Amicus Curiarum

VOLUME 29
ISSUE 10 OCTOBER 2012

A Publication of the Office of the State Reporter

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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Godson M. Nnaka, AG No. 52, September Term 2008, filed August 21, 2012. Per Curiam Opinion.

http://mdcourts.gov/opinions/coa/2012/52a08ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Godson M. Nnaka. Bar Counsel alleged that, while representing two couples in two separate matters, Mr. Nnaka violated Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 8.1 (Bar Admission and Disciplinary Matters), and 8.4(c)–(d) (Misconduct).

In 2006, Mr. Nnaka agreed to represent the Dowuonas in an automobile accident claim. After both parties signed a retainer agreement, Mr. Nnaka left for Nigeria. Mr. Nnaka did not inform the Dowuonas that he would be out of the country for an extended period of time. Mr. Nnaka also failed to inform the Dowuonas when he relocated his office. Mr. Nnaka demanded $15,000 to continue his services but was unable to provide any time sheets for his work. The Dowuonas declined but Mr. Nnaka failed to return their documents so that they could retain new counsel.

Also in 2006, Mr. Nnaka filed a medical malpractice complaint for the Shupes. In both the complaint and the designation of experts, Mr. Nnaka failed to provide an expert report. He also did not cooperate with discovery, resulting in an order to comply or face dismissal. Mr. Nnaka did not notify the Shupes about the motion to dismiss until the day of the hearing. He advised the Shupes to tell the judge that they had fired their attorney and to request a postponement, after which the Shupes would rehire Mr. Nnaka. At the hearing, the case was dismissed and the Shupes were unable to refile due to the statute of limitations. Mr. Nnaka informed the Shupes that he would draft a motion for reconsideration that they would file *pro-se* and then they could rehire him if the case was reinstated.

The Honorable Robert N. Dugan of the Circuit Court for Baltimore County found that Mr. Nnaka failed to diligently and promptly represent his clients, failed to reasonably inform his clients about the status of their cases or his frequent travel, failed to respond to his clients' reasonable requests for information, and failed to sufficiently explain the consequences of a dismissal to the Shupes. Because not filing an expert report was "common practice" at the time, the court concluded that Mr. Nnaka did not violate MLRPC 1.1. However, the court found that

instructing the Shupes to lie at the hearing was fraudulent and deceitful. Finally, the hearing judge determined that Mr. Nnaka had abandoned his practice because he remains decertified due to outstanding debts to the Client Protection Fund, he did not participate in his disciplinary proceedings, and he continues to be absent from the country.

Held:

Neither party filed any exceptions to the Circuit Court's findings, therefore, the Court accepted the findings as established and found that Mr. Nnaka violated MLRPC 1.3, 1.4(a), 1.4(b), 8.1(b), 8.4(c), and 8.4(d). As Mr. Nnaka did not respond to the disciplinary proceedings, he offered no justification for leniency. Based on Mr. Nnaka's unresponsive and deceitful conduct, the Court found him unfit to practice law and concluded disbarment was the appropriate sanction.

Attorney Grievance Commission v. Donya Tarraine Zimmerman, AG No. 32, September Term 2011, filed August 21, 2012. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2012/32a11ag.pdf

ATTORNEY DISCIPLINE – APPROPRIATE SANCTIONS – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Donya Tarraine Zimmerman. The Commission alleged violations of Md. Rules 16.604 and 16.609(a); Md. Code, Bus. Occ. & Prof. § 10-306; and Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.3, 1.4, 1.15(a), 1.15(c), 1.16(d), and 8.4(b)-(d).

Ms. Zimmerman was paid a $3,000 retainer by Monique Shilling. Ms. Shilling was seeking a modification of child custody and child support. In July 2010, Ms. Shilling terminated Ms. Zimmerman's services and requested a refund of the unearned portion of the retainer. The hearing judge found that Ms. Zimmerman failed to maintain the unearned portion of the retainer in her escrow account.

Ms. Zimmerman also received a $2,000 retainer from Deedra Danner. Shortly after depositing the check, Ms. Danner informed Ms. Zimmerman that she would no longer need Ms. Zimmerman's services. Ms. Zimmerman suggested that she hold the retainer in case Ms. Danner changed her mind. After a month, Ms. Danner received an invoice indicating that $1,610 would be returned, but no check was enclosed. The hearing judge found that Ms. Zimmerman took a total of $450 in fees from Ms. Danner, although her invoice indicated that the only fee to which she was entitled was $390.

The hearing judge also found that Ms. Zimmerman regularly paid her business expenses out of her escrow account, that she paid her federal taxes with an escrow account check that belonged to Ms. Shilling, that she drew 14 checks on her escrow account to pay her secretary, and that she paid her bar association dues and malpractice insurance premiums from the escrow account.

The hearing judge also discussed several potential mitigating factors, including that Ms. Zimmerman was taking care of her ill parents in 2010 and that she was looking to take some CLE courses. The hearing judge was concerned, however, that Ms. Danner had not yet received the $1,610 owed to her, despite the lapse of almost 20 months and numerous promises.

Held:

The Court found that Ms. Zimmerman's conduct violated MLRPC 1.15(a), 1.15(c), 1.16(b), 1.16(d), and 8.4(b)-(d), Md. Rules 16-604 and 16-609, and Md. Code, Bus. Occ. & Prof. § 10-306. The Court found no evidence to support a violation of MLRPC 1.3 or 1.4. Disbarment was the appropriate sanction for Ms. Zimmerman's misappropriation of funds from both clients.

Attorney Grievance Commission v. David L. Zeiger, AG No. 28, September Term 2007, filed September 24, 2012. Per Curiam Opinion.

http://mdcourts.gov/opinions/coa/2012/28a07ag.pdf

ATTORNEY DISCIPLINE – PROFESSIONAL CONDUCT – MISCONDUCT AND UNETHICAL BEHAVIOR

Facts:

The Attorney Grievance Commission charged David A. Zeiger with violating several provisions of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), including MLRPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice).

Mr. Zeiger was admitted to practice law in Maryland in 1986. After his father's death, Mr. Zeiger and his sister sought information from their stepmother about whether their father had a recent will. The stepmother was unresponsive to their inquiries. To determine whether a recent will existed, the siblings applied to be appointed in West Virginia as co-administrators of their father's estate. Where the appointment form inquired as to whether the decedent had a will, Mr. Zeiger left the answer blank. He also completed an appraisement of the estate and signed it under oath as a fiduciary. Though Mr. Zeiger attested on the form that he had made diligent efforts to assess the estate and that the appraisement was "true," he had, in fact, made no formal appraisal. His educated guesses about the property in the estate and its value turned out be inaccurate.

Mr. Zeiger and his sister were appointed co-administrators of the estate, and Mr. Zeiger set out to determine whether a will existed. He did not, however, undertake other duties of an administrator, including taking control of the estate, notifying his stepmother of his appointment, completing an accounting or inventory of the estate, filing interim accounts and tax returns, and paying applicable estate taxes. Mr. Zeiger's stepmother eventually produced her former husband's will, and Mr. Zeiger and his sister were removed as co-administrators of the estate.

Mr. Zeiger filed a motion to dismiss the charges brought by the Commission, arguing that it was estopped as a result of the Peer Review Panel's recommendation to the Commission. The hearing judge denied the motion, and, after a two-day hearing, found violations of MLRPC 8.4(c) and (d). Mr. Zeiger challenged the denial of his motion to dismiss, and filed numerous exceptions to the judge's findings of fact and conclusions of law.

Held:

The Court upheld the denial of the motion to dismiss, reaffirming that Peer Review Panel proceedings — an informal, non-binding process where no facts are adjudicated — cannot be grounds for estoppel of subsequent formal charges against an attorney. On the merits, however, the Court sustained Mr. Zeiger's exceptions and dismissed the charges against him. Although Mr. Zeiger may have given an inaccurate appraisal of his father's estate and failed to fully carry out his duties as administrator of that estate, there was not clear and convincing evidence in the record that he intended to mislead or defraud in violation of MLRPC 8.4(c), or that his actions had resulted in prejudice to the administration of justice in violation of MLRPC 8.4(d).

Merle Unger v. State of Maryland, No. 111, September Term 2009, filed May 24, 2012. Opinion by Eldridge, John C. , J.

Harrell and Adkins, JJ., concur and dissent.

http://mdcourts.gov/opinions/coa/2012/111a09.pdf

CONSTITUTIONAL LAW – DECLARATION OF RIGHTS, ARTICLE 23

Facts:

During a murder trial that occurred in 1976, the trial judge instructed the jury that all of his instructions were "merely advisory" and that the jury was "not in any way bound by" the instructions. These instructions were given pursuant to Article 23 of the Maryland Declaration of Rights, which provides that in all criminal cases, juries are "Judges of Law, as well as of fact...." The trial judge also instructed the jury that they were "to make the sole determination as to what the evidence is and what the law is..." Thus, under the trial judge's instructions, the jury could decide to place the burden of proof upon the defendant, could utilize a different standard than reasonable doubt, or could even adopt a presumption of guilt. Counsel for the defendant Unger did not object to these instructions. Unger was found guilty of felony murder and other crimes, and was sentenced to life imprisonment. The Court of Special Appeals affirmed his felony murder conviction, and the Court of Appeals denied his petition for a writ of certiorari.

The Court of Appeals subsequently held in *Stevenson v. State*, 289 Md. 167, 423 A.2d 558 (1980),
and later reaffirmed in *Montgomery v. State*, 292 Md. 84, 437 A.2d 654 (1981), that Article 23 limited the jury's role of deciding the law to non-constitutional "disputes as to the substantive 'law of the crime,' as well as the 'legal effect of the evidence.'" The Court stated that "all other legal issues are for the judge alone to decide," and held that its construction of Article 23 was not a new interpretation and did not violate the U.S. Constitution. Failure to object to a jury instruction ordinarily constitutes a waiver of a later claim that the instruction was erroneous, but under the Postconviction Procedure Act, as well as Maryland case law, the failure to raise an issue at trial is not a waiver if there is a relevant U.S. Supreme Court or Maryland Court of Appeals decision later changing the applicable legal standard.

In 1996, the defendant filed a petition under the Postconviction Procedure Act, but hearings on the petition were delayed until 2006, three days after the Court of Special Appeals filed its opinion in another related case, *State v. Adams,* 406 Md. 240, 958 A.2d 295 (2008). In *State v. Adams*, the Court of Special Appeals held that advisory jury instructions, similar to the ones given in Unger's case, violated the defendant's constitutional right to due process. Although the defendant had failed to object to the jury instructions, the defendant's failure was excused because the "law governing the constitutionality of the advisory jury instruction" had materially changed. At Unger's postconviction hearing in the Circuit Court, *State v. Adams* was discussed

and, subsequently, the Circuit Court vacated Unger's convictions and granted him a new trial. The Circuit Court concluded that the jury instructions given at Unger's trial had denied him due process of law. Because the relevant legal standard had changed, the Circuit Court decided that Unger's failure to object to the jury instructions when they were given did not constitute waiver.

The Court of Special Appeals granted the State leave to appeal. While the *Unger* appeal was pending, the Court of Appeals issued its opinion in *State v. Adams,* reversing the Court of Special Appeals' earlier judgment. The majority in *Adams* held that *Stevenson* and *Montgomery* had not announced a new legal standard, that defense counsel's failure in *Adams* to object to the advisory jury instructions constituted waiver, and that the waiver was not excused. Relying on the Court of Appeals' decision in *Adams*, the Court of Special Appeals in *Unger* reversed the postconviction trial court's order granting Unger a new trial.

Unger petitioned the Court of Appeals for a writ of certiorari arguing that the judge's instructions at his trial were a violation of his right to due process. Unger also alleged that even if his objection to the instructions had been waived, such a waiver would constitute ineffective assistance of counsel, requiring a new trial.

Held:

The Court of Appeals overruled its decision in *State v. Adams* and portions of other related opinions. The judgment of the Court of Special Appeals was reversed and Unger's case was remanded to that court with instructions to affirm the judgment of the postconviction trial court granting him a new trial.

The Court of Appeals held that the issue of whether trial counsel rendered ineffective assistance by not objecting to the advisory nature of the jury instructions, and the issue of whether a challenge to the non-binding jury instructions was waived because of failure to object, were so intertwined that they should be treated as a single issue for purposes of preservation. Because those issues were inextricably interrelated, Unger did not waive either issue. Moreover, Unger, as the prevailing party in the postconviction trial court, was entitled to assert any ground shown by the record to uphold the trial court's decision, even if the ground was not raised in the trial court.

The Court of Appeals held that the *Stevenson* and *Montgomery* opinions set forth a new interpretation of Article 23 and established a new state constitutional standard. Consequently, defense counsel's failure to object to the advisory nature of the trial judge's jury instructions at Unger's 1976 trial did not amount to deficient representation and, accordingly, the lack of objection to the same jury instruction did not constitute a waiver. The trial judge's instructions at Unger's 1976 trial, telling the jury that all of the court's instructions on legal matters were "merely advisory," were clearly in error and the post-conviction trial court correctly granted a new trial.

Tonto Corbin v. State of Maryland, No. 48, September Term 2011, filed August 22, 2012. Opinion by Adkins, J.

Battaglia, J., concurs.
Bell, CJ., and Greene, J., dissent.

http://mdcourts.gov/opinions/coa/2012/48a11.pdf

CRIMINAL LAW – CRIMINAL PROCEDURE

Facts:

In December 1995, the victim's body was discovered, and a subsequent investigation concluded the cause of death to be homicide. Semen was found on the body. Petitioner, Tonto Corbin, was identified as being associated with the victim but declined to voluntarily submit a DNA sample.

At the time, Petitioner was on probation for a DWI conviction and required to undergo court-ordered breath tests for alcohol consumption. The test was administered by having Petitioner blow into a straw. Investigators of the homicide arranged to secure the straw after Petitioner's test. Petitioner's DNA from the straw was then matched to the DNA in the semen recovered from the victim. Based on this initial match, police obtained a warrant for another DNA sample from Petitioner. The second DNA sample confirmed the match between Petitioner's DNA and the DNA found on the victim.

Before trial, Petitioner filed a motion to suppress the DNA evidence on the grounds that the initial seizure of his DNA, without a warrant, violated his Fourth Amendment rights. Petitioner's motion was denied and he was convicted in the Circuit Court for Somerset County of involuntary manslaughter and sentenced to 10 years imprisonment.

Petitioner appealed to the Court of Special Appeals, challenging the denial of his motion to suppress the DNA evidence and claiming that the evidence was legally insufficient to support his conviction. The intermediate appellate court rejected his Fourth Amendment claim, relying on *Williamson v. State*, 413 Md. 521, 538 A.2d 626, 636 (2010), to hold that Petitioner did not have an expectation of privacy in either the straw or the DNA that was collected from it. Additionally, the Court held that Petitioner's conviction was reasonable.

The Court of Appeals granted *certiorari* on both issues to consider the following: (1) Whether a DWI probationer, who had previously declined police requests to seize and test his DNA, voluntarily surrendered his breath for DNA testing where State officers seize his DNA on the false pretense of seizing and testing only his blood alcohol; (2) Whether, in an entirely circumstantial case, the evidence of Petitioner's criminal agency was legally insufficient because the State failed to establish that it was any stronger than evidence implicating two or three other suspects.

Held: Affirmed

The Court of Appeals relied on *Williamson* to explain Petitioner's protections under the Fourth Amendment. In order to be protected, Petitioner must show that he had an actual and reasonable expectation of privacy in the item or place searched. The Court focused on the reasonableness of his expectation of privacy.

The Court relied on two decisions by the United States Supreme Court, *Samson v. California*, 547 U.S. 843, 846, 126 S. Ct. 2193, 2196 (2006) and *United States v. Knights*, 534 U.S. 112, 118—19, 122 S. Ct. 587, 591 (2001), which concluded that probationers have diminished expectations of privacy. Based on these cases, the Court ruled that Petitioner's Fourth Amendment rights were not violated. The Court reasoned that Petitioner's expectations were not reasonable given the lowered expectations of privacy for probationers

The Court further recognized, however, the Supreme Court's policy that the touchstone of the Fourth Amendment is reasonableness, for which a balancing test is utilized, weighing the intrusion of an individual's privacy against the interest of the state. *Knights*, 534 U.S. at 119, 122 S. Ct. at 591.

In Petitioner's case, the state's interest was finding the guilty party in the homicide of the victim. The Court of Appeals found that all of the other people known to be associated with the victim submitted DNA. All of these DNA tests did not match the DNA found in the semen discovered on the victim's body. This provided reasonable suspicion that permitted the DNA sampling of Petitioner.

Additionally, the Court ruled that Petitioner forfeited much of his privacy by accepting probation for his earlier crime and knowingly submitting to breath tests. The Court stated that a probationer's privacy interest does not prevent law enforcement, during the period of probation, from testing his legally collected DNA. Thus, the Petitioner did not meet the two-part test from *Williamson*. As such, the Court affirmed the trial court's denial of his motion to suppress the DNA evidence.

The Court further affirmed the Court of Special Appeals' judgment that the evidence was legally sufficient to convict Petitioner based on the criteria from *Smith v. State*, 415 Md. 174, 184, 999 A.2d 986, 991 (2010), which state that the critical aspect on review of the sufficiency of evidence is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The Court concluded that the facts of the case provided sufficient circumstantial evidence to convict Petitioner of involuntary manslaughter by ruling out other potential suspects and recognizing Petitioner's pattern of lying to the police regarding his interaction with the victim.

Gregory Marshall v. State of Maryland, No. 103, September Term 2011, filed August 24, 2012. Opinion by Adkins, J.

Bell, CJ., and Greene, J., dissent.

http://mdcourts.gov/opinions/coa/2012/103a11.pdf

CRIMINAL LAW – CRIMINAL PROCEDURE – MD. RULE 4-215(e) – MEANINGFUL TRIAL PROCEEDINGS – VOIR DIRE

Facts:

On September 30, 2009, Petitioner Gregory Marshall was tried for assault in the Circuit Court for Allegany County resulting from an incident where he threw feces onto three correctional officers at the Western Correctional Institute in Cresaptown. After several preliminary matters were considered, the venire panel was summoned to begin voir dire. As the judge addressed the panel, Petitioner interrupted and asked if he could represent himself. The judge deferred Petitioner's request until after the clerk took the panel's roll call. Then the judge read and explained the requirements of Maryland Rule 4-215(e). The judge found that Petitioner's reasons for dismissing his attorney lacked merit and then advised Petitioner of the severity of the charges and the looming maximum penalties. Nonetheless, Petitioner chose to discharge his attorney and represent himself.

The Circuit Court tried and convicted Petitioner. Petitioner appealed the Circuit Court's decision by arguing (1) that Maryland Rule 4-215(e) applied because he motioned to discharge his attorney before a meaningful trial proceeding commenced and (2) that the judge failed to comply with Maryland Rule 4-215(a). The Court of Special Appeals affirmed the decision of the Circuit Court, holding that Maryland Rule 4-215(e) did not apply because meaningful trial proceedings began before Petitioner's request. Petitioner filed a petition for certiorari.

Held: Affirmed.

The Court of Appeals affirmed the judgment of the Court of Special Appeals, holding that meaningful trial proceedings began once the venire panel was summoned to the courtroom. The "last clear chance" principle did not apply to Petitioner because he had several opportunities during preliminary proceedings to assert his right to self-representation before meaningful trial proceedings began, yet waited until after the venire panel was summoned. Thus, the Court of Special Appeals correctly concluded that Maryland Rule 4-215(e) did not apply to Petitioner's request to discharge counsel. Moreover, the Court of Special Appeals applied the appropriate standard of review on appeal—whether the trial judge's action constituted an abuse of discretion.

Building Materials Corporation of America d/b/a GAF Materials Corporation v. Board of Education of Baltimore County, No. 71, September Term 2011, filed September 24, 2011. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2012/71a11.pdf

EDUCATION LAW – PUBLIC SCHOOL CONSTRUCTION – LOCAL BOARDS OF EDUCATION – PROCUREMENT

Facts:

Building Materials Corporation of America, doing business as GAF Materials Corporation, sought a declaratory judgment that the Board of Education of Baltimore County's procurement of roofing services failed to comply with Md. Code, Educ. § 5-112, which requires local school boards to use locally conducted competitive bidding procedures when procuring buildings, improvements, supplies, or equipment costing more than $25,000. Specifically, GAF challenged the Board of Education's use of an intergovernmental purchasing organization for its roofing needs, as § 5-112 only allows such contracts for "goods and commodities." The Board of Education contended that roofing services could be considered a good or commodity, but also argued that the use of intergovernmental purchasing for those services had been approved by the Board of Public Works and the Interagency Committee on School Construction pursuant to their authority over local school construction as delegated by the General Assembly in Md. Code, Educ. § 4-126 and § 5-301. The circuit court ruled in favor of the Board of Education, and the Court of Appeals granted certiorari prior to consideration by the Court of Special Appeals.

Held:

Because roofing services are not "goods or commodities," contracts for those services awarded by intergovernmental purchasing organizations are not authorized by Md. Code, Educ. § 5-112. However, Md. Code, Educ. § 4-126 and § 5-301, which are specific to school construction and finance, give the Board of Public Works the power to adopt regulations governing school construction that allow local school boards to use alternative methods of financing and procurement. Those regulations authorize local school boards to use intergovernmental purchasing cooperatives for various requirements. By approving and funding the Board of Education's roofing contracts, the BPW determined that those contracts fell within the purview of its regulations enabling such intergovernmental purchasing. Giving deference to that determination, the Court of Appeals held that the Board of Education's use of intergovernmental purchasing organizations to procure roofing contracts was legally permissible pursuant to the BPW's regulations and direct authorization.

Barry K. Downey, et al. v. Nicholas Sharp, No. 19, September Term 2011, filed August 23, 2012. Opinion by Eldridge, John C. , J.

http://mdcourts.gov/opinions/coa/2012/19a11.pdf

ARBITRATION – REHEARINGS

Facts:

An arbitration award under the Maryland Uniform Arbitration Act, Maryland Code (1974, 2006 Repl. Vol.), § 3-201 *et seq.* of the Courts and Judicial Proceedings Article, rejected respondent Sharp's claim of an implied easement by necessity over the petitioners' property. Sharp claimed that he was entitled to the easement because, without it, his property would be landlocked and inaccessible. The arbitration proceedings were not transcribed and the arbitration award, in part, was facially inconsistent. In particular, the arbitrator found that Sharp's lot was landlocked, but still denied Sharp's claim to an implied easement by necessity because Sharp did "not need one."

The Downeys filed in the Circuit Court a petition to confirm the arbitration award, and Sharp filed a motion to vacate the award. The Circuit Court confirmed the arbitration award in its entirety. The Court of Special Appeals, however, vacated the portions of the award that denied Sharp the implied easement by necessity on the grounds that the award exhibited "manifest disregard of the law,""violated clear public policy," and was "completely irrational."

Held:

The Court of Appeals vacated the judgment of the Court of Special Appeals and remanded the case with instructions to order a rehearing before new arbitrators.

The grounds set forth in § 3-224(b) of the Arbitration Act for vacating an arbitration award do not expressly include either an award which, in the reviewing court's judgment, is "completely irrational" or an award which demonstrates "manifest disregard of the law." Contrary to the holding of the Court of Special Appeals, these two grounds are not encompassed by the statutory grounds of an award that was procured by "undue means" pursuant to § 3-224(b)(1) or an award which exceeds the arbitrators' powers pursuant to § 3-224(b)(3). Because the issue was not presented by the facts in this case, the Court of Appeals expressly did not reach the issue of whether an award subject to § 3-224 of the Arbitration Act may properly be vacated by a reviewing court on the grounds that it is "completely inrrational" or demonstrates a "manifest disregard of the law."

Under Maryland law, reviewing courts generally defer to the arbitrator's findings of fact and applications of law. In this case, the Court of Special Appeals did not defer to the arbitrator's findings of facts and conclusions of law, but rather rendered its own findings of fact and

conclusions, which were contrary to those of the arbitrator. Nevertheless, because it was clear that the arbitration award was, in part, contradictory, the Court of Appeals applied § 3-225(a) of the Arbitration Act, which permits a rehearing before new arbitrators if an award is vacated on grounds other than those stated in § 3-224(b)(5).

Pro-Football, Inc., t/a The Washington Redskins, et al. v. Thomas J. Tupa, Jr., No. 29, September Term 2011, filed August 22, 2012. Opinion by Eldridge, John C., J.

http://mdcourts.gov/opinions/coa/2012/29a11.pdf

WORKERS' COMPENSATION – FORUM SELECTION

Facts:

The petitioner Pro-Football and respondent Tupa entered into an employment contract for Tupa to play football. The contract contained a forum selection clause, which stated that "the exclusive jurisdiction for resolving...dispute[s] in the case of Workers' Compensation is the Virginia Workers' Compensation Commission."

During a pre-game warm-up for a pre-season game at FedEx Field in Maryland, Tupa landed awkwardly after a punt and felt an immediate pain in his lower back. After seeking extensive medical treatment, Tupa's condition did not improve, and his doctor concluded that it would not improve without major spinal surgery. Tupa filed a claim for benefits with the Maryland Workers' Compensation Commission, and, after a hearing on Tupa's contested claim, the Commission decided that it could entertain the claim. The Commission found that Tupa had sustained an accidental injury arising "out of and in the course of [his] employment," and that Tupa's disability was causally related to his accidental injury. Tupa was awarded temporary partial disability benefits and the petitioners were ordered to pay the related medical expenses.

Petitioners filed an action for judicial review in the Circuit Court, contending that the Maryland Workers' Compensation Commission did not have jurisdiction over Tupa's claim. The Circuit Court determined that the Maryland Commission was entitled to exercise jurisdiction over Tupa's claim, and the Court of Special Appeals affirmed. The Court of Appeals granted Pro-Football's petition for a writ of certiorari.

Held: Affirmed.

Before the Court of Appeals, the employer argued that, because Tupa was contractually bound to file his claim with Virginia's Workers' Compensation Commission, the Maryland Commission had no authority to act on Tupa's claim. The Court of Appeals, however, rejected this argument, relying upon § 9-104(a) of the Labor and Employment Article, which explicitly precludes an agreement which waives the right of an employee to receive workers' compensation benefits which are otherwise due under the Maryland statute. The forum selection clause in the employment contract was ineffective to divest the Maryland Workers' Compensation Commission of the ability to exercise jurisdiction.

With regard to the petitioners' argument that Tupa's injury was not an "accidental personal injury" pursuant to § 9-101(b)(1) of the Labor and Employment Article because the activity was not unusual, the Court of Appeals noted that its decision in *Harris v. Board of Education*, 375 Md. 21, 825 A.2d 365 (2003), had expressly rejected the principle that an "accidental injury" must arise from an unusual or unexpected occurrence. The Court of Appeals rejected the concept that football injuries should not be considered accidental because football is a dangerous sport likely to cause injury.

COURT OF SPECIAL APPEALS

In the Matter of the Motion of Frederick R. Franke, Jr., to Withdraw Representation, No. 2577, September Term 2009, filed August 29, 2012. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2012/2577s09.pdf

CIVIL PROCEDURE – MOTION TO WITHDRAW REPRESENTATION

Facts:

Frederick R. Franke, Jr., a member of the Maryland Bar, was retained by Raymon K. Nelson, M.D., to represent Raymon in his capacity as trustee of the Trust of his late brother, Ralph L. Nelson, M.D., after the beneficiaries of that trust filed a petition in the Circuit Court for Anne Arundel County, requesting the court to assume jurisdiction over the Trust because of Raymon's alleged mismanagement, misappropriation, and dissipation of trust assets. After paying Franke a retainer and, later, as the case progressed, additional legal fees, Raymon reimbursed himself, with funds from the Trust, relying on provisions in the Trust Agreement which purportedly allowed him to do so. But, as the litigation progressed, he fell into arrears, eventually owing Franke at least $120,000 in unpaid attorney fees and costs.

After discovery, the beneficiaries filed an amended petition, seeking, among other things, to remove Raymon as trustee and replace him with the cousin of one of the beneficiaries, as well as to enjoin Raymon from spending any trust assets. The court, in a memorandum opinion and order, granted that request and removed Raymon as trustee, installing, in his place, an interim trustee and ordering Raymon to surrender control over trust assets. Trial on the remaining misappropriation claims was scheduled to take place several months later. By this time, Raymon had not made any payments to Franke for more than six months.

Two months before the scheduled trial, Franke sent a letter to Raymon, informing him that he intended to withdraw as counsel because of the non-payment of fees. About two weeks after that, Franke filed a motion to withdraw, in which he explained that he was owed more than $120,000 in legal fees; that, despite the fee arrearage, he had continued to represent Raymon throughout discovery and the hearing on the motion for preliminary injunction so as to avoid "potential prejudice" to Raymon; that, after the ruling installing an interim trustee, he had "overseen the turnover of trustee responsibilities" to the interim trustee and had "undertaken efforts to settle the matter" to no avail; that he had served Raymon with notice, as required by the Maryland rules; and that trial was scheduled "two months from the notice of intention to withdraw."

Raymon filed an opposition, contending that "at this late stage in the matter, having completed discovery and other trial preparation work," and with trial to begin in five weeks, he "would likely sustain irreparable harm and an unfair trial if Counsel were to withdraw." Ultimately, the circuit court denied Franke's withdrawal motion without explanation. Franke filed a motion to stay proceedings so that he could note an interlocutory appeal of the denial of his motion to withdraw, and the Trust beneficiaries did not oppose that motion to stay, which the circuit court thereafter granted.

Held:

Addressing an issue of first impression in Maryland, the Court held that an attorney may file an interlocutory appeal, under the collateral order doctrine, when his motion to withdraw as counsel in a civil case has been denied. Relying upon precedent from several Federal circuit courts of appeals, the Court of Special Appeals reasoned that an order denying an attorney's withdrawal motion satisfies all of the requirements for application of the collateral order doctrine: (1) it conclusively determines the disputed question; (2) it resolves an important issue; (3) it is completely separate from the merits of the action; and (4) it is effectively unreviewable on appeal from a final judgment.

Under the circumstances presented here, the lower court abused its discretion in denying Franke's motion to withdraw. The effect of that denial was to compel Franke to continue representing Raymon, free of charge and with no realistic prospect of payment. In arriving at this conclusion, the Court applied Maryland Rule 2-132, which governs attorneys' motions to withdraw from civil cases, as well as Maryland Rule of Professional Conduct 1.16(b), which states grounds for permissive withdrawal and includes a client's substantial failure to fulfill an obligation to his attorney, as well as whether continued representation would impose "an unreasonable financial burden" on the attorney. Because the Court of Special Appeals determined that there had been an abuse of discretion, it vacated the circuit court's denial of Franke's withdrawal motion and remanded with instructions to grant it.

Hector Butler, Jr. v. S&S Partnership, et al., No. 214, September Term 2011, filed August 31, 2012. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2012/0214s11.pdf

DISCOVERY – SCHEDULING ORDERS

Facts:

On October 9, 2007, Hector Butler, Jr., appellant, by his mother, Yvonne Crosby ("Crosby"), brought suit in the Circuit Court for Baltimore City, against S&S General Partnership ("S&S G.P."), Lee Shpritz ("Shpritz"), Barbara Benjamin ("Benjamin"), S&S Partnership ("S&S"), Stanley and Rhoda Rochkind (the "Rochkinds"), N.B.S., Inc. ("N.B.S."), Dear Management & Construction Co., Inc. ("Dear Management") and Charles Runkles ("Runkles"), (collectively, "appellees"), alleging injuries and damages resulting from lead paint exposure at two residential properties, 2238 Linden Avenue ("Linden Avenue") and 2308 Bryant Avenue ("Bryant Avenue") in Baltimore City, which properties were owned, operated, controlled and/or managed by appellees, either individually or in their capacity as agents/employees. At the conclusion of discovery, each appellee, either individually or together, filed dispositive and/or discovery and/or scheduling order motions, raising several issues, including, *inter alia*, lack of ownership of the properties and/or lack of the presence of lead-based paint during the relevant time periods; lack of evidence of flaking, chipping, or peeling paint to support a Consumer Protection Act ("CPA") claim; that the affidavit of appellant's expert witness, Howard M. Dr. Klein, M.D. ("Dr. Klein"), should be stricken, as there was no factual basis to support his proffered opinion; that capillector screening tests for appellant's blood lead level related to Bryant Avenue should be stricken; and, that reports prepared by Arc Environmental, Inc. ("Arc"), which conducted tests to determine the presence of lead at each property, were not in compliance with the court's scheduling order and, thus, should be stricken. The court refused to strike the screening tests but ruled in favor of appellees on the other issues, including striking the Arc reports with respect to both properties, as appellant did not comply with the scheduling order. The court also struck the affidavit of Dr. Klein on the ground that it violated the scheduling order and Maryland Rule 2-402.

Held: Affirmed.

On appeal, appellant argued that the court erred and/or abused its discretion in granting N.B.S.'s motion for summary judgment. According to appellant, the court's denial of his request to depose Stanley Rochkind, pursuant to Maryland Rule 2-501 (d), after N.B.S. included Rochkind's affidavit as an attachment in support of its amended motion for summary judgment, was an abuse of discretionandthe court erredwhen it failed to "correctly apply the applicable law regarding the definition of 'owner' as that term is defined by the Baltimore City Housing Code." Held that the evidence and theory advanced by appellant based on the indemnity deed of trust

did not meet the definition of owner within the meaning of the housing code. Thus, there was no reasonable basis on which to believe that the deposition of Stanley Rochkind would produce anything relevant.

Appellant next argued that the court erred and/or abused its discretion when it granted the motion to strike the Arc report relating to Bryant Avenue filed by Runkles and joined by the Rochkinds, S&S and N.B.S. According to appellant, he was "deprived . . . of notice and the opportunity to be heard" when the trial court "on its own initiative," questioned appellant on his adherence to Maryland Rule 2-402 (g) (1), and relied on that rule "as the basis for its decisions," although no such motion was before the court. Appellant also asserts that the court erred in deciding the merits of the motion to strike because the scheduling order concerned "Defendants who still own a subject property," and it was undisputed that "none of the [a]ppellees owned the Bryant Avenue property at the time of the testing"; thus, "they were not entitled to notice or opportunity to attend," and there was no scheduling order violation. Held appellant was required by the plain language of the scheduling order to permit the defendants to attend the lead test accompanied by a consultant or expert. Appellant did not do so. The court was within its discretion to fashion an appropriate remedy for appellant's violation.

Appellant next argued that the court erred and/or abused its discretion when it granted Benjamin's motion for summary judgment and ordered that the Arc report relating to Linden Avenue be stricken and inadmissible. Appellant also argued that the court erred in *sua sponte* considering the timeliness and adequacy of appellant's disclosures, in not considering whether appellant was entitled to discovery of the new experts identified by Benjamin, and in opining that the report was not the type that Dr. Klein could rely on. Held court did not err in strikingthe report as to all appellees, including Shpritz and S&S G.P., because the court did not err in concluding that it was clearly in violation of the scheduling order.

Appellant next argued that the court erred and/or abused its discretion when it granted Shpritz and S&S G.P.'s motion for summary judgment. Held appellant produced no evidence that the third floor interior of Linden Avenue contained lead paint during the brief period that S&S G.P. owned the property during appellant's tenancy. Moreover, appellant was not tested for lead exposure until after S&S G.P. sold the property to Benjamin. Appellant's first lead level was reported nearly two months after the property was sold. Thus, in the absence of any evidence to suggest that appellant was injured due to exposure to lead between August 7, 1987 and September 18, 1987, appellant could not create a genuine dispute of fact.

Appellant next argued that the court erred and/or abused its discretion when it granted N.B.S. and S&S's motion for partial summary judgment as to his CPA claims. The purpose of the CPA is to protect consumers from unfair or deceptive trade practices that induces prospective tenants to enter into a lease. Maryland Code ( ), § 13-303 (1) of the Commercial Law Article.*See Richwind Joint Venture v. Brunson*, 335 Md. 661 (1994). Appellant conceded that there was no evidence of deteriorated paint at the inception of the lease at Bryant Avenue. The undisputed facts in the record indicate that the walls were painted and repaired and there was no

peeling or flaking paint at the time appellant entered into the lease and moved into the property. Held there was simply no admissible evidence to support a CPA claim against appellees.

One of appellant's primary arguments on appeal, relating to all appellees, was that the court raised issues *sua sponte*, not raised by the appellees in their motions, and ruled on them. Because appellant moved to strike appellees's replies and attachments, it necessarily raised the issues pertaining to the Dr. Klein affidavits. As a remedy for violation of the scheduling order, the court excluded Dr. Klein. Held a court has the right to enforce it own orders, including scheduling orders, to control its docket and, in appropriate circumstances, raise compliance issues *suasponte*. At the same time, parties are entitled to appropriate notice and opportunity to be heard. In the context of appellant's own motion to strike appellees's replies, the court was entitled to raise the issue of appellant's compliance with the scheduling order because of appellees' assertion that the reason for their replies was the late information supplied by appellant. Consequently, the court did not err.

The remaining issues, including appellant's contention that the court erred and/or abused its discretion in granting the Rochkinds' "clean up" motion for summary judgment, joined by N.B.S., Dear Management and Runkles, necessarily failed because of the conclusion that the court did not abuse its discretion in excluding either of the Arc reports or in excluding Dr. Klein's affidavit. In the absence of evidence to make a *prima facie* case of negligence, the court's granting of the motions for summary judgment was proper.

Kasedaa Samba v. State of Maryland, No. 1895, September Term 2010, filed June 28, 2012. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2012/1895s10.pdf

CRIMINAL LAW & PROCEDURE – JURY INSTRUCTIONS – "ANTI-CSI EFFECT" INSTRUCTION IMPROPER IN FORM AND APPLICATION

Facts:

Appellant, Kasedaa Samba, was driving a vehicle with a passenger in the front seat when he was pulled over by police. The vehicle was subsequently impounded after Officer Martin discovered that the vehicle did not have proper tags, registration, or proof of insurance, and that Samba did not have a driver's license. Officer Martin conducted an inventory search of the vehicle and discovered a revolver, loaded with five bullets, under the driver's seat. Samba was subsequently arrested and charged with committing several offenses.

At trial, Officer Martin testified during cross-examination that nobody took Samba's fingerprints, even though they were available following his arrest, and that no DNA or fingerprinting tests were conducted on either the revolver or bullets. At the close of evidence, the State sought, and the court gave (over Samba's objection) an "anti-CSI effect" jury instruction explaining that the State was not legally required to "utilize any specific investigative technique or scientific test to prove this case." Samba was convicted of transporting a handgun on a roadway and possession of a regulated firearm after conviction of a disqualifying crime, and several motor vehicle-related offenses.

Held:

Weapons convictions reversed; judgments affirmed in all other respects. Case remanded to circuit court for a new trial.

The Court of Special Appeals examined the three "anti-CSI effect" cases previously decided in Maryland: (1) *Evans v. State*, 174 Md. App. 549, *cert. denied*, 400 Md. 648 (2007); (2) *Atkins v. State*, 421 Md. 434 (2011); and (3) *Stabb v. State*, 423 Md. 454 (2011). Applying the lessons from the Court of Appeals in *Atkins* and *Stabb*, the Court held that an "anti-CSI effect" instruction is only appropriate as a curative measure, as when the defense overreaches by distorting the law to suggest an obligation of the State to conduct forensic testing or that the results of such tests would be favorable to the defendant. The Court held that the defense's cross-examination of Officer Martin and statements in closing argument that the State failed "to utilize a well-known, readily available, and superior method of proof," and that DNA and fingerprinting tests should have been conducted as a matter of "fairness" were "legitimate, brief and reasonable." The Court further held that an "anti-CSI effect" instruction that fails to advise

the jury to consider the lack of forensic evidence in evaluating reasonable doubt is improper *per se*. The instruction, as phrased, failed to hold the State to its burden of proof beyond a reasonable doubt. Lastly, the Court held that retrial on the weapons charges was not barred by the Double Jeopardy Clause, because the evidence was sufficient to support convictions on the weapons charges.

Alexander Crippen v. State of Maryland, No. 531, September Term 2011, filed September 4, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/0531s11.pdf

CIVIL PROCEDURE – APPEALS – REVIEWABILITY – NOTICE OF APPEAL

CRIMINAL LAW & PROCEDURE – COUNSEL – EFFECTIVE ASSISTANCE – APPEALS

CRIMINAL LAW & PROCEDURE – APPEALS – REVIEWABILITY – PRESERVATION FOR REVIEW – GENERAL OVERVIEW

Facts:

On June 14, 2010, Crippen was indicted on charges of first-degree murder; attempted first-degree murder; attempted second-degree murder; first-degree assault; second-degree assault; use of a handgun in the commission of a felony or crime of violence; wearing, carrying, and transporting a handgun; and reckless endangerment. The indictment arose from Crippen's alleged involvement in the murder of Reginald Handy, Jr., and the attempted murder of Torrance Davis during a shooting at 503 Laurel Street on May 26, 2010. According to the indictment, Crippen used a handgun during the attack; however, prior to trial, the State received a ballistics report, which indicated that Handy was killed by a .223 caliber rifle bullet fired by a second shooter. Therefore, on December 1, 2010, the State *nol prossed* the first-degree murder charge against Crippen.

Following a two day bench trial, the circuit court convicted Crippen of all charges against him. In reaching its decision, the circuit court relied in large part on the testimony of Torrance Davis that Crippen shot at him. On December 20, 2010, Crippen's attorney filed a motion for a new trial, pursuant to Maryland Rule 4-331, which contained no argument in support of the motion. On April 8, 2011, Crippen was sentenced, and on April 13, 2011, Crippen noted this appeal.

On June 6, 2011, after hiring a new attorney, Crippen filed an amended motion for a new trial, in which he argued that he was entitled to a new trial because, among other reasons, his trial counsel was ineffective. On August 5, 2011, the circuit court held a hearing on Crippen's motion, at which time Crippen's trial counsel testified. On September 20, 2011, the circuit court issued an order denying Crippen's motion for a new trial. Crippen did not file a notice of appeal following the court's denial of his amended motion.

Held: Affirmed.

Crippen failed to file a notice of appeal following the circuit court's denial of his amended motion for a new trial, as required by Maryland Rule 8-202; therefore, to the extent that his

appeal challenges the circuit court's ruling on his amended motion, his appeal is dismissed pursuant to Maryland Rule 8-602(a)(3). To the extent that Crippen's appeal challenges his conviction, the record lacks a sufficient factual basis to permit review of Crippen's claim of ineffective assistance of counsel on direct appeal.

Prince George's County, Maryland, et al. v. Roguell Blue, No. 191, September Term 2011, filed August 30, 2012. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2012/0191s11.pdf

CRIMINAL LAW – HANDGUN PERMITS

Facts:

Prince George's County police were investigating a possible shooting at Irving's Nightclub in Capitol Heights when they encountered appellee, Roguell Blue, standing in the parking lot with a handgun without a permit. Blue identified himself as the nightclub's head of security and provided the police with several weapons certifications and a laminated copy of a state statute that he believed exempted him from the state's handgun permit requirement while he was in the parking lot of Irving's Nightclub. The police disagreed with Blue's interpretation of the statute and arrested him for wearing a gun in public without a permit, in violation of Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article (Crim. Law), § 4-203. The criminal charges against Blue were subsequently *nol prossed*, but Blue filed a complaint against Prince George's County, alleging a violation of his civil rights, false imprisonment, and malicious prosecution. The County was granted summary judgment on the malicious prosecution count, but the jury returned a verdict against the County on the remaining counts and awarded Blue $106,100 in compensatory damages.

Held: Reversed.

The Court of Special Appeals reversed. Crim. Law § 4-203(b)(7) exempts certain supervisory employees from the statute's general prohibition against wearing, carrying, or transporting a handgun without a permit when those employees possess the gun in the course of employment, within the confines of the business establishment, and when authorized by the owner or manager of the business. The Court considered the meaning of "within the confines of the business establishment" and determined that, based on the plain meaning, legislative history, and purpose of the statute, "within the confines" means physically within the building. The Court also reviewed relevant caselaw from other jurisdictions and determined that state and federal courts have interpreted similar home and business exemptions from handgun permits in an equally narrow manner, drawing a clear dividing line between handgun possession inside a building and outside of it. The Court concluded that the statutory exemption therefore does not apply to employees working outside the building, such as in a parking lot. Because Blue was carrying a handgun outside the premises and failed to produce a permit, the County had probable cause to arrest and charge him with violating Crim. Law. § 4-203.

Travon David Davis v. State of Maryland, No. 953, September Term 2011, filed September 4, 2012. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2012/0953s11.pdf

CRIMINAL LAW – PLEADINGS AND MOTIONS – DENIAL OF A MOTION FOR CONTINUANCE

CRIMINAL LAW – TRIAL AND SENTENCING – PRESERVATION OF ISSUES FOR APPEAL PURSUANT TO RULES 4-323 AND 8-131(a)

Facts:

On February 4, 2011, Travon Davis was indicted on one count of first degree burglary and one count of conspiracy to commit first degree burglary. The underlying incident involved a 9-1-1 call, alerting police that two men were attempting to break into a residence. In responding to the call, police pursued and arrested Davis and a juvenile co-perpetrator, Jerquan H. Following their arrests, Davis and Jerquan each provided police with separate recorded statements.

Davis's trial was set for April 27, 2011 and Jerquan's juvenile proceedings were scheduled to begin on June 28, 2011. Davis filed a motion for continuance to allow Jerquan to complete his proceedings and testify at Davis's trial, which was subsequently denied by the circuit court. During Davis's trial, without objection from defense counsel, the audiotape of Jerquan's post-arrest statement was admitted into evidence. A jury found Davis guilty of first degree burglary and acquitted him of conspiracy to commit first degree burglary. After his motion for a new trial was denied, Davis was sentenced to eight years imprisonment, with all but 18 months suspended, and five years probation upon release.

Held: Affirmed.

The Court of Special Appeals held that there was no abuse of discretion by the trial court in denying Davis's motion for continuance. In finding no abuse of discretion, the Court applied the three requirements from *Jackson v. State*, 214 Md. 454 (1957). Under *Jackson*, the party requesting a continuance must show: (1) "that he had a reasonable expectation of securing the evidence of the absent witness or witnesses within some reasonable time"; (2) "that the evidence was competent and material, and he believed that the case could not be fairly tried without it"; and (3) "that he had made diligent and proper efforts to secure the evidence." The Court held that Davis did not meet his burden to show all three *Jackson* criteria, specifically that (1) there was no reasonable expectation that Jerquan would testify within a reasonable time, because Jerquan would not waive his Fifth Amendment privilege and there was no indication that Jerquan would enter a plea of involved to the crimes charged; and (2) the case could be fairly

tried without Jerquan's live testimony, because Jerquan's recorded statement contained substantially all of the information desired by Davis.

Pertaining to the audiotape of Jerquan's post-arrest statement at trial, the Court found that Davis did not object and consented to its introduction, thus failing to preserve his argument on appeal that the introduction of the statement violated his Sixth Amendment right to confrontation. The Court also held that, in the event Davis had timely objected, any error in admission would be harmless.

In addition, the Court held that the evidence was sufficient to support the jury's conclusion that Davis aided and abetted Jerquan in the commission of first degree burglary. The Court found that statements made by Davis and Jerquan, along with testimony from the arresting police officers, were sufficient evidence, if believed by the jury, to establish that Davis (1) knowingly associated with Jerquan with the intent to commit the burglary, (2) was present at the scene of the burglary, and (3) acted to make the crime succeed.

State of Maryland v. Jamar Holt a/k/a Jamal Holt, No. 132, September Term 2012, filed August 29, 2012. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2012/0132s12.pdf

CRIMINAL LAW – FOURTH AMENDMENT – MOTION TO SUPPRESS

Facts:

Jamar Holt, appellee, was charged with assault, firearms violations, and drug conspiracy charges. Appellee filed a motion to suppress evidence obtained as a result of the investigatory stop leading to these charges. The Circuit Court for Baltimore City granted in part and denied in part appellee's motion to suppress. The State filed an interlocutory appeal.

The charges stemmed from an investigatory stop of appellee's vehicle on July 13, 2011. The stop was the result of an ongoing investigation of suspected drug dealer Daniel Blue. On June 29, 2011, Mr. Blue, who was "known [by law enforcement] for distributing raw heroin within Baltimore City," delivered 50 grams of raw heroin to Keith Townsend on a street corner in East Baltimore. The entire transaction was captured on a City Watch, or Blue Light, camera. Mr. Blue was not arrested that day.

On July 13, 2011, Detectives Crystal and McShane conducted surveillance of Mr. Blue when he appeared at the North Avenue courthouse. The detectives placed a GPS tracker on Mr. Blue's vehicle and followed him after he left the North Avenue courthouse. Mr. Blue drove to an apartment complex located in White Marsh, Baltimore County, where he entered the complex and returned moments later with a small Rubbermaid container. Mr. Blue then traveled back into Baltimore City, arriving at Lake Montebello in Northeast Baltimore City.

At Lake Montebello, Mr. Blue met with a man later identified as appellee. The two men got into a Jeep Cherokee parked near the workout station. Appellee drove around the lake once before Mr. Blue got out of the car and walked back to his car. Appellee remained in the Jeep, turned left out of the park, and drove away.

The detectives followed appellee in the Jeep for several minutes and then made a stop. DetectiveMcShane approached the Jeep from the front and repeatedly stated, "Police, let me see your hands." Detective Crystal approached from the rear driver's side. According to his written statement, Detective Crystal initially saw appellee's hands on the steering wheel, but then appellee lowered his right hand out of sight and quickly raised it to point a handgun directly at Detective McShane. According to Detective McShane's written statement, appellee then started driving the Jeep directly towards Detective McShane, who was able to move out of the vehicle's path.

The circuit court determined that the stop was illegal. With respect to a remedy, the circuit court ultimately determined that any testimony of an assault based on appellee pointing a firearm at Detective McShane would be suppressed, but that testimony of an assault based on appellee driving his Jeep toward Detective McShane would not.

Held: Reversed denial of motion to suppress.

Based on the totality of the circumstances, the stop of appellee's vehicle on July 13, 2011 was supported by articulable reasonable suspicion, as required by *Terry v. Ohio*, 392 U.S. 1 (1968). In addition, assuming the stop was not supported by articulable reasonable suspicion, any new crimes committed by appellee immediately following the stop, such as possessing, raising, and pointing the firearm at Detective McShane and accelerating his vehicle towards Detective McShane, purged the taint from the unlawful stop; therefore, the exclusionary rule did not apply.

James Allen Kulbicki v. State of Maryland, No. 2940, September Term 2007, filed September 26, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/2940s07.pdf

CRIMINAL LAW & PROCEDURE – POST-CONVICTION PROCEEDINGS – GENERAL OVERVIEW

CRIMINAL LAW & PROCEDURE – CRIMINAL OFFENSES – MISCELLANEOUS OFFENSES – PERJURY

Facts:

Following a jury trial in the Circuit Court for Baltimore County, appellant, James Kulbicki, was convicted of first degree murder on October 20, 1993. On December 1, 1994, this Court reversed and remanded for a new trial. *Kulbicki v. State*, 102 Md. App. 376 (1994). On November 22, 1995, Kulbicki was again convicted, by a jury, of murder, as well as a related handgun charge. He was sentenced to life in prison without parole. On December 20, 1996, this Court affirmed Kulbicki's convictions, and on April 9, 1997, the Court of Appeals denied Kulbicki's petition for writ of certiorari. *Kulbicki v. State*, 345 Md. 236 (1997).

On or about March 17, 1997, while his request for certiorari review was pending, Kulbicki filed a petition for postconviction relief. After filing several amendments and repeatedly seeking postponements of his postconviction proceedings, Kulbicki filed an amended petition for postconviction relief on April 4, 2006. In relevant part, Kulbicki argued that during his trial, Ernest Peele, an agent with the Federal Bureau of Investigation, testified extensively about Comparative Bullet-Lead Analysis ("CBLA"), which had since been "exposed as nothing more than a series of speculative and exaggerated claims." Relying on *Clemons v. State*, 392 Md. 339, 372 (2006), a case in which the Court of Appeals held that the conclusory aspects of CBLA are not admissible under the *Frye-Reed* test, Kulbicki argued that "the introduction of improper ballistics and firearms evidence in this case is sufficient to warrant reversal of conviction." Next, Kulbicki argued that Joseph Kopera, an examiner with the Maryland State Police Firearms Unit who was presented as an expert in the field of firearms identification, committed perjury at the trial "when he testified that he had attended the University of Maryland and the Rochester Institute of Technology," and when he "falsified documents in order to conceal and protect his lies." Kulbicki also alleged that Kopera's testimony "was inconsistent with his own reports and bench notes." Furthermore, Kulbicki argued that trial counsel's failure to preserve issues for appeal constituted ineffective assistance of counsel.

Following a five-day hearing in April 2007, the circuit court denied postconviction relief through an opinion and order dated January 2, 2008. Kulbicki then filed an application for leave to appeal the denial of postconviction relief, which this Court granted on March 9, 2010. On appeal, Kulbicki argued that: (1) the use of unreliable evidence, such as CBLA, is a violation of

due process cognizable under the Uniform Postconviction Procedure Act; (2) the State's use of "perjured, false, and misleading expert ballistics testimony" denied him his constitutional right to a fair trial; and (3) his trial counsel provided ineffective assistance.

Held: Affirmed.

Where expert opinion rested on assumptions, some of which were not supported by scientific evidence, the testimony would have been fully discredited had the defense recognized those assumptions and tested their foundations on cross-examination. Therefore, here, the evidence was not so arbitrary that the factfinder and the adversary system were not competent to uncover, recognize, and take due account of its shortcomings, and the testimony's admission at trial did not violate due process.

With regard to the issue of perjury, the Fourteenth Amendment to the United States Constitution prohibits the use of false evidence, known to be such by representatives of the State, including not only prosecutors but also law enforcement officers and other state agents testifying as fact or expert witnesses. The knowing and intentional use of false testimony violates due process when *such testimony* is material to the result of the case.

Finally, we have no reason to disturb the trial court's ruling that counsel acted reasonably where counsel chose to pursue a certain trial strategy, particularly where one of them had seen the evidence "play out once before at trial.

Bobby Rydell Lloyd, II v. State of Maryland, No. 1144, September Term 2011, filed September 4, 2012. Opinion by Rodowsky, J.

http://mdcourts.gov/opinions/cosa/2012/1144s11.pdf

SPEEDY TRIAL – PRAYER FOR JURY TRIAL – REMOVAL FROM DISTRICT COURT TO CIRCUIT COURT – PREJUDICE – BALANCING

Facts:

Lloyd was convicted of second degree assault on a not guilty statement of facts. He was arrested on October 12, 2010. A total period of eight months and fifteen days elapsed between Lloyd's arrest and his trial in the circuit court. Before his jury trial in the circuit court, Lloyd prayed a jury trial on the last possible day. After removal to the circuit court, Lloyd's trial was postponed for good cause because the single Circuit Court for Garrett County jury courtroom was needed to try an older case.

The Court addressed the following issue:

> Was Lloyd denied his federal and state constitutional right to a speedy trial?

Held: Affirmed.

The Court first noted that criminal defendants are guaranteed the right to a speedy trial by the Sixth Amendment of the United States Constitutions and by Article 21 of the Maryland Declaration of Rights. The Court utilizes a balancing test to determine if an individual's right ti a speedy trial has been violated. There are four factors to analyze: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant.

The Court discussed the length of delay. It stated that, measured from the date of the defendant's arrest, this Court has consistently held that a delay of more than one year and fourteen days is presumptively prejudicial and triggers the balancing of the remaining factors. This Court has also held that a delay of under six months was not of constitutional dimension. The nature of the charges levied also affects of permissible delay: the more complex and serious the crime, the longer a delay might be tolerated. Here, the Court concluded that because the eight months and fifteen day delay was more than six months but less than the presumptively prejudicial one year and fourteen day mark, it might be of constitutional dimension and thus balancing the remaining factors was required.

The Court then turned to the reason for the delay. It first noted that different weights are assigned to different reasons justifying the delay: a deliberate attempt to delay the trial in order to hamper the defense is weighed heavily against the government, whereas a more neutral reason such as negligence or overcrowded courts should be weighted less heavily against the government. The Court then discussed the reasons for delay in the case before it. The period between Lloyd's arrest and the day which he could have been tried in the District Court but instead prayed a jury trial, was neutral and not charged to either party because that period is necessary for the orderly administration of justice. The next period, commencing with Lloyd's removal of the case to circuit court and ending with the first trial date in the circuit court were chargeable to Lloyd. Citing *dicta* in *State v. Gee*, 298 Md. 565, 471 A.2d 712 (1984), where the Court of Appeals stated that "if the defendant removes the trial to a circuit court by praying a trial by jury, any normal delay in bringing him to trial by reason of the request would be, of course, chargeable to him." Turning its attention to the next period of delay, from the time of Lloyd's first scheduled trial date in the circuit court to the ultimate disposition of the charges, the Court concluded that this weighed lightly against the State.

The Court then addressed the defendant's assertion of his right. The Court stated that the defendant's assertion of his right is entitled to strong evidentiary weight when determining whether the defendant was deprived of his right to a speedy trial. Here, Lloyd made a perfunctory motion for a speedy trial in January 2011 as part of an omnibus motion in the circuit court. There was no further motion for a speedy trial until June 27, 2011, before the circuit court accepted the parties' plea bargains. Lloyd did not object when the scheduled trial was postponed. The Court concluded that this was little more than the avoidance of waiver.

The Court finally addressed the fourth factor: prejudice. Lloyd asserted that because he was denied bail throughout his pretrial incarceration, he was oppressively incarcerated and unable to prepare his defense. After reviewing the pertinent facts to the bail review hearings in this case, and the others with which Lloyd was simultaneously charged, the Court concluded that the circuit court properly weighed public safety, including particularly the safety of the victim, against Lloyd's interest in pretrial release when it twice denied Lloyd's bail. The Court also determined that Lloyd's decision to pray a jury trial resulted in fifty percent of the pretrial confinement of which he complained. The Court concluded that Lloyd's pretrial detention was not oppressive. Lloyd also asserted prejudice by the delay of is trial because a witness he wanted to call to testify on his behalf at his originally scheduled trial date in May 2011 was unable to be present at trial due to deployment. The witness was not an eyewitness to the assault or property damage, he was not among some fourteen persons who had been subpoenaed for trial, Lloyd had not sought a continuance when the witness became unavailable, and the first time that the witness's absence was advanced as a cause of prejudice was at the June 27, 2011 hearing on Lloyd's motion to dismiss. The Court concluded that Lloyd failed to show he was prejudiced by the witness's absence.

The Court ultimately concluded that, on balance, the factors did not weigh in Lloyd's favor and that he was not denied a speedy trial.

TJ Sharocko Jackson v. State of Maryland, No. 1159, September Term 2011, filed September 5, 2012. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2012/1159s11.pdf

EVIDENCE – HEARSAY – EXCEPTIONS – STATEMENT AGAINST PENAL INTEREST

EVIDENCE – HEARSAY – EXCEPTIONS – STATEMENT AGAINST PENAL INTEREST – CORROBORATION AND TRUSTWORTHINESS

EVIDENCE – HEARSAY – EXCEPTIONS – STATEMENT AGAINST PENAL INTEREST – EXCULPATORY & INCULPATORY STATEMENTS

Facts:

Appellant, TJ Sharocko Jackson, was charged with murder and related charges arising out a home invasion, in which he and another individual, Jamar Jones, allegedly broke into an apartment to steal drugs. A day after the alleged break-in, appellant took Mr. Jones to appellant's defense counsel's office. While there, Mr. Jones gave a written, signed statement to defense counsel, which detailed the events that led to the shooting and indicated that appellant was not present. Mr. Jones and appellant subsequently were indicted for murder.

Prior to trial, but after Mr. Jones pled guilty in his severed trial, the State filed a motion in limine to preclude the admission of Mr. Jones's statement. Appellant argued that the statement was admissible as a statement against penal interest, pursuant to Maryland Rule 5-804(b)(3). For purposes of the motion, Mr. Jones was considered "unavailable," since his counsel indicated that Mr. Jones would refuse to testify at appellant's trial. The circuit court reviewed the statement and heard *in camera* testimony from Mr. Jones and a law clerk for appellant's defense counsel. Mr. Jones stated that he "made [the statement] up" and implied that he gave the statement because he did not have any place to stay, other than with appellant. The law clerk opined that Mr. Jones appreciated the implications of his statement and that he gave it voluntarily. The court ruled that the statement was not truly inculpatory because Mr. Jones included references to self-defense, that the statement's mentioning of appellant's absence was collateral to the totality of the statement, and that there were not adequate guarantees of trustworthiness or corroboration for the statement to be admissible. Appellant was later convicted of a majority of the charged crimes.

Held: Affirmed.

The Court recited Maryland Rule 5-804(b)(3) and the purpose of requiring corroborating circumstances that indicate the trustworthiness of a statement against penal interest offered in a criminal case. While Mr. Jones was "unavailable" under the rule, it was a unclear whether Mr.

Jones's statement was truly inculpatory. Mr. Jones admitted being at the scene of a home invasion, being in close proximity to illegal drugs, and to carrying and discharging a handgun in a residence. However, Mr. Jones indicated that he fired in self-defense. Nevertheless, for the sake of argument, and because it did not affect the court's holding, the court accepted appellant's contention that Mr. Jones's statement was against his penal interest.

The Court agreed with the circuit court's determination that Mr. Jones's statement was not adequately corroborated or trustworthy. Specifically, Mr. Jones's self-defense claim weighed against the reliability. The statement also indicated that another third party committed the crimes, weighing against trustworthiness. Rather than presenting "particularized guarantees of trustworthiness" as required by Maryland Rule 5-804(b)(3), the statement contained the exact opposite. Appellant brought Mr. Jones to appellant's defense counsel's office a day after the alleged incident and suggested that Mr. Jones sought to make a statement. Mr. Jones stated that he did not have a place to live, other than with appellant. Though otherwise unsubstantiated, Mr. Jones's counsel indicated at the hearing on the State's motion in limine that Mr. Jones "was terrified" of appellant and would not testify against him. At the hearing, Mr. Jones refused to state whether he gave the statement to protect appellant, instead testifying that the statement to appellant's defense counsel was "not true" and that he "made up" the statement. Finally, the statement was clearly inconsistent with Mr. Jones's prior guilty plea, in which he inculpated appellant. Therefore, the circuit court complied with Maryland Rule 5-804(b)(3) and the interpreting case law when it excluded Mr. Jones's statement to appellant's defense counsel.

Daniel W. Shelton v. State of Maryland, No. 1240, September Term 2011, filed September 5, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/1240s11.pdf

EVIDENCE – HEARSAY – EXEMPTIONS – STATEMENTS BY CO-CONSPIRATORS – STATEMENTS FURTHERING CONSPIRACY

CRIMINAL LAW & PROCEDURE – TRIALS – CLOSING ARGUMENTS – FAIR COMMENT & FAIR RESPONSE

Facts:

On October 27, 2012, the Montgomery County Police Department's Tactical Narcotics Unit carried out an undercover operation to purchase crack cocaine. The target of the operation, Nicole Hosley, along with Darrin Duffin, Hosley's supplier, met Sgt. Carafano, the undercover purchaser, in a grocery store parking lot. When they arrived, Duffin instructed Sgt. Carafano to drive them to the Maryvale Market so Duffin could obtain the crack cocaine from his supplier. Duffin insisted that Sgt. Carafano pay for the drugs and then wait in the car while Duffin retrieved them. Sgt. Carafano indicated that he was uncomfortable with this arrangement, but agreed to it when Duffin offered to leave his wallet as collateral. When they arrived at the Maryvale Market, Duffin stepped out of the car to meet with his supplier. While Hosley and Sgt. Carafano waited in the car, Hosley made several statements that tended to identify appellant, Daniel Shelton, as Duffin's supplier.

At trial, Shelton objected to the admission of Hosley's statements on the grounds that they were hearsay; however, the circuit court admitted the statements under the co-conspirator exception to the hearsay rule. In its closing argument, the State referenced portions of Duffin's testimony regarding statements the prosecutors made when Duffin asked about the consequences if he refused to testify. The circuit court overruled Shelton's objection to the prosecutor's statements, and on February 18, 2011, a jury convicted Shelton of one count of distribution of a controlled dangerous substance, one count of conspiracy to distribute a controlled dangerous substance, and one count of second-degree assault. This appeal followed.

Held: Affirmed.

The circuit court did not err when it ruled that Hosley's statements to Sgt. Carafano were in furtherance of the conspiracy to sell drugs, and therefore, satisfied the co-conspirator exception to the hearsay rule. A co-conspirator's statements to a customer, made during a transaction for the sale of drugs, that reassures the customer or assuages the customer's concerns about dealing with the conspirators furthers the conspiracy bringing those statements within the exception. The circuit court also did not abuse its discretion when it overruled Shelton's objection to the

prosecutor's characterization of Duffin's testimony regarding the State's efforts to procure his testimony at trial. A prosecutor does not exceed the limits of proper argument during her closing statement where she chooses to discuss some, but not all, of a witness's testimony.

Adam C. Gutloff v. State of Maryland, No. 207, September Term 2011, filed August 31, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/0207s11.pdf

REQUIRED ADVISEMENTS FOR WAIVER OF COUNSEL UNDER RULE 4-215 – FAILURE TO GIVE ADVISEMENTS – EXCUSE FOR FAILURE TO ADVISE BASED ON CONDUCT OF DEFENDANT – FORFEITURE OF RIGHT TO COUNSEL BY DEFENDANT BY EGREGIOUS MISCONDUCT.

Facts:

The appellant was charged with drug offenses. He appeared in district court without counsel and requested a jury trial. The case was transferred to circuit court, and the appellant appeared, again without counsel. The circuit court did not comply with the requirements of Rule 4-215 to advise the appellant, in order to obtain a valid waiver of appellant's right to counsel. Throughout the proceedings, the appellant persisted in arguing that the court did not have jurisdiction over him because he is a member of the Moorish Nation, and therefore is not subject to the laws of this State. The appellant continued to press that argument long after the court ruled against him on it.

The State concedes that the advisements required by Rule 4-215 were not given, but asserts that the appellant's conduct in court either thwarted the court from giving the advisements, or amounted to a forfeiture of the right to counsel.

Held: Reversed.

The appellant's conduct did not thwart the court from giving the required advisements. For conduct of a defendant to thwart the court from giving the advisements, the record must show that the court was attempting to give the advisements and that the defendant engaged in disruptive and obstreperous conduct of such a magnitude that the court could not comply with its duty to advise under Rule 4-215, or that reduced the proceedings to a mockery. The record does not show that the court attempted to give all the advisements. The appellant's conduct in repeatedly raising his frivolous argument was irritating, but it did not disrupt the proceedings so that the court could not give the advisements.

The appellants conduct did not amount to a forfeiture of his right to counsel. For a defendant to forfeit his right to counsel by conduct, he must have engaged in extreme and egregious misconduct that imperiled the proceedings, such as threatening or causing harm to others. The appellant did not harm or threaten anyone, imperil the proceedings, or engage in any egregious misconduct.

Janet Kalman v. Jose Fuste, No. 1617, September Term 2011, filed September 5, 2012. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2012/1617s11.pdf

MARYLAND UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT – FAMILY LAW § 9.5-202 – CONTINUING EXCLUSIVE JURISDICTION – FAMILY LAW § 9.5-204 – TEMPORARY EMERGENCY JURISDICTION

Facts:

The parties were married in 1997 and resided in Maryland until appellant became pregnant with their child. At that point the parties separated and appellant moved to Florida, where she gave birth to the parties' daughter. The parties finalized their divorce in Maryland, agreeing that appellant would be the child's primary physical custodian and that appellee would retain the right to liberal visitation. Before the events giving rise to this case, the child spent only one week of her life in Maryland. In August, 2011, the child was with appellee's parents when Florida police arrested appellant for shoplifting and trafficking of prescription drugs. Appellant was held overnight and released on her own recognizance. When appellee learned of appellant's arrest, he visited the child and, without informing appellant, brought the child to Maryland. The next day appellee filed an emergency motion for custody in the Circuit Court for Montgomery County. Appellee's affidavit stated his belief that appellant was using and possibly selling drugs and would abscond with Alexis to Switzerland, where appellant is also a citizen. Appellee also averred that appellant had been terminated from her employment and could lose her license to practice nursing, and that she was residing with her sister, who has two pending theft charges, and with "a live-in boyfriend who has a prior drug conviction." Appellee stated that appellant's "arrests are a drastic change in [appellant]'s behavior" and that they made him "very concerned for the safety and well-being of my child Alexis." The parties testified at an emergency hearing, and at its conclusion the court found that an emergency existed and awarded appellee temporary sole legal and physical custody, with the child's grandparents and appellant to have reasonable visitation, all pending the outcome of full custody proceedings. The court also directed the parties to file motions to modify physical custody in the Circuit Court for Montgomery County or in Florida, which they did while the present appeal was pending.

Held: Vacated and remanded for further proceedings.

Under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act, the circuit court retains continuing, exclusive jurisdiction over an existing custody dispute until it finds that the requisites of FL § 9.5-202 were not satisfied by the facts of the case. The trial court erred when it presumed that it retained jurisdiction simply because of the parties' history of litigation in Maryland.

The circuit court might also have exercised temporary emergency jurisdiction under FL § 9.5-204, which requires that "the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." The uniform drafters' intent was to reserve emergency jurisdiction for "extraordinary circumstances." "Abuse" in FL § 9.5-204 should be reconciled with existing statutory definitions of that word. In both the Family Law and Criminal Law Articles, "abuse" requires actual physical or mental harm or injury, or a substantial risk thereof. In Maryland, "mistreatment" was the statutory predecessor of "abuse," and the two words are commonly considered synonyms. The UCCJEA drafters omitted the word "neglect" for reasons not applicable in Maryland, where the term is well-defined in statutes and the only difference between "abuse" and "neglect" is action and inaction. In order to eliminate the redundancy of "abuse" and "mistreatment" and to preserve the drafters' intent while reconciling the UCCJEA with existing Maryland Statutes, "mistreatment" should be interpreted as equivalent to "neglect." Emergency jurisdiction under FL § 9.5-204 therefore requires actual physical or mental harm or injury, or a substantial risk of physical or mental harm or injury. Because the facts of this case did not establish such harm or injury, the case was remanded so that the circuit court could determine whether it retained continuing, exclusive jurisdiction under FL § 9.5-202, in conference with the Florida court.

H. Jeffrey Schwartz, et al. v. Arvia Johnson, No. 2556, September Term 2009, filed June 27, 2012. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2012/2556s09.pdf

MEDICAL MALPRACTICE – AVAILABILITY OF ASSUMPTION OF RISK DEFENSE WHERE LACK OF INFORMED CONSENT NOT ALLEGED – ADMISSIBILITY OF EVIDENCE OF INFORMED CONSENT

Facts:

Johnson sued appellant, H. Jeffrey Schwartz, M.D., for negligently performing a colonoscopy and appellant, H. Jeffrey Schwartz, M.D., P.A., for vicarious liability. Prior to trial, Johnson filed a *motion in limine* to bar the introduction of informed consent evidence and the defense of assumption of the risk, which the circuit court granted. During the five-day jury trial, appellants objected to the testimony of Johnson's expert on a medical opinion that had not been disclosed in discovery. Appellants also made a motion to strike a juror for bias because he commented on the case and another motion to strike the same juror for juror misconduct, because he fell asleep; the court denied both motions. The jury found that Dr. Schwartz's negligence caused Johnson's injuries and awarded Johnson past medical expenses in the amount of $23,791.19 and non-economic damages in the amount of $650,000.00.

Held: Affirmed.

After reviewing several relevant cases from other jurisdictions, the Court of Special Appeals held that, except in cases involving a refusal or delay in undergoing recommended treatment or the pursuit of unconventional medical treatment, a healthcare provider cannot invoke the affirmative defense of assumption of risk in a medical malpractice claim brought by his or her patient where a breach of informed consent has not been alleged. In this case, the Court concluded that the defense of assumption of risk was not applicable, because (1) Johnson did not refuse recommended treatment or seek unconventional treatment, (2) assumption of the risk was only a defense to breach of informed consent, which Johnson did not assert, and (3) Johnson did not assume the risk of Dr. Schwartz acting negligently in the performance of the colonoscopy.

The Court then held that the trial court correctly excluded evidence of informed consent. The Court reasoned that claims of medical malpractice and breach of informed consent are separate, disparate theories of liability, and thus evidence of informed consent was irrelevant. The Court also opined that the introduction of evidence of informed consent would be prejudicial, as such evidence carried with it the risk of misuse by the jury to find a waiver.

The Court also concluded that the trial court did not err in allowing Johnson's expert to opine that Dr. Schwartz was negligent if the injury occurred as Dr. Schwartz claimed, without prior

disclosure, because (1) the opinion was admitted as rebuttal evidence, (2) Maryland Rule 2-401(e) did not require supplementing a deposition seeking disclosure of the expert's opinion, because an interrogatory did not ask the question, and (3) the expert was not asked about this opinion at his deposition.

Finally, the Court held that the trial court did not err in failing to excuse a juror for commenting on the case or sleeping, because nothing showed (1) a comment about the case by the juror to other jurors before deliberations, (2) prejudice from the comment, or (3) prejudice from sleeping, absent evidence of how long he slept or testimony introduced at the time.

Bryan C. Hinebaugh v. The Garrett County Memorial Hospital, et al., No. 331, September Term 2011, filed August 31, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/0331s11.pdf

MEDICAL MALPRACTICE – CERTIFICATE OF QUALIFIED EXPERT – STATUTORY REQUIREMENT THAT HEALTH CARE PROVIDER WHO SIGNS A CERTIFICATE OF QUALIFIED EXPERT BE BOARD CERTIFIED IN THE SAME OR A RELATED SPECIALTY AS A DEFENDANT WHO IS BOARD CERTIFIED.

Facts:

The appellant was hit in the face and sought treatment from a family medicine doctor who ordered x-rays. The x-rays were performed at a local hospital and were evaluated by two radiologists and by the family medical doctor. All three doctors interpreted the x-rays not to show any fracture to the appellant's facial bones. The appellant continued to experience pain, and a few weeks later a CT scan was performed that revealed fractures to the appellant's facial bones. According to the appellant, the treatment he had to undergo to repair the facial fractures was more extensive than it would have been had the fractures been diagnosed when he first saw the family medical doctor and had the x-rays.

The appellant sued the family medical doctor, the radiologists, and the local hospital alleging medical malpractice. He submitted a certificate of qualified expert and report signed by a dentist who is board certified as an Oral and Maxillofacial Surgeon ("OMS"). The OMS opined that the appellees had breached the standard of care by failing to perform a CT scan.

The appellees filed motions to strike the appellant's certificate of qualified expert on the ground that the OMS was not board certified in the same or a related specialty as the appellees, and therefore was precluded from providing a certificate by statute. The appellees also argued that neither exception to the board certified in the same or a related specialty requirement applied. The circuit court granted the motion to strike, and dismissed the case without prejudice.

Held: Affirmed.

In *DeMuth v. Strong*, this Court explained the phrase "related specialty," as used in the statute that requires that a certifying or testifying expert witness be board certified in the same or related specialty as the defendant health care provider. This Court held that "related specialty" means that there is an overlap in treatment or procedures within the specialties, and therefore an overlap of knowledge of treatment or procedures among practitioners experienced in the fields or practicing in the specialties, and the treatment or procedure in which the overlap exists is at issue in the case.

An OMS is a highly specialized dentist whose practice focuses solely upon the diagnosis and treatment of facial fractures. Family medical doctors are generalists, who evaluate and treat patients for all aspects of medical problems. In the same way, radiologists perform studies on all parts of the body. The specialty of OMS and the specialties of family medicine and radiology do not overlap with respect to the front line diagnosis of facial fractures.

Shelia Murphy, Personal Representative of the Estate of Dorothy Mae Urban v. Jeremy K. Fishman, et al., No. 786, September Term 2011, filed September 4, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/0786s11.pdf

REAL PROPERTY – FORECLOSURE – MOTION TO STAY AND DISMISS – *LIS PENDENS* – NOTICE – CONSTRUCTIVE NOTICE – BONA FIDE PURCHASER

Facts:

This case involves the Circuit Court for Anne Arundel County's denial of a Motion to Stay and Dismiss a foreclosure action filed by appellant, Shelia Murphy, Personal Representative of the Estate of Dorothy Mae Urban. On December 1, 2010, appellees, Jeremy K. Fishman, Samuel D. Williamowsky, and Erica T. Davis Ruth, Substitute Trustees, filed an Order to Docket a foreclosure action for real property located at 229 Dale Road, Pasadena, Maryland ("the Property"), naming appellant and Robert Street, Sr., Urban's son, as defendants. In the Order to Docket, appellees stated that the foreclosure was based on a Deed of Trust that Street executed on February 18, 2008, in closing on a loan of $91,350 from 1st Chesapeake Home Mortgage, LLC ("the Street Deed of Trust"). The loan transaction was a refinance of the Property by Street, the mortgagor, of an existing mortgage in Urban's name. In the Order to Docket, appellees alleged that the mortgage had been in default since May 1, 2010.

On December 20, 2010, appellant filed a Motion to Stay and Dismiss the foreclosure action, alleging that Urban's Estate ("the Estate") was the Property's lawful owner. Appellant asserted that Street had no ownership interest in the Property because, in a separate civil action ("the Estate Lawsuit"), the circuit court allegedly invalidated an earlier May 2007 deed from Urban to Street and imposed a constructive trust over the Property. Appellant argued that the complaint filed in the Estate Lawsuit created a *lis pendens*, and that the lien upon which appellees sought to foreclose was invalid. In support of the Motion to Stay and Dismiss, appellant attached copies of documents that had been filed in the Estate Lawsuit, alleging the following: (1) on May 30, 2007, Urban, as grantor, conveyed the Property to Street, as grantee, by deed for zero monetary consideration ("the 2007 Deed"); (2) on May 31, 2007, the 2007 Deed was recorded; (3) on June 5, 2007, Urban died; and (4) on June 11, 2007, the Estate was opened, appointing appellant as its personal representative.

On January 3, 2008, appellant filed a Complaint to Nullify or Declare the 2007 Deed Null and Void in the Estate Lawsuit in the circuit court, seeking to invalidate the 2007 deed. In the complaint, appellant sought to: (1) impose a constructive trust on the Property, (2) have the Property returned to the Estate to be distributed according to Urban's will, and (3) nullify and void the 2007 Deed on the grounds of breach of confidential relationship, lack of capacity, lack of due execution, undue influence, and fraud. On February 18, 2008, Street obtained the Street

Deed of Trust from 1st Chesapeake Home Mortgage. On March 15, 2010, the circuit court issued an Order in the Estate Lawsuit ("the Estate Order"), ordering the imposition of a constructive trust on the Property and ordering that appellant be appointed Trustee of the constructive trust in order to transfer the Property to the Estate. On May 25, 2010, appellant, by deed, conveyed the Property to the Estate ("the 2010 Deed"). On June 1, 2010, the 2010 Deed was recorded in the Land Records of Anne Arundel County.

On January 7, 2011, in the foreclosure action, appellees filed an Opposition to the Motion to Stay and Dismiss, contending that, as to the merits, appellant misconstrued the effect of the Estate Order and that the Estate Order did not invalidate the 2007 Deed or the Street Deed of Trust. On May 16, 2011, the circuit court held a hearing on the Motion to Stay and Dismiss and Opposition. On May 19, 2011, the circuit court issued an Order and Opinion denying the Motion to Stay and Dismiss because the "mortgagee bank's actual notice of the pending litigation or bad faith are disputed material fact[s.]"

Held: Reversed.

The Court of Special Appeals reversed and remanded with instructions to grant the motion to dismiss. A bona fide purchaser is one who gives value for the property, deals in good faith with respect to the purchase, and is without notice or knowledge of any infirmity in the title of his or her seller or mortgagor.

A lender who secures its interest with a mortgage or deed of trust may be entitled to the protections available to bona fide purchasers for value, where the lender is without notice of any alleged infirmity in the title of the mortgagor.

Where a lender has constructive notice–through the doctrine of *lis pendens* pursuant to Maryland Rule 12-102–of a pending lawsuit involving a dispute as to ownership of property at the time the lender acquires an interest in the property, the lender is not entitled to the protection of a bona fide purchaser and not entitled to foreclose on the property.

The question of whether a lender has notice of an existing interest in property is not confined to whether the lender had actual notice, but rather is much broader, and encompasses the constructive notice provided by *lis pendens*.

Lis pendens is a common law doctrine meaning "lawsuit pending." Two distinct definitions and purposes of the doctrine are: "[t]he jurisdiction, power or control acquired by a court over property while a legal action is pending" and "[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome."

Pursuant to Maryland Rule 12-102(a), *lis pendens* applies to an action filed in a trial court that affects title to real property located within the State.

Pursuant to Maryland Rule 12-102(b), "[i]n an action to which the doctrine of lis pendens applies, the filing of the complaint is constructive notice of the lis pendens as to real property in the county in which the complaint is filed."

Constructive notice is defined as "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit; notice presumed by law to have been acquired by a person and thus imputed to that person."

Under the doctrine of *lis pendens*, a purchaser of the subject-matter property from either party during the pendency of the lawsuit takes the property subject to the rights of the other party involved in the controversy.

A lender who acquires an interest in property where the property is subject to an action in which the doctrine of *lis pendens* applies has constructive notice of the action pursuant to Maryland Rule 12-102, and is not entitled to bona fide purchaser status.

Flora E. Lipitz, et al. v. William A. Hurwitz, No. 351, September Term 2011, filed September 4, 2012. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2012/0351s11.pdf

MARYLAND HOMEOWNERS ASSOCIATION ACT – INTERPRETATION OF PHRASE "MEMBER OF THE PUBLIC"

MARYLAND HOMEOWNERS ASSOCIATION ACT – EQUITABLE ESTOPPEL

MARYLAND HOMEOWNERS ASSOCIATION ACT – GOOD FAITH AND FAIR DEALING

Facts:

Hurwitz, who owned property in the same residential subdivision as the Lipitzes, entered into a contract with the Lipitzes to buy the Lipitz home. Lots in the subdivision are subject to certain covenants and homeowners association assessments, and, therefore, the Maryland Homeowners Association Act, MD. CODE ANN. REAL PROP. §§ 11B-101 *et seq*., requires that certain disclosures be made to a buyer by the seller upon the sale of the home. The initial version of the sale contract, signed by Hurwitz but not the Lipitzes, contained an addenda which contained the required disclosures. However, further negotiations between realtors resulted in a striking of the addenda from the contract, thereby removing much of the information a buyer is entitled to receive under the Act. The disclosures were, ultimately, never provided to Hurwitz.

One day before settlement, Hurwitz informed the Lipitzes that he was cancelling the contract. In response, the Lipitzes sued Hurwitz for specific performance and breach of contract. The circuit court granted Hurwitz's motion to dismiss, concluding that Hurwitz could cancel the contract because the required disclosures had not been provided and the Act permitted a purchaser to revoke a contract under those circumstances..

On appeal, the parties disputed the meaning of the term "member of the public," as used in the Act, whether application of the Act to the instant case yielded an absurd result, whether the Liptizes could use the doctrine of equitable estoppel to avoid the disclosure requirements of the Act, and whether Hurwitz violated the doctrine of good faith and fair dealing in cancelling the sales contract.

Held: Affirmed.

The Court concluded that the phrase "member of the public" includes a buyer who owns a lot within the same subdivision as the seller, observing that simply because a buyer may have access to the information required under the Act does not mean that a seller is relieved from his or her statutory obligation to provide this information to the buyer. The Court determined that it is not

absurd to conclude that the General Assembly intended the phrase "member of the public" to include a buyer who already owned property within the seller's subdivision because there were sound reasons to require a seller to provide disclosures to such a buyer, namely, *inter alia*: (1) if the buyer did not obtain the covenants when purchasing his or her previous home; (2) if the buyer did not use the previous lot for residential purposes; or (3) if the covenants and disclosures changed since the buyer last bought his or her previous home. Further, the Court determined that the Lipitzes did not reasonably rely on a communication from the buyer, thereby defeating their claim for equitable estoppel. Lastly, the Court concluded that there was no violation of the implied duty of good faith and fair dealing because 1) it could not be said that Hurwitz prevented the Lipitzes from performing their obligations under the contract, 2) the Lipitzes, of their own accord, failed to provide the required disclosures under the Act, and 3) the grounds for Hurwitz's cancellation of the contract were set out clearly in the Act, which both parties, represented by real estate agents, should have been keenly aware of.

Arthur E. Selnick Associates, Inc. v. Howard County Maryland, et al., No. 1418, September Term 2010, filed August 30, 2012. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2012/1418s10.pdf

REAL PROPERTY – INTERESTS – POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY – STATUTORY THIRTY-YEAR LIMITATION

REAL PROPERTY – DEEDS – INTERPRETATION

REAL PROPERTY – DEEDS – AMBIGUITY

Facts:

Appellant, Arthur E. Selnick Associates, Inc. ("Selnick"), purchased property in Howard County in 1974. Prior to that, Selnick's predecessor in title deeded a temporary easement to Howard County over a portion of the land to serve as an entrance to a business park. The easement was to exist until another entrance was constructed. No other entrance was constructed. Selnick brought suit against Howard County, the State Highway Administration, and other defendants, seeking monetary relief and a declaratory judgment that the easement remained temporary. The circuit court granted the defendants' motions for summary judgment, holding that parol evidence was not necessary to interpret the grant and that the easement had become a permanent easement pursuant to the thirty-year limitation on possibilities of reverter and rights of entry in Md. Code (2010), § 6-101 of the Real Property Article (R.P.), so no taking had occurred.

Held: Reversed.

The Court agreed with the circuit court that parol evidence was unnecessary to interpret the grant, and thus inadmissible, because the grant was not ambiguous. However, the Court reversed in regard to R.P. § 6-101. While R.P. § 6-101 does not state that it applies to "fee simple estates in land," the preceding statute, from which R.P. § 6-101 was recodified without substantive change, implemented a thirty-year limit on possibilities of reverter and rights of entry that restricted "a fee-simple estate in land." The Court held that the omission of "a fee-simple estate in land" did not expand the scope of R.P. § 6-101 to include easements. Rather, it was a stylistic change during recodification. In addition, possibilities of reverter and rights of entry have been defined by Maryland case law to follow fee simple estates. Moreover, not only are easements different interests altogether from possibilities of reverter and rights of entry, but the policy concerns present in possibilities of reverter and rights of entry are not present in easements. Therefore, the Court held that the circuit court erred in applying R.P. § 6-101 to the temporary easement. Finally, Selnick had not yet shown sufficiently definite facts to establish that Howard County or the State Highway Administration sought to continue to use the temporary easement,

even if a second entrance was constructed. Because the temporary easement still existed, there could be no taking.

In re: Ryan W., No. 1503, September Term 2011, filed September 5, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/1503s11.pdf

SOCIAL SECURITY ACT – OLD AGE, SURVIVOR, AND DISABILITY INSURANCE (OASDI) BENEFITS – USE BY DEPARTMENT OF SOCIAL SERVICES FOR SELF-REIMBURSEMENT OF OASDI BENEFITS TO CHILD DECLARED CHILD IN NEED OF ASSISTANCE BY JUVENILE COURT – ALLEGATIONS OF BREACH OF FIDUCIARY DUTY, VIOLATIONS OF RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER FEDERAL CONSTITUTION AND MARYLAND DECLARATION OF RIGHTS – JURISDICTION JUVENILE COURT – COMAR REGULATIONS REGARDING OASDI BENEFITS.

Facts:

In 2002, when he was 9 years old, Ryan W., the appellee, was declared by the Circuit Court for Baltimore City, sitting as a Juvenile Court, to be a Child in Need of Assistance. He was committed to the care and custody of the Baltimore City Department of Social Services ("the Department"), the appellant. Ryan was placed in foster care, living primarily in therapeutic and non-therapeutic group homes. After Ryan's mother died, he became eligible for Old Age, Survivor, and Disability Insurance ("OASDI") benefits under Title II of the Social Security Act. After his father died, Ryan became eligible for additional benefits. In 2009, when Ryan was 16 years olds, the Department applied to the Social Security Administration ("SSA") to be named the representative payee to receive Ryan's OASDI benefits. The SSA granted the Department's request. Ryan was not informed, nor was his CINA counsel. The Department received two lump-sum retroactive benefits payments and began receiving $771 per month in current benefit payments. It used all of the monies it received, a total of $31,693.30, to reimburse itself for the cost of Ryan's care.

Subsequently, after the Department was no longer receiving OASDI benefits on Ryan's behalf, he filed a "motion to control conduct" in his CINA case, asking the Juvenile Court to order the Department to conserve any OASDI benefits received on his behalf for his use upon his transition out of foster care. He argued that the Department violated his state and federal constitutional rights to due process and equal protection in applying for benefits without notice to him or his counsel and by using his benefits for self-reimbursement; and that this practice also violated state and federal law.

The Juvenile Court ruled in Ryan's favor, finding that the Department had breached fiduciary duties owing to Ryan and had violated his equal protection and due process rights. It declared two Maryland regulations permitting the self-reimbursement practice *ultra vires* and held that the Department had not acted in Ryan's best interests when it used his OASDI benefits for self-reimbursement, rather than conserving the benefits for his future use. The Juvenile Court

ordered the Department to return to Ryan the entire $31,693.30 in benefits it had received on his behalf.

The Department noted an appeal. It conceded that a portion of the OASDI benefits received on Ryan's behalf as lump-sum, retroactive payments – a little over $8,000 – had to be refunded to him because it only could be applied to cover the cost of Ryan's care for the month prior to its receipt. Otherwise, it took the position that its practice of using OASDI benefits received on behalf of a foster child to self-reimburse complied with federal and state law and that the Juvenile Court lacked jurisdiction to order it to repay the full amount of Ryan's OASDI benefits and to declare Maryland regulations *ultra vires*.

Held: Reversed.

Under the SSA regulations, the Department was entitled to apply for and receive OASDI benefits for Ryan without informing him or his counsel. Its obligation to conserve benefits for future use was only with respect to benefits over the amount of the cost of his current maintenance and the amount of Ryan's monthly OASDI benefits was far less than the cost of his current maintenance. There was no equal protection violation because the Department's practice did not create two classes of foster children. Moreover, the Juvenile Court has limited jurisdiction that does not include broad equitable powers, such as it exercised in its ruling in this case; nor did it have the power to declare two Maryland regulations, which previously had been approved, *ultra vires*. Ryan was entitled to a refund of approximately $8,100, as conceded, but the ruling of the Juvenile Court was otherwise reversed.

Maria Iglesias v. Pentagon Title and Escrow, LLC, et al., Nos. 1562 and 1563, September Term 2010, filed August 30, 2012 Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/1562s10.pdf

TORTS – NEGLIGENCE – LEGAL DUTY OF CARE – PRIVITY OR EQUIVALENT OF PRIVITY – REAL ESTATE PURCHASE BY IMPOSTER BUYER BY USE OF A FACIALLY VALID POWER OF ATTORNEY – EXISTENCE *VEL NON* OF DUTY OF CARE OWED BY LENDING BANK AND/OR TITLE COMPANY TO VICTIM OF IDENTITY FRAUD PERPETRATED BY THE IMPOSTER.

Facts:

In July of 2006, Maria Iglesias, the appellant, a first-time home buyer, engaged the services of a loan officer, Jose Ramirez, in an effort to purchase a condominium. The deal ultimately fell through. Iglesias later began working with a second loan officer to purchase a different condominium. She did not qualify for financing, however, because a credit search revealed that she recently had purchased a home in Montgomery County encumbered by two mortgages in her name. Iglesias had no knowledge of any such purchase. A criminal investigation revealed that Ramirez and others associated with him had perpetrated a fraud by which two properties were purchased in Iglesias's name without her knowledge. In each transaction, the real estate settlement was consummated under the strength of a forged power of attorney.

In the Circuit Court for Montgomery County, Iglesias filed two separate actions for, *inter alia*, negligence against various parties involved, including the appellees: Pentagon Title & Escrow, LLC, the company that conducted both real estate settlements; Christina Shin, an attorney and Pentagon member who acted as the settlement agent in each transaction; and JP Morgan Chase Bank, N.A., the lender in the first transaction. The cases ultimately were consolidated. Iglesias argued that each appellee owed her a duty to discover and protect her from the identity fraud scheme.

The circuit court granted Chase's motion to dismiss for failure to state a claim and granted summary judgment in favor of Pentagon and Shin. These rulings were premised on the lack of any legal duty flowing to Iglesias. Finally, the court denied Iglesias's motion for default against Shin. Iglesias timely appealed the judgments.

Held: Affirmed.

As a matter of law, neither the lending bank nor the title company owed a duty of care to Iglesias, an identity-fraud victim. She was not in privity with the lending bank and the equivalent of privity did not exist given that the transactions were carried out based upon a facially valid power of attorney. She also was not in privity or its equivalent with the title

company, which owed its duty of care to the lender to carry out the terms of the real estate settlements and where there was no evidence that the title company did not abide by those instructions in carrying out the settlements.

Russell Rosen et al. v. BJ's Wholesale Club, Inc., No. 2861, September Term 2009, filed August 30, 2012. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2012/2861s09.pdf

TORTS – RELEASE OF LIABILITY

Facts:

Russell Rosen, a member of BJ's Wholesale Club and the father of a young boy, Ephraim, wished to have his son be permitted to use the supervised children's play center, which BJ's offers at its stores to its members. As a condition of a member's child's access to the play center, the member is required to sign a release, which contains both an exculpatory clause and an indemnification clause. Russell Rosen signed this release. The following year, when Ephraim was five-years-old, Russell Rosen's wife, Beily Rosen, left Ephraim at the play center at BJ's store in Owings Mills, Maryland, while she went shopping. Ephraim climbed atop a plastic play apparatus and fell some thirty-eight inches to the floor below. Although most of the floor of the play center was padded, Ephraim fell on a part of the floor which was covered by only a thin layer of carpet, and he sustained a life-threatening brain trauma. He was transported, in succession, to two different hospitals, and he underwent a craniectomy.

Ephraim's parents brought an action against BJ's in the Circuit Court for Baltimore County, both in their own names and on behalf of Ephraim, alleging negligence. BJ's defended itself, relying on the release, and it filed a counterclaim against Russell and Beily Rosen for breach of the indemnification agreement. The circuit court granted BJ's motion for summary judgment, relying on Maryland precedent, which has generally upheld exculpatory agreements, but only when executed by an adult on his or her own behalf.

Held:

The Court of Special Appeals reversed the grant of summary judgment and remanded for further proceedings. Addressing an issue of first impression in Maryland, which is whether a release of liability, presented by a "commercial enterprise," and executed by a parent, on behalf of a minor child and before the child has sustained any injury, is enforceable, the Court held that enforcement of such a release is contrary to Maryland public policy.

The Court began by attempting to limit its holding to cases where the party asserting the release is a "commercial enterprise," which it defined as "a for-profit, commercial entity that principally serves private interests." The Court then surveyed cases from other states which addressed the same issue, and it adopted the majority rule, which generally prohibits enforcement of parentally executed releases of a minor child's prospective negligence claims. In arriving at its holding, the Court relied on the doctrine of parens patriae, reasoning that, where adults may be jeopardizing

the future welfare of their children by signing releases like the one at issue, the courts have a duty to protect the child, even though such a release, if executed by the parent on his or her own behalf, may be enforceable. The Court acknowledged the strong presumptions favoring freedom of contract and recognizing that a parent generally acts in the best interests of his or her child, but it deemed that those interests were outweighed by the need to encourage owners and operators of commercial facilities open to minor children to: (1) take reasonable safety precautions in the operation and maintenance of their facilities; and (2) obtain adequate insurance to cover the risk of physical injury to their minor patrons, caused by the negligence of their employees and agents.

Because enforcement of the indemnification clause would make it trivially easy for commercial enterprises to circumvent the rule denying enforcement of parentally executed, pre-injury releases, the Court held that the indemnification clause at issue was likewise unenforceable.

Jazminn E. Taylor v. Ronald Fishkind, et al., No. 2407, September Term 2010, filed August 31, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/2407s10.pdf

EVIDENCE – TESTIMONY – EXPERTS – ADMISSIBILITY

Facts:

This appeal arises from a complaint filed in the Circuit Court for Baltimore City by Jazminn E. Taylor, appellant, through her mother, Nellie Virginia Taylor, in which Jazminn sought damages for injuries she sustained as a result of alleged exposure to lead-based paint while living at 2320 Riggs Avenue and 1025 North Carrollton Avenue. The complaint identified Ronald Fishkind and Edward Lichter, appellees, as the owners of 1025 N. Carrollton Avenue during the period that Jazminn lived there. The complaint asserted one count of negligence for failing to remove lead-based paint from the premises, and one count of unfair trade practices in violation of the Consumer Protection Act for leasing the premises when they contained lead-based paint, against appellees.

Jazminn was born on June 7, 1990. From her birth until February 1993, Jazminn lived with her family at 2320 Riggs Avenue. She then moved with her family to 1025 N. Carrollton Avenue where she resided from February 1993 until March 1994. Between 1991 and 1994, Jazminn's blood was repeatedly tested for the presence of lead. Those tests indicated that Jazminn had an elevated blood lead level while living at both residences. During discovery, Jazminn retained Arc Environmental, Inc. to inspect 1025 N. Carrollton Avenue for the presence of lead-based paint. Arc tested the exterior of the building and found that one window apron tested positive for lead-based paint. Arc did not test the interior of the building. Additionally, Jazminn's mother testified that she observed Jazminn with paint chips and dust on her hands and in her mouth while residing at 1025 N. Carrollton Avenue. Based on the above evidence and the age of the house, Dr. Henri Merrick, Jazminn's medical causation expert, authored a causation report in which she concluded that Jazminn was exposed to lead-based paint at 1025 N. Carrollton Avenue.

On June 14, 2010, appellees filed a motion for summary judgment, in which they argued that Dr. Merrick's testimony was inadmissible pursuant to Maryland Rule 5-702 because she lacked a sufficient factual basis to testify that Jazminn was exposed to lead-based paint at 1025 N. Carrollton Avenue or that 1025 N. Carrollton Avenue was a lead source. Appellees further asserted that, without Dr. Merrick's testimony, Jazminn could not prove the elements of her claims, and therefore, appellees were entitled to judgment as a matter of law. On August 5, 2010, finding that there was no factual basis for Dr. Merrick to testify that 1025 N. Carrollton was a substantial factor in contributing to Jazminn's injuries or that it was a lead source, the circuit court granted appellees' motion for summary judgment.

Held: Affirmed.

To be admissible, an expert's opinion testimony must rest on a sufficient factual basis such that the expert's conclusions amount to more than mere conjecture or speculation. Where an individual claims that he or she was exposed to lead-based paint at multiple dwellings, the record must reflect exposure at each dwelling to establish a sufficient factual basis to admit testimony from an expert that the individual's injuries were caused by exposure at the second dwelling or any subsequent dwellings. Where it is just as plausible that any evidence of exposure at subsequent dwellings could be the result of exposure at the first dwelling, an expert's testimony that an individual's injuries were caused by exposure at the subsequent dwellings amounts to mere speculation, and therefore, is inadmissible. Here, the evidence that Dr. Merrick relies on to support her opinion that Jazminn was exposed to lead-based paint at 1025 N. Carrollton Avenue could just as plausibly have been the result of exposure to lead-based paint at 2320 Riggs Avenue; therefore, the circuit court correctly ruled that Dr. Merrick's testimony was inadmissible. As Jazminn could not prove her case without Dr. Merrick's testimony, the circuit court correctly granted summary judgment in favor of the appellees after excluding Dr. Merrick's testimony.

Wayne H. Goss, et al. v. Estate of Bertha Jennings, et al., Case No. 1931, September Term 2010, filed August 31, 2012. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2012/1931s10.pdf

TORTS – WRONGFUL DEATH ACTIONS

Facts:

While working on a litter pickup detail on the Capital Beltway in Prince George's County, Rodney Jennings, an inmate in the custody of the Maryland Division of Corrections ("DOC"), was struck and killed by a dump truck operated by appellant, Wayne H. Goss. Appellees, Jennings' estate, the estate of his mother, and three beneficiaries, filed a wrongful death and survival action against Goss, his trucking company, the DOC, and the State Highway Administration.

Jennings and at least two other inmates were working at the exit for Route 202, in the triangular area between the exit ramp and the highway shoulder known as the gore. Goss saw the inmates walk across the exit ramp towards the gore and sounded his horn to warn them when he was about 75 feet away from the exit. Testimony from the other inmates established that it looked like the dump truck was heading straight towards them in the gore. Jennings ran back across the exit ramp, to try to escape the dump truck, but was struck and killed. Post-accident investigation revealed that Goss' truck was in violation of the statutory weight limit and had faulty brakes. Expert testimony at trial indicated that Goss would not have struck Jennings if the dump truck had properly functioning brakes and was within the weight limit. The jury returned a verdict against Goss and the State for $2,025,000, or $350,000 and $1,675,000 in noneconomic damages for the survival action and wrongful death claim, respectively. The trial court reduced the awards to $350,000 and $1,020,000 (150% of $680,000 the statutory cap) for the survival action and wrongful death claim, respectively, over Goss' argument that a single statutory cap should apply to both awards, for a total of $1,020,000. The trial court also granted the State's motion for a JNOV, finding that the State was not negligent, but denied Goss' motion for a JNOV.

Held: Affirmed.

The Court of Special Appeals affirmed the circuit court. Among other issues, Goss argued that the trial court erroneously imposed two separate statutory caps on the non-economic damage awards in the survival and wrongful death actions, in violation of Md. Code (1974, 2006 Repl. Vol.), Courts & Judicial Proceedings Article (CJP), § 11-108. The Court rejected Goss' arguments and found that the imposition of separate caps was proper. The Court considered the text and legislative history of the 1994 amendments to the statute, which responded to the Court of Appeals' decision in *United States v. Streidel*, 329 Md. 533 (1993), that the noneconomic caps of CJP § 11-108 did not apply in a wrongful death case. The Legislature's subsequent

amendments to the statute brought wrongful death actions within the ambit of the cap but did not purport to redefine an action for personal injury to include a wrongful death action. Rather, the General Assembly intended to treat non-economic damages in survival and wrongful death actions separately and to impose separate caps on them.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated September 5, 2012, the following attorney has been disbarred by consent:

RICHARD PAUL RIEMAN, JR.

*

By an Order of the Court of Appeals dated September 7, 2012, the following attorney has been suspended for thirty days by consent:

CHIKE IJEABUONWU

*

This is to certify that

JOE DONALD WATSON, JR.

has been replaced on the register of attorneys in this state as of September 13, 2012.

*

This is to certify that

JAGJOT SINGH KHANDPUR

has been replaced on the register of attorneys in this state as of September 20, 2012.

*

This is to certify that

MICHAEL LOUIS SUBIN

has been replaced on the register of attorneys in this state as of September 20, 2012.

*

By an Opinion and Order of the Court of Appeals dated September 25, 2012, the following attorney has been indefinitely suspended:

TIFFANY T. ALSTON

*

JUDICIAL APPOINTMENTS

On July 19, 2012, the Governor announced the appointment of **JOHN CHRISTIAN MOFFETT** to the Montgomery County District Court. Judge Moffett was sworn in on September 7, 2012 and fills the vacancy created by the retirement of the Honorable Stephen Johnson.

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