to accommodate various tenants. In 2001, MIE leased a portion of this space to C&C Dance Studio ("the Dance Studio"), a use which the City contended was in violation of the Covenants. MIE countered that the City previously approved of

the Dance Studio's tenancy, but reneged on that approval in retribution for MIE's refusal to construct a large, multi-story office building on the Property requested by the City. The City commenced this litigation to prevent the Dance Studio's further use of its leased space.

The City filed a complaint in the Circuit Court for Prince George's County seeking a declaration that the Dance Studio's use was in violation of the Agreement and Covenants and further requesting a permanent injunction against the continued operation of the Dance Studio. MIE filed a counterclaim seeking to have the Covenants and portions of the Agreement declared invalid and unenforceable. Relying on the City's expert witnesses, the Circuit Court determined ultimately that the Covenants were valid and enforceable against MIE because there had been "no radical change to the character of the neighborhood [of the Property] so as to defeat the purpose [] embodied in the Covenants and the Annexation Agreement." The Circuit Court, again persuaded by expert testimony, also concluded that MIE had violated the Covenants by permitting the Dance Studio to use and occupy leased space on the Property, a use prohibited by the Covenants. Accordingly, because the City had not waived its right to enforce the instruments, the Circuit Court enjoined MIE from permitting the Dance Studio to use and occupy any space on the Property.

MIE filed a timely appeal to the Court of Special Appeals. It raised five questions for review, alleging primarily that the Circuit Court erred by finding the Covenants valid and enforceable. In an unreported opinion, the intermediate appellate court overturned the Circuit Court's judgment that the Covenants were valid and enforceable. The Court of Special Appeals concluded that the continuing vitality of a restrictive covenant is determined by the "*reasonable probability* that the parties will be able to achieve the goals of the Covenants within a reasonable period of time." Because the Circuit Court incorrectly "emphasized the *theoretical possibility*" of fulfilling the Covenants' purpose, remand was necessary. The intermediate appellate court, however, disposed of the secondary issues raised by MIE in favor of the City, such as the City's failure to join the Dance Studio as a named defendant, waiver of the Covenants' enforcement, and an argument that the Covenant was a form of illegal contract zoning.

The Court of Appeals granted cross-petitions for writ of certiorari to review all of the issues decided by the Court of Special Appeals. 394 Md. 478, 906 A.2d 942 (2006).

Held: Reversed. The Court of Appeals reiterated that restrictive covenants on land are a valid contractual device, the

purpose of which is often the key to determining their continuing vitality. The Court examined the language of the Covenants and ascertained that, contrary to MIE's assertion, the purpose of the Covenants was to foster the development of a technology park, but not necessarily one with the backing of the University of Maryland or some other research university. With this purpose in mind, the Court set out to determine whether the Covenants were still valid in light of the standard of a "radical change in the neighborhood causing the restrictions to outlive their usefulness." *Chevy Chase Village v. Jaggers*, 275 Md. 309, 316, 275 A.2d 167, 171 (1971). In applying the standard, the Court noted that "the question of validity is a combination of a reasonable period of elapsed time and frustration of purpose in light of changed circumstances," with the caveat that each passing year does not erode necessarily the validity of a restrictive covenant. Because no radical change had occurred in the 22 years since the Covenants were executed, their continuing vitality was not compromised.

The Court further disagreed with MIE's other contentions. First, the Court rejected the notion that the City's annexation of the Property and placement of restrictions on it via restrictive covenants was akin to illegal contract zoning. The Court distinguished the present case from *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 814 A.2d 469 (2002), where the City of Rockville, which possessed zoning authority, engaged in illegal contract zoning when it entered into an annexation agreement that also re-zoned the land. Because the City of Bowie lacks zoning authority, it could not be said to engage in contract zoning. Second, there was no clear error in the Circuit Court's judgment that the City had not waived enforcement of the Covenants. Finally, the non-joinder of the Dance Studio was not fatal to the City's suit. The owner of the Dance Studio testified at trial, demonstrating clearly that she adequately was aware of the lawsuit which may affect her interests should she want to become a party to the suit.

City of Bowie, Maryland v. MIE, Inc., et al., No. 57, September Term 2006, filed 4 May 2007. Opinion by Harrell, J.

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TAXATION – APPEAL

Facts: Petitioner, Leefen Quillens, owned eight contiguous pieces of property in Baltimore City upon which he failed to pay real property taxes. At subsequent tax sales, Baltimore City was required to "buy in and hold" two of the properties pursuant to Section 14-824 (a) of the Tax-Property Article, Maryland Code (1986, 2001 Repl. Vol.), and Kathleen Parker purchased four of the properties pursuant to Section 14-817 of the Tax-Property Article, Maryland Code (1986, 2001 Repl. Vol.). Tax certificates were issued to both the City and Parker, reflecting that the properties were sold for the total amount of taxes due on the property, including those secured by prior, void tax certificates.

Both the City and Parker filed complaints in the Circuit Court for Baltimore City to foreclose Quillens' right of redemption. Quillens filed answers to the complaints, alleging that the tax sales were invalid because the tax certificates issued thereon purported to sell the properties for taxes secured by previously issued void tax certificates. On August 30, 2005, the Circuit Court entered orders finding that the tax certificates issued to Parker, and consequently the tax sales thereon, were valid, and setting the redemption amount for the City properties. From these orders, Quillens noted an appeal. Subsequently, the Circuit Court entered an order in the City cases foreclosing Quillens' right of redemption, from which he filed an amended notice of appeal. The Court of Special Appeals dismissed the appeal in the Parker case and affirmed the Circuit Court's foreclosure of Quillens' right of redemption in the City cases.

Held: Affirmed. The Court of Appeals affirmed and held that Quillens' appeal in the Parker case was premature and that he was required to tender payment of the deficient taxes to challenge the tax sales. In reaching its conclusion that Quillens' appeal in the Parker case was premature, the Court noted that the final appealable order in a tax sale proceeding is the decree foreclosing the right of redemption. The Court also rejected Quillens' argument that the notice of appeal divested the Circuit Court of jurisdiction, remarking that a premature notice of appeal does not obviate the jurisdiction of the trial court. The Court also held that Quillens was required, pursuant the recent decision in *Canaj, Inc. v. Baker and Division Phase III*, 391 Md. 374, 893 A.2d 1067 (2006), to render payment of taxes in arrears as a condition precedent to challenging a tax sale. Additionally, to provide guidance to the Circuit Court when the Parker case is remanded, the Court addressed Quillens' argument that the tax sales were invalid because the certificates contained amounts which were included on previously issued invalid tax certificates, noting that they were

not so invalidated because the lien for unpaid real property taxes is not dependent upon a valid tax certificate.

Leefen Quillens, et. al. v. Richard W. Moore, Jr., No. 114, September Term, 2006, filed May 10, 2007.

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WORKERS' COMPENSATION - INSURER - COVERED CLAIM - IMMUNITY

Facts: On October 19, 2000, Peter L. Yanni, employed with MTI Technology Corporation ("MTI") as a Customer Service Engineer, sustained an injury when a piece of equipment on which he was working began to fall, causing him to twist and wrench his back, for which he subsequently filed a claim for workers' compensation. MTI was insured for such claims by Legion Insurance Company ("Legion"), which was declared insolvent in July of 2003. PCIGC subsequently assumed responsibility for Yanni's claim.

After conducting a hearing on Yanni's claim, the Workers' Compensation Commission awarded Yanni $211.00 in weekly wages, to be paid for 75 weeks, for permanent partial disability, commencing when his temporary total disability terminated, $3,165.00 in attorneys' fees and $528.00 for medical bills.

When the PCIGC failed to timely pay the award, Yanni filed issues with the Workers' Compensation Commission, requesting that penalties be assessed against the PCIGC pursuant to Section 9-728 of the Labor and Employment Article, Maryland Code (1991). The Commission ordered PCIGC to pay Yanni penalties in the amount of 35% of his workers' compensation award, but did not award additional penalties for the delayed payment of attorneys' fees. Yanni's counsel subsequently wrote the Commission inquiring into whether they had inadvertently neglected to assess that penalty in its Order; the Commission responded by issuing a new Order, "rescinding and annulling" its earlier order and denying Yanni's request for any penalties. Yanni filed a second set of issues with

the Commission, again requesting penalties against and attorney's fees. A second hearing was held before the Commission, after which the Commission ordered the PCIGC to pay Yanni penalties in the amount of 35% of the original award, plus $500.00 in additional attorneys' fees.

The PCIGC petitioned the Circuit Court for Montgomery County for judicial review of the penalties and subsequently filed a motion for summary judgment, to which Yanni responded by filing a cross-motion for summary judgment. The Circuit Court granted summary judgment to Yanni. The PCIGC noted a timely appeal to the Court of Special Appeals. Prior to any proceedings in the intermediate appellate court, the Court of Appeals issued a writ of certiorari on its own initiative.

Held: Reversed. The Court of Appeals reversed summary judgment for Yanni and held that the penalties should not have been assessed against the PCIGC because it was not an "insurer" for purposes of Section 9-728 of the Labor and Employment Article, and because the late-payment penalties were not part of Yanni's "covered claims," as the term is defined in Section 9-301 (d) of the Insurance Article. The Court also concluded that, even if the PCIGC were an "insurer," and the penalties were part of the "covered claim," it was immune from the assessment of late-payment penalties under the provisions of Section 9-314 (a) of the Insurance Article and Section 5-412 of the Courts and Judicial Proceedings Article.

Property and Casualty Insurance Guaranty Corporation v. Yanni, No. 112, Sept. Term, 2006. Opinion by Battaglia, J., filed March 15, 2007.

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ZONING AND PLANNING - CONSTRUCTION, OPERATION AND EFFECT - IN GENERAL - TIME OF TAKING EFFECT; RETROACTIVE OPERATION - IN LAND USE AND ZONING CASES, THE LAW SHALL BE APPLIED AS IT IS IN EFFECT AT THE TIME OF ARGUMENT.

ZONING AND PLANNING - CONSTRUCTION, OPERATION AND EFFECT - IN GENERAL - TIME OF TAKING EFFECT; RETROACTIVE OPERATION - SUBSEQUENT CHANGE IN ZONING LAW REGARDING THE DEFINITION OF ANIMAL SANCTUARY, WHICH CHANGE OCCURRED DURING THE PENDENCY OF WILDLIFE SANCTUARY OPERATOR'S APPEAL OF COUNTY BOARD OF APPEALS' DENIAL OF EXCEPTION TO ZONING CODE TO OPERATE PRIMATE OR OTHER WILDLIFE SANCTUARY AS AN EXHIBITOR, APPLIED RETROSPECTIVELY, AND THUS, ON REMAND, THE BOARD WAS REQUIRED TO APPLY THE NEW LAW.

Facts: Colleen Layton and Scott Robbins, d/b/a Frisky's Wildlife and Primate Sanctuary, Inc. ("Frisky's"), the petitioners, were cited in December of 1999 for operating a charitable and philanthropic institution in violation of a local Howard County zoning ordinance. Compliance with the zoning regulations required a special exception, which Frisky's did not have at that time.

On April 28, 2000, Frisky's filed a petition "for a Special Exception for a Charitable and Philanthropic Institution . . . for an existing wildlife rehabilitation center and primate sanctuary" with the Howard County Department of Planning and Zoning (the "Department"). On August 9, 2000, the Department issued a recommendation to the Howard County Board of Appeals (the "Board") suggesting that the special exception be approved, subject to a number of conditions. The matter then went before the Board. Hearings were held over the course of the next three years in which both sides provided witnesses and testimony.

On May 18, 2004, the Board issued its written decision, which granted Frisky's a special exception to operate as a charitable and philanthropic institution, including permitting the operation of an animal rehabilitation center on the property. The Board, however, denied Frisky's an exception to operate a primate or other wildlife sanctuary.

On June 17, 2004, Frisky's filed a petition for judicial review in the Circuit Court for Howard County. On June 25, 2004, Richard Wyckoff and Julianne Tuttle, neighbors of Frisky's and the respondents, filed a separate petition for judicial review on June 25, 2004. Both petitions were consolidated by order of the court.

On September 27, 2004, prior to any hearing before the Circuit Court, Howard County amended pertinent provisions of the Howard County Code. The Code provided a new definition for "Animal Sanctuary." § 17.300(g) of the Howard County Code. A provision dealing with the prohibition against keeping wild or exotic animals was also changed; providing an exemption for animal sanctuaries. § 17.307(d)(5) of the Howard County Code. Therefore, under the new law Frisky's could arguably meet the definition of an "Animal

Sanctuary" and thus be exempt from the prohibition against keeping wild or exotic animals.

Frisky's argued this change in law before the Circuit Court. On July 13, 2005, the Circuit Court issued its decision, affirming the Board's decision. The Circuit Court declined to retrospectively apply the changes in law. Frisky's appealed to the Court of Special Appeals.

The intermediate appellate court, on October 2, 2006, issued a decision, *Layton v. Howard County Board of Appeals*, 171 Md. App. 137, 908 A.2d 724 (2006), in which it affirmed the decision of the Circuit Court for Howard County.

Held: Reversed. The Court of Appeals reaffirmed *Yorkdale Corporation v. Powell*, 237 Md. 121, 205 A.2d 269 (1964), holding that a change in statutory law that takes place during the ongoing litigation of a land use or zoning issue shall be retrospectively applied by appellate courts whether it operates to deny, i.e., moot an application (provided that it does not affect the vested rights of a party), or applies in an opposite context. The case was remanded to the Board to apply the law then in effect.

Colleen Layton, et al. v. Howard County Board of Appeals, et al., No. 116 September Term, 2006, filed May 9, 2007. Opinion by Cathell, J.

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COURT OF SPECIAL APPEALS

CRIMINAL LAW - CLAIM OF RIGHT DEFENSE - *THE FISHERMAN'S CASE*, 2 E. EAST. PLEAS OF THE CROWN 661-62 (1806); 1 W. HAWKINS, PLEAS OF THE CROWN, 98 (4TH ED. 1762); *JUPITER v. STATE*, 328 MD. 635 (1992); TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST, RELYING ON *JUPITER v. STATE*, FOR A JURY INSTRUCTION REGARDING THE CLAIM OF RIGHT DEFENSE, WHERE APPELLANT CONTENDED THAT, IN BRANDISHING A TREE BRANCH, WHILE EXACTING MONEY FROM THE VICTIM ALLEGEDLY TO REPAY MONEY PAID BY APPELLANT TO THE VICTIM FOR ILLICIT DRUGS NEVER DELIVERED, HE WAS, IN EFFECT, ACTING TO RECOVER MONEY THAT BELONGED TO HIM; THE CLAIM OF RIGHT DEFENSE IS NOT APPLICABLE TO ROBBERY WHEN THE TRANSACTION THAT THE ROBBERY AFFECTS WOULD BE ILLEGAL EVEN IF IT WERE CONSENSUAL.

Facts: While walking his dog, complainant was accosted by appellant and his cousin. According to appellant, complainant owed him $150 for a drug purchase gone awry. Appellant, armed with a tree branch or a baseball bat, demanded immediate repayment from the complainant, who gave appellant $100 and promised the balance once he reached his home. After accompanying complainant to his home, complainant gave appellant an additional $50. At trial, appellant's counsel requested a proposed jury instruction that appellant lacked intent to steal from the complainant because he was recovering his own money, *i.e.*, claim of right defense. During deliberations, the jury asked the court "Does it matter whether the victim felt threatened for there to be a threat of force?" The court did not answer the question, but instead, instructed the jury to rely on the previously given instructions.

Held: Affirmed. There was sufficient evidence to sustain a conviction for robbery because appellant threatened force if complainant did not produce money. The jury was free to believe any part or all parts of either of the witnesses to arrive at this inference. *Bayne v. State*, 98 Md. App. 149, 155 (1993).

The court held that the trial court properly denied the requested claim of right instruction because the claim of right defense does not apply to situations where the underlying transaction is illegal. *Jupiter v. State*, 328 Md. 635 (1992). Since, according to appellant, he was attempting to recover money lost in an illicit drug transaction, the claim of right defense was not available to him.

Appellant's final contention was that the robbery instruction propounded to the jury, which stated "it is essential only that the

victim have possession, without regard to whether he has title . . .," was a correct statement of the law and comported with Maryland Rule 4-325(c) and the Maryland Pattern Jury Instructions.

Quinnel Martin v. State of Maryland, No. 2146, September Term, 2005, decided May 3, 2007. Opinion by Davis, J.

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CRIMINAL LAW - CONFESSIONS - IMMEDIATE STATUTORY APPEAL OF PRE-TRIAL SUPPRESSION RULING BY STATE – ADEQUACY OF *MIRANDA* ADVISEMENTS – VOLUNTARINESS OF CONFESSIONS

Facts: On May 1, 2006, appellee Cindi Renee Katherine Rush was arrested on a warrant for first-degree murder, first-degree assault, and related charges and brought to the Prince George's County Homicide Division for questioning. Rush received *Miranda* advisements and agreed to be questioned without counsel. She subsequently made oral and written statements to the police implicating herself in the crime.

On May 30, 2006, in the Circuit Court for Prince George's County, a grand jury indicted Rush for first-degree murder, armed robbery, and related charges. Thereafter, counsel for Rush moved to suppress her statement to the police. The suppression court granted the motion, ruling that the statement was obtained in violation of the dictates of *Miranda v. Arizona*, but rejecting Rush's alternative argument that her statement was involuntary under constitutional and common law principles.

The State took an immediate appeal of the pretrial suppression ruling, under section 12-302(c) of the Courts and Judicial Proceedings Article, challenging the decision on *Miranda* grounds. Rush sought to support the *Miranda* ground ruling and to have the suppression decision upheld on the alternative, but rejected, involuntariness ground.

Held: Affirmed in part and vacated in part. The Court held that, under controlling Supreme Court case law, Rush's inculpatory statements were not obtained in violation of *Miranda v. Arizona* and thus the circuit court's ruling to this effect was vacated.

The Court also held that the scope of appellate review on a State's appeal of a pretrial suppression ruling under section 12-302(c) of the Courts and Judicial Proceedings Article encompasses alternative grounds for suppression that were raised and fully developed before the circuit court, but rejected. Thus, the Court had jurisdiction to consider Rush's alternative argument, rejected below, that her statement was involuntary.

The Court concluded that the interrogating officer made improper implied promises to Rush that she would benefit from giving a statement by elimination or reduction of the first-degree murder charge against her and that the officer could help her to do so. With the exception of certain statements made by Rush after the *Miranda* advisements but before the improper implied promises of benefits, the defendant's inculpatory statements were the product of the promises and were involuntarily given under constitutional and common law principles.

State v. Rush, No. 2007, Sept. Term, 2006, filed April 27, 2007. Opinion by Eyler, Deborah S., J.

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CRIMINAL LAW - SEARCH AND SEIZURE - WARRANT REQUIREMENT - AUTOMOBILE EXCEPTION - PROBABLE CAUSE.

Facts: A Maryland State Trooper was operating radar on U.S. 13 in Worcester County when he observed a vehicle traveling 62 miles per hour in a 55 mile per hour zone. The Trooper initiated a traffic stop and approached the vehicle. While speaking with appellant, the Trooper smelled "an odor of burnt marijuana emanating from the vehicle."

A search of the passenger compartment of the vehicle was conducted. No evidence of a crime was discovered during the search. Appellant's car key was used to open the trunk of the vehicle. Inside, six and one-half pounds of marijuana were discovered in a black suitcase.

Held: Affirmed. The odor of marijuana emanating from the passenger compartment of a vehicle provides probable cause for an officer to search the trunk of the vehicle, without more, under the automobile exception to the Fourth Amendment.

Wilson v. State, No. 2185, September Term, 2005, filed May 2, 2007. Opinion by Kenney, J.

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EVIDENCE - MOTION TO SUPPRESS - MARYLAND RULE 8-131(A); *REYNOLDS v. STATE*, 327 MD. 494 (1992), *JOHNSON v. STATE*, 138 MD. APP. 539, 560 (2001); FAILURE TO ARGUE SPECIFIC THEORY IN SUPPORT OF A MOTION TO SUPPRESS EVIDENCE CONSTITUTES WAIVER OF THAT ARGUMENT ON APPEAL; FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES; *NATHAN v. STATE*, 370 MD. 648, 675 (2002); *ORNELAS v. UNITED STATES*, 417 U.S. 690, 696 (1996); DESCRIPTION RELAYED BY MEMBER OF POLICE TEAM, WHO CONDUCTED A CONTROLLED DRUG BUY, TO ARRESTING OFFICER WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR ARREST, CONSIDERING THE TEMPORAL AND GEOGRAPHIC PROXIMITY BETWEEN THE CONTROLLED BUY AND THE ARREST; *GREEN v. STATE*, 127 MD. APP. 758, 771 (1999); TRIAL COURT DID NOT ERR IN PROMULGATING JURY CHARGE NOT INCLUDED IN THE MARYLAND PATTERN JURY INSTRUCTIONS; IN CASE WHERE APPELLANT'S COUNSEL ARGUED TO THE JURY THAT IT SHOULD FIND APPELLANT NOT GUILTY BECAUSE THE STATE FAILED TO EMPLOY SURVEILLANCE, AUDIO OR SCIENTIFIC EQUIPMENT TO CORROBORATE THE TESTIMONY OF THE INVESTIGATING OFFICERS, THE TRIAL JUDGE DID NOT ERR IN INSTRUCTING THE JURY "THAT THERE IS NO LEGAL REQUIREMENT THAT THE STATE UTILIZE ANY SPECIFIC INVESTIGATIVE TECHNIQUE OR SCIENTIFIC TEST TO PROVE ITS CASE."

Facts: A Baltimore City Police Officer working undercover in a planned "buy-bust" narcotics sting operation entered the 2100 block of East North Avenue in Baltimore City. The officer approached a man and stated that he wanted "two red lines," which referred to street level heroin. The man then directed the detective to appellant who allegedly produced two gel capsules containing a white powder substance from the front waistband of his pants. The detective gave a marked twenty-dollar bill to a third male, who was never found. A short time later, the detective alerted a waiting arrest team of the description and whereabouts of appellant and his cohorts. The team arrested the man whom the detective initially spoke and appellant. A gelatin capsule containing heroin was recovered from appellant's back pocket. Appellant sought to suppress the gelatin capsule on the basis that the arrest team lacked sufficient probable cause to make an arrest. Specifically, he complained that undercover officer failed to relay an adequate description to the arrest team who actually made the arrest. The trial court which heard this motion to suppress denied appellant's motion and stated that the detective properly identified appellant and, thus, the requisite probable cause existed. Appellant was subsequently convicted of a litany of drug charges, in connection to the aforementioned incident. He appealed this conviction, averring that there was insufficient probable cause to effectuate his arrest and that the trial court erred by issuing an instruction on the State's failure to use certain investigative and scientific techniques.

Held: Affirmed. During trial, appellant failed to raise specific argument that arresting officers lacked probable cause because they were given insufficient description by officer who made drug purchase; instead, appellant's trial argument focused on there was no evidence that appellant was in any way connected to his codefendant. Pursuant to Maryland Rule 8-131(a), appellant was precluded from raising this issue in this appeal.

Appellant took issue with the court's instruction that there was no legal requirement that the State introduce specific investigative technique or scientific evidence to prove appellant's guilt beyond a reasonable doubt. Although this issue was raised for the first time on appeal, the Court held that pursuant to Maryland Rule 4-325, a jury instruction must be a correct statement of the law, be applicable under the facts of the case and not have been fairly covered in the instructions given. *Stevenson v. State*, 163 Md. App. 691 (2005). Consistent with *U.S. v. Saldarriaga*, 204 F.3d 50 (2000), appellant's contention that the instruction implicitly undermined the State's burden to prove appellant's guilt, the instruction was a correct statement of the law and was necessary, in light of defense counsel's closing argument

"regarding [the officer's] failure to employ audio or video surveillance equipment and the lack of any other investigative or scientific evidence produced by the State." Accordingly, the trial court did not err by giving the above referenced jury instruction.

Willie Evans v. State of Maryland, No. 2446, September Term, 2005, decided May 3, 2007. Opinion by Davis, J.

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FAMILY LAW - MONETARY AWARD - MARITAL HOME - TENANTS BY THE ENTIRETY - FAMILY LAW SECTIONS 8-201(e)(3) and 8-205(b)

Facts: Shortly after the parties' marriage, the wife contributed $30,000 in nonmarital funds for the acquisition of the parties' marital home, which was titled as tenants by the entirety. During much of the ten-year marriage, the wife was the economically dominant spouse. After their son was born, however, her earnings decreased. When the parties filed for divorce, the wife held title to a larger portion of the marital assets.

At trial, the parties expressed their willingness to distribute marital property by title. The wife, however, also sought reimbursement of her $30,000 contribution, used towards the purchase of the marital home. During trial, she traced the source of those funds to a nonmarital 401(k). Aside from Family Law § 8-205(b)(9), the wife did not rely on any other statutory factor to support her request for "reimbursement" of her $30,000. The circuit court agreed that the wife was entitled to a "credit" for her $30,000 contribution. However, it distributed the remaining marital property by title. Based on title, the wife was to receive approximately 56% of the marital assets, while the husband was to receive about 44% (exclusive of the award to the wife of $30,000 and the equal division of the net proceeds of sale of the marital home).

Held: Affirmed in part, vacated in part, and remanded for further proceedings. The Court vacated the monetary award of

$30,000. In its view, the record did not reflect that the circuit court considered all of the statutory factors in Family Law § 8-205(b). Moreover, a party who contributes nonmarital funds to the acquisition of real property titled as tenants by the entirety is not automatically entitled to a refund of nonmarital funds used to acquire the property. Instead, a monetary award must be made in accordance with Title 8 of the Family Law Article, and must comport with the underlying legislative purpose of adjusting inequities in regard to the way that marital property is titled.

Dennis Gordon v. Patricia Gordon, No. 976, September Term, 2006. Opinion filed May 18, 2007, by Hollander, J.

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REAL PROPERTY - PROPERTY – LEASES - TENANT HOLDING OVER.

Facts: After the deaths of Henry and Evelyn Meyn, owners and operators of the Ev-Mar Mobile Home Village, the representatives for the estates of Henry and Evelyn Meyn, appellees, pursuant to a settlement agreement in a separate case, sought and obtained a judgment of restitution of possession for the mobile home park. In January, 2003, appellees filed an application to change the zoning classification on the property. The county authorities denied the application after residents of the park protested.

In April, 2004, appellees entered into a contract to sell the property and to deliver it to the purchaser vacant and unoccupied. That same month, the residents formed the Ev-Mar Village Residents' Association, Inc. Appellees sent notices to the residents on six different occasions informing them that if the tenants did not vacate by June 1, 2005, appellees would proceed against them as holdover tenants.

On June 6, 2005, appellees initiated tenant holding over proceedings against those residents who had not vacated the mobile home park. The Circuit Court for Howard County granted the appellees motion for summary judgment of restitution of possession.

In its accompanying opinion, the court explained that the rental agreements had terminated, appellants had received proper notice, and appellees' actions did not constitute a retaliatory eviction. On appeal, appellants contended that the court erred in interpreting § 8A-202(c)(3) of the Act as permitting a change in use without a change in zoning, and failed to consider Howard County Code § 16.516, which provides protection over and above that provided in the Act.

Held: Affirmed. The Court of Special Appeals held a change in "use" within the meaning of Section 8A-202(c)(3) of the Act is not synonymous with change in zoning. Subsection (c)(3) provides that - "If the use of land is changed, all residents shall be entitled to a 1-year prior written notice of termination notwithstanding the provisions of a longer term in a rental agreement." In the Court's view, 'the clear intent was to provide mobile home park residents with protection from being forced to move on a frequent basis, without cause, but only as long as the property was used as a park.'

Subsection (b)(2) provides that a court shall enter judgment for restitution of possession if (1) the park owner had been in possession of the leased property, (2) the rental agreement had ended, (3) the resident had been given due notice to vacate the premises, and (4) the resident had refused to vacate. Here, the Court found that appellees had met all four requirements.

With respect to the contention that the Circuit Court failed to consider the Howard County code, the Court of Special Appeals did not decide whether and, if so, under what circumstances, the retaliatory eviction provisions may apply to a tenant holding over proceeding. The Court limited its decision to the specific contention of the appellants. They found that at the end of the notice term, the owner had the right to initiate tenant holding over proceedings, and the retaliatory eviction provisions did not apply to these specific circumstances.

Loy Dove, et al. v. Walter Childs, et al., No. 233, September Term 2006, filed April 4, 2007. Opinion by Eyler, James R., J.

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TAXATION - TAX LAW – MOTOR FUEL TAX ASSESSMENT

Facts: Clise Coal Co., Inc. [appellee] owns a coal mining and trucking business that operates in Maryland, West Virginia, and Pennsylvania. It holds a 'special fuel user license' which allows it to purchase fuel in bulk without paying a tax directly to the seller. Each month, appellee must calculate the fuel used and pay a tax to the Comptroller of the Treasury for the State of Maryland [appellant]. Appellant may audit this account at any time. This action arises from such an audit.

The appellee uses two types of diesel fuel – a 'clear fuel' for on-road vehicles, which is subject to the tax in question, and a 'dyed fuel' for off-road vehicles, which is not subject to the tax. Appellee stored by types of fuel at its facilities. In February 2003, two of appellee's vehicles were stopped by an inspection officer who withdrew fuel and found that the vehicles were using dyed fuel in on-road vehicles. The officer issued citations for each truck, and appellee paid two $1,000 fines.

As a result of these fines, appellant conducted an audit for the time period of March 1999 to March 2003 with the following results reported –

1) The fleet miles per gallon reported by [appellee] was higher than that determined by [appellant];

2) [Appellee] reported receipts, inventories and usage from fuel stored in out-of-state tanks on its Maryland return;

3) [Appellee] reported fuel usage by odometer miles rather than the actual fueling amounts;

4) [Appellee] maintained inadequate receipts of fuel purchased;

5) [Appellee] maintained inadequate documentation to backup [sic] its summary sheet of off-road usage;

6) Additional diesel powered vehicles were fueled from [appellee's] bulk storage tanks, which fuel was not reported on [appellee's] Maryland returns;

7) [Appellee's] inventory records inaccurately calculated inventory levels by erroneously

> using readings for tanks [sic] sizes which were not the actual tanks maintained by [appellee].

T.G. § 13-406, entitled "Motor fuel tax assessment when records not kept," states that "[i]f a person fails to keep the records required under § 9-309 . . . the Comptroller may: (1) compute the motor fuel tax due by using the best information in the possession of the Comptroller, and (2) assess the tax due." Such an assessment is prima facie correct. T.G. § 13-411. By the directive of this statute, the appellant calculated the amount due. After an administrative review required a revised assessment following the initial assessment, appellant came to the amount of $15,401.90 plus interest and penalty. Appellee appealed to the Tax Court which affirmed the assessment and interest, but waived the penalty. The Circuit Court for Allegany County reversed the Tax Court's decision with respect to the non-IFTA portion of the assessment on the ground that it was not supported by substantial evidence and affirmed the remainder of the decision. The circuit court's decision resulted in an assessment in the amount of $5,491.90.

Held: Reversed in part; affirmed in part, to the extent consistent with the Tax Court findings. T.G. § 13-411. S.G. § 10-222(h)(v) embodies the substantial evidence standard of review. Spencer v. Md. State Bd. of Pharmacy, 380 Md. 515, 529 (2004). "That provision grants a court authority to overrule an agency's factual finding only when the finding is 'unsupported by competent, material, and substantial evidence in light of the entire record as submitted.'" Id. at 529 (*quoting* S.G. § 10-222(h)(v)). Appellant's tax assessment is prima facie correct, and the agency had no duty to produce evidence to support its findings. The burden is on the appellee to show error. The credibility of witnesses and the weight of the evidence are for the Tax Court. Here, there was substantial evidence in the record to support the appellant's assessment.

T.G. § 13-406 provides that if a taxpayer "fails to keep adequate records required under section 9-309," the Comptroller may compute the tax by using the best information available. Section 13-406 includes a taxpayer's failure to keep inadequate records and is not limited to situations in which a taxpayer keeps no records. Because appellee failed to keep adequate records as required by § 9-309, appellant was authorized to "compute the motor fuel tax due by using the best information in the possession of the Comptroller." T.G. § 13-406.

Comptroller of the Treasury v. Clise Coal Co., Inc., No. 654, September Term, 2006, filed April 5, 2007. Opinion by Eyler, James R., J.

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TORTS - MEDICAL MALPRACTICE - HEALTH CARE MALPRACTICE CLAIMS STATUTE - CERTIFICATE OF QUALIFIED EXPERT - COURTS & JUDICIAL PROCEEDINGS ARTICLE § 3-2A-02(d) - C.J. § 3-2A-04; "et al." - MARYLAND RULE 1-301(a)

Facts: Carolyn Barber underwent a repeat coronary bypass on November 24, 2000, and died on the same date. An autopsy revealed that Ms. Barber's pulmonary artery had been punctured. On November 19, 2003, Jason Allen Barber, as Personal Representative of the Estate of Carolyn Barber, and Jason and Andrew Barber, as surviving sons of Carolyn Barber, appellants, filed a Statement of Claim with the Health Claims Arbitration Office ("HCAO") against six physicians and six entities, identified by name and address, and collectively referred to as "Health Care Providers," all appellees here. In addition, all twelve were again mentioned in the text of the Statement of Claim, where they were referred to as "Health Care Providers."

In the Certificate of Qualified Expert, filed a few months later, appellants named only one entity in the caption, followed by "et al." and "Health Care Providers." The expert's report stated, in part: "Furthermore, it is my opinion that such Health Care Providers' actions or omissions did proximately cause injury to Carolyn Barber, and was a substantial factor in causing her death."

The parties waived arbitration and suit was filed in the Circuit Court for Baltimore County. Following this Court's decision in *D'Angelo v. St. Agnes Healthcare, Inc.*, 157 Md. App. 631, *cert. denied*, 384 Md. 158 (2004), appellees moved to dismiss the suit, arguing that the Certificate did not comply with the requirements of C.J. § 3-2A-04, because appellants failed to name

each appellee in the caption and the text of the Certificate of Qualified Expert. The circuit court agreed and dismissed the case.

Held: Reversed. The Court noted that the appeal concerned the sufficiency of a timely filed Certificate. It concluded that the use of the phrase "Health Care Providers" in the Certificate satisfied any requirement of specificity, because it clearly was a reference to a corresponding and discrete group named, listed, and identified in the Statement of Claim as the "Health Care Providers." In addition, the Court said:

> It is also salient that the caption of the Certificate used the abbreviation "et al." after the name of the one defendant listed in the caption. In legal circles, "et al." is a well known abbreviation for the Latin words "et alii" or "et alia," meaning "and other persons." Black's Law Dictionary 373 (8th ed. 2004). The use of that term clearly signaled that the Certificate was not limited to the one entity named in the caption, and referred back to the others previously named in the Statement of Claim.

Further, the Court considered C.J. § 3-2A-02(d) as relevant. It provides that, unless otherwise indicated, "the Maryland Rules *shall* apply to all practice and procedure issues arising under this subtitle." (Emphasis added.) Maryland Rule 1-301(a) governs the "form of court papers" and provides: "An original pleading shall contain the names and addresses ... of all parties to the action.... *In other pleadings and papers, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties*." (Emphasis added.) The Court reasoned: "It is hard to conceive of a valid reason why, in principle, we should impose a more stringent standard for the form of a certificate than for pleadings filed in court."

The Court concluded:

> Each defendant was identified in both the Claim Form and the Statement of Claim, which were the initial filings in the HCAO. Moreover, for convenience, they were then collectively identified in both documents as "Health Care Providers." The Certificate, filed a few months later with the HCAO, in the very same case, used the defined term of Health Care Providers and the common legal shorthand of "et al." to refer to all the defendants previously identified.

Jason Allen Barber, et al. v. Catholic Health Initiatives, Inc., et al., No. 2819, September Term, 2004. Opinion filed on April 30, 2007 by Hollander, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated May 2, 2007, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

JAMES L. COFFIN

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By an Order of the Court of Appeals of Maryland dated May 2, 2007, the following attorney has been placed on inactive status by consent, effective immediately, from the further practice of law in this State:

MELVIN THOMAS MYERS

*

By an Opinion and Order of the Court of Appeals of Maryland dated May 8, 2007, the following attorney has been indefinitely suspended from the further practice of law in this State:

RANDALL E. GOFF

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