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CONSTITUTIONAL LAW - ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS – TAKING OF PROPERTY

Facts: Robert Serio was charged with vehicular manslaughter, which is a felony in Maryland, and pled guilty and was sentenced on June 2, 1999, to six months imprisonment.

On the same day that Serio was sentenced, Officers Russo and Overfield of the Baltimore County Police Department applied for a warrant to search Serio's house and to seize "any firearms and any ammunition, boxes, receipts, or manuals relating to said firearms," based upon information that they had gleaned from Serio's estranged wife and a search of the Maryland Automated Firearms System, arising from the allegation that he was a felon in possession of firearms in violation of Maryland Code (1957, 1996 Repl. Vol., 1998 Cum. Supp.), Article 27, Section 445(d)(1)(ii). The warrant was issued, and the officers searched Serio's home on June 3, 1999 and seized numerous firearms, including seven handguns, five rifles, a shotgun, a silencer, and ammunition. Ultimately, Serio was not charged with possessing firearms in violation of Section 445(d), but the County, nonetheless, refused to return the firearms to him, or give them to a designee or sell them and give Serio the proceeds.

Serio filed suit against the County seeking the return of the firearms or in lieu thereof, to give them to a designee for sale and return of the proceeds to Serio under Article 27, Section 551 (c). The County filed a motion for summary judgment. After a number of motions by the parties and hearings were held, the court entered summary judgment in favor of the County, which was affirmed by the Court of Special Appeals.

Held: Judgment of the Court of Special Appeals was reversed. Although the Court of Appeals agreed with the Court of Special Appeals that Section 551(c) did not apply, the Court of Special Appeals had failed to address whether Serio retained due process protection for his property interest in the firearms under Article 24 of the Maryland Declaration of Rights. Serio had not lost his property interest in the firearms because he was a convicted felon, and he retained due process protection against wrongful retention of his property under Article 24 of the Maryland Declaration of Rights. The County could not retain the firearms just because Serio could not possess them, and Serio may be entitled to "just compensation."

Robert L. Serio v. State of Maryland, No. 17, September Term, 2004,

filed December 13, 2004. Opinion by Battaglia, J.

CRIMINAL LAW - DOUBLE JEOPARDY - SUCCESSIVE PROSECUTIONS - CHARGING DOCUMENT DELINEATES THE SCOPE OF JEOPARDY IN WHICH A DEFENDANT IS PLACED IN INITIAL PROSECUTION

Facts: At 1:55 p.m, On October 1, 2002, Jesse Anderson sold two gelatin capsules of heroin to an undercover detective in the 1500 block of Myrtle Avenue in Baltimore City. Five minutes later, at 2:00 p.m., on the same block, Anderson sold two more capsules to a second undercover detective. During both transactions, Anderson took the capsules from a red cigarette pack. At 2:30 p.m., a third detective approached Anderson for purposes of conducting a "field interview," during which Anderson threw the cigarette pack underneath a nearby parked car. The detective witnessed this action, retrieved the cigarette pack, examined it, and placed Anderson under arrest for possession of 25 capsules of heroin.

Eight days later, Anderson was convicted of one count of possession of heroin on October 1, 2002 in the 1500 block of Myrtle Avenue in the District Court. On November 4, 2002, the State obtained an indictment against Anderson for possession with intent to distribute and distribution, based on the sale of heroin at 2:00 p.m. On November 12, 2002, the State obtained another indictment for possession, possession with intent to distribute, and distribution, based on his sale of heroin at 1:55 p.m.

Anderson moved to dismiss the two indictments on the grounds that these successive prosecutions violated the prohibition on double jeopardy. The circuit court denied this motion, holding that the possession of heroin of which he was convicted in the District Court occurred at a different time and place than did the possession of heroin at 1:55 and 2:00 p.m. respectively. The Court of Special Appeals affirmed in part and reversed in part, holding that all of the possession charges related to the same controlled dangerous substance of which Anderson was already convicted of possessing, and were therefore barred. The court affirmed the circuit court's ruling allowing for the prosecution to continue on the distribution charges, because they were "spawned from separate acts."

Held: Reversed. The Court of Appeals held that possession is a lesser included offense of both possession with intent to distribute and distribution. The Court abstained from deciding whether Anderson's possession of heroin from 1:55 p.m. to 2:30 p.m. constituted one act of possession, holding, rather, that by virtue of the charging document, the scope of jeopardy in which Anderson was placed in his first prosecution in District Court included any possession of heroin on October 1, 2002 in the 1500 block of Myrtle Avenue. Therefore, because Anderson had previously been placed in jeopardy of possession of heroin at both 1:55 p.m. and 2:00 p.m.,

successive prosecutions for possession of heroin or greater offenses of possession are barred by the prohibition on being twice placed in jeopardy.

Anderson v. State, No. 41, September Term, 2004, filed January 10, 2005. Opinion by Wilner, J.

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CRIMINAL LAW - EVIDENCE - ADMISSIONS - ADMISSIONS BY ACCUSED - ACQUIESCENCE OR SILENCE - IN GENERAL

Facts: Responding to a 911 call, police discovered a severely injured woman lying at the bottom of an apartment stairwell. The only other persons present were witness Thomas Crabtree and petitioner Mark Weitzel. Prior to his subsequent trial for attempted murder and assault, Weitzel filed a motion in limine to exclude evidence that he had sat by silently as Crabtree told police that Weitzel had thrown the victim down the stairs.

At a hearing on the motion, the Circuit Court heard testimony that Weitzel had purchased cocaine during the afternoon of the incident, and had smoked cocaine and drunk alcohol within two hours preceding Crabtree's accusation. Evidence was also presented that Crabtree had punched Weitzel two to three times in the face, causing Weitzel to remain "curled up in a ball on the floor" for approximately ten minutes. The Circuit Court denied Weitzel's motion, finding that Weitzel had been awake and alert, and ruling that the evidence was admissible as a tacit admission of guilt.

The State introduced the tacit admission evidence at trial, over Weitzel's continuing objection. The only direct evidence of Weitzel's guilt presented at trial was Crabtree's eyewitness testimony that he had observed Weitzel throw the victim down the stairs. Weitzel was convicted of second degree assault, and the Court of Special Appeals affirmed.

Before the Court of Appeals, Weitzel argued that his silence was inherently ambiguous; that a jury could only speculate as to whether it reflected an admission of guilt as to the assault, rather than an attempt to avoid detection of his illegal drug use

or merely the effects of intoxication and recent head trauma.

Held: Reversed. The Court surveyed numerous federal and state decisions on pre-arrest silence that had been handed down since its 4-3 decision in *Key-El v. State*, 349 Md. 811, 709 A.2d 1305 (1998)(permitting use of pre-arrest silence as substantive evidence of guilt if requirements for "tacit admission" hearsay exception satisfied). These cases evince an emerging consensus that pre-arrest silence should be excluded *per se* as substantive evidence of guilt.

While some courts have held that use of pre-arrest silence violates the right against compelled self-incrimination guaranteed under the Fifth Amendment to the Unites States Constitution, the Court of Appeals did not to reach this Constitutional issue. Rather, it held that such silence *in the presence of a police officer* was insufficiently probative to be admissible under Maryland evidence law. The Court noted a myriad of reasons why a suspect might choose not to answer a false accusation in police presence. Among these motivations is the understanding disseminated by popular entertainment that any statement made in the presence of police "can and will be used against you in a court of law." The Court overruled *Key-El* to the extent that case permitted the use of pre-arrest silence in police presence as substantive evidence of guilt.

Mark Edward Weitzel v. State of Maryland, No. 44, September Term, 2004, filed December 21, 2004. Opinion by Raker, J.

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CRIMINAL LAW – JURY INSTRUCTION - REVIEW – HARMLESS OR REVERSIBLE ERROR – INSTRUCTIONS – INAPPLICABLE TO ISSUE OR EVIDENCE – TRIAL JUDGE COMMITTED REVERSIBLE ERROR WHEN, IN GIVING SUPPLEMENTAL JURY INSTRUCTIONS IN RESPONSE TO QUESTIONS FROM THE JURY, THE TRIAL JUDGE INSTRUCTED THE JURY AS TO WHICH PARTY BORE THE BURDEN OF ESTABLISHING WHETHER DEFENDANT HAD A HANDGUN LICENSE, WHEN THAT DEFENSE WAS ENTIRELY INAPPLICABLE TO THE CASE AS PRESENTED.

Facts: Lionel Brogden was arrested and tried in the Circuit Court for Baltimore City on the charges of burglary in the first

degree, malicious destruction of property, and wearing, carrying or transporting a handgun. At trial, the victim of the burglary testified that she recognized Brogden, a former neighbor, as being the intruder whom she saw flee her apartment while brandishing a handgun. After the State presented its case-in-chief, the defense rested without presenting any evidence. In other words, Brogden chose to present no defense other than requiring the State to prove its case against him.

During jury deliberations, the jury sent a note to the trial judge asking for clarification on two points: first, whether it as a crime to have a handgun, and secondly, whether the State had the burden of proving that Brogden did not have a license to carry a handgun. Brogden's defense counsel urged the trial judge to refrain from commenting to the jury on any question regarding whether Brogden possessed a handgun license, as it was not an issue raised during trial. The trial judge, however, chose to give supplemental jury instructions, which addressed the jury questions, over defense counsel's objection. The supplemental instructions given to the jury in response to its questions discussed which party bore the burden of establishing whether Brogden possessed a handgun license. After receiving the supplemental jury instructions, the jury arrived at its verdict very soon thereafter and Brogden was convicted of first degree burglary and of wearing, carrying, or transporting a handgun. Brogden thereafter filed an appeal to the Court of Special Appeals. In an unreported opinion, the intermediate appellate court affirmed the trial court's judgment, finding no error with the trial judge's supplemental jury instructions. Brogden then filed a Petition for Writ of Certiorari to the Court of Appeals. The Court of Appeals granted the petition.

Held: The Court of Appeals held that the trial judge's action of giving supplemental instructions, over Brogden's objection, to the jury during its deliberations, in which the trial judge discussed a possible defense theory as to a particular count that was entirely inapplicable to that count as presented, had never been proffered by Brogden, and alluded to that defense as placing a burden of proof on Brogden, constituted reversible error on the part of the trial court. The Court stated that the jury should have instead been instructed to confine its deliberations to the issues and evidence properly before it and the instructions already given and not to speculate on matters as to which no evidence had been introduced. The Court further found that this error was not harmless, stating that the supplemental jury instructions injected into the jury deliberations a defense theory that was never raised by Brogden at trial and was misleading as to which party bore the ultimate burden of proof as to the handgun charge.

Lionel Brogden v. State of Maryland. No. 55, September Term, 2004,

filed January 18, 2005. Opinion by Cathell, J.

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CRIMINAL LAW - RESTITUTION - BANKRUPTCY — DISCHARGE

Facts: On February 3, 2001, at 3:00 AM, Jacqueline Mae Garnett drove her Ford Taurus station wagon to the Maryland State Police Barracks in Salisbury, Maryland, and rammed into six cars parked behind the barracks by accelerating into one parked car, reversing, and accelerating again into the next parked car. Two state police officers observed Garnett driving her car into the parked vehicles and arrested her at the scene. Garnett was charged with six counts of malicious destruction of property for the damage she caused to five police cruisers and one privately-owned car and was also charged with one count of trespass.

On April 18, 2001, Garnett entered a plea of not guilty, as well as a plea of "not criminally responsible by reason of insanity," as to all charges against her and subsequently filed a motion for a mental examination to determine competency to stand trial and criminal responsibility. She was referred to the Department of Health and Mental Hygiene pursuant to Maryland Code (1957, 2000 Repl. Vol.), Section 12-104 of the Health-General Article for examination and evaluation through the Eastern Shore Hospital Center, a forensic team from which determined that Garnett was competent to stand trial, but that she was not criminally responsible for her actions because of a mental disorder, specifically severe depression, at the time of the offenses. Garnett eventually pled guilty to all six charges of malicious destruction of property, after which the trial court found that Garnett was not criminally responsible for her actions because of a mental disorder and ordered her to be conditionally released from the Hospital Center. The trial court ordered Garnett to pay restitution under Article 27, Section 807.

Subsequently, Garnett filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Maryland, and she was granted a discharge of her debts pursuant to 11 U.S.C. § 727 (2000). The State filed a Writ of Garnishment of Wages in the Circuit Court for Wicomico County seeking to enforce the restitution judgment, and Garnett filed a reply asserting that the restitution judgment was discharged in bankruptcy. Thereafter, the Circuit Court held a hearing on the motion, during which time the parties agreed to have the State's writ dismissed.

Thereafter, the State filed a Motion to Allow Garnishment, and during a hearing, the Circuit Court denied the motion and held that the restitution was a civil judgment that could be discharged in bankruptcy because: (1) Garnett was found "not criminally

responsible," and, therefore, she could not be punished; (2) the restitution could be enforced as a money judgment in a civil action, and so was a civil sanction; and (3) the restitution was not ordered as a condition of probation. The lower court also determined that the restitution was for a pecuniary loss; thus, the judgment could be discharged under the United States Bankruptcy Code.

The State noted an appeal to the Court of Special Appeals, and the Court of Appeals issued, on its own initiative, a writ of certiorari to determine whether judgment of criminal restitution was discharged under Chapter 7 of the United States Bankruptcy Code.

Held: The Circuit Court erred in its determination that the judgment of restitution ordered against Garnett was discharged in bankruptcy. The order of restitution in favor of the Maryland State Police that was entered as part of criminal proceedings against Garnett was a penal sanction to which she was subject, despite a finding of guilty but not criminally responsible. Because the restitution ordered in the case was a criminal sanction, it was not dischargeable under the Bankruptcy Code. The dismissal of the State's motion to allow garnishment was reversed.

State of Maryland v. Jacqueline Mae Garnett, No. 47, September Term, 2004, filed December 22, 2004. Opinion by Battaglia, J.

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EVIDENCE - ATTORNEY-CLIENT PRIVILEGE – MARYLAND RULE OF PROFESSIONAL CONDUCT 1.6, AND THE CRIME-FRAUD EXCEPTION

Facts: Elsa Newman and Arlen Slobodow married in 1990, and thereafter, had two sons. In 1999, Newman's marriage to Slobodow deteriorated, and the couple began divorce and custody proceedings in the Circuit Court for Montgomery County, during which Newman was represented by an attorney, Stephen Friedman. During the course of Friedman's representation of Newman in the Spring of 2001, Friedman asked Newman's close friend, Margery Landry, to be present in meetings with Newman for a "cool head in the room." Landry and Newman discussed various plans, while in Friedman's presence,

involving harming Newman's children and blaming Slobodow.

On August 31, 2001, Newman met with Friedman. At one point during the meeting, Newman stated, "You know, I don't have to kill both children. I only need to kill Lars because I can save Herbie, and then Arlen will go to jail and get what he deserves because he is a criminal, and I can at least save Herbie."

Friedman disclosed to Montgomery County Circuit Court Judge Scrivener the statements made by Newman the previous Friday. After Judge Scrivener informed presiding Judge Ryan of Friedman's disclosure, Judge Ryan announced its substance during the September 4, 2001 custody hearing. Newman was granted supervised visitation and Friedman's appearance as her counsel of record was stricken. The trial on the merits was postponed until December 7, 2001, and then again to January 28, 2002.

Prior to the trial on the merits, on January 7, 2002, at approximately 3:30 a.m., Landry entered Slobodow's house through an unlocked basement window carrying pornographic materials and a Smith and Wesson 9MM handgun, shot Slobodow, struggled with him and fled. Later that morning, Montgomery County Police arrested Landry at her home.

On January 9, 2002, the State of Maryland filed charges against Newman for conspiracy to commit first degree murder and conspiracy to commit assault in the first degree, and Newman was arrested the following day. On April 4, 2002, Newman appeared in the Circuit Court for Montgomery County, and entered a plea of not guilty. On June 28, 2002, the Circuit Court held a pretrial hearing in which it considered the State's oral Motion in Limine to compel Friedman to testify about the matters that he had disclosed to Judge Scrivener. The State called Friedman to the stand. The presiding judge rejected Newman's request that the court clear the courtroom prior to Friedman's testimony. Consequently, Newman asserted that the attorney-client privilege precluded Friedman's testimony, for which she was granted a standing objection. At the close of Friedman's testimony, the court ruled that Friedman acted reasonably in disclosing Newman's statements under Rule 1.6 and that his disclosure obviated Newman's attorney-client privilege regarding the disclosed statements. At Newman's trial and under court order, Friedman again testified.

During the trial, Detective Mercer, the officer who arrested Newman, also testified that he advised Newman "that she had the right to remain silent, she had the right to an attorney. At which time she advised that she would like to consult with an attorney. Actually, she had an attorney waiting in the station lobby for her." Newman objected and moved for a mistrial. The trial court denied her motion and instead gave the jury a curative instruction.

On August 6, 2002, the jury found Newman guilty of conspiracy to commit first degree murder, attempted first degree murder, assault in the first degree, burglary in the first degree, and use of a handgun in the commission of a felony. Newman filed a motion for a new trial, which the court denied. Newman received four concurrent sentences of twenty years, one concurrent sentence of fifteen years, and upon release is required to serve five years supervised probation.

On appeal, the Court of Special Appeals held that Friedman's testimony was admissible under the crime-fraud exception to the attorney-client privilege because Newman evidenced an intent to commit future crimes. The court also concluded that the prejudice suffered by Newman, caused by the improper testimony of Detective Mercer, was cured by the trial court's instruction and affirmed the judgment of the trial court. The Court of Appeals granted Newman's petition for writ of certiorari to determine whether the trial court erred in allowing Newman's domestic relations attorney to testify about confidential attorney-client communications; and whether the trial court abused its discretion in denying Newman's Motion for Mistrial.

Held: Reversed. Friedman's discretionary disclosure of client communications under MRPC 1.6 does not obviate the client's ability to later successfully assert the attorney-client privilege. The Court of Appeals adopted the crime-fraud exception and required that the communications be made to an attorney seeking his assistance or aid in furtherance of an ongoing or future crime or fraud. Because neither disclosure under MRPC 1.6 or the crime-fraud exception destroyed Newman's privilege, Friedman's testimony about his communications with Newman was inadmissible. The prejudice caused by testimony elicited concerning a defendant's post-*Miranda* silence, whether done so inadvertently or intentionally, cannot be cured by a curative instruction given over the defendant's objection.

Elsa Newman v. State of Maryland, No. 31, September Term, 2004, filed December 13, 2004. Opinion by Battaglia, J.

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FAMILY LAW - ANTENUPTIAL AGREEMENTS - DIVORCE - VALIDITY - CONFIDENTIAL RELATIONSHIP

Facts: This case posed a challenge to the validity of an antenuptial agreement (the Agreement) executed by Mr. and Mrs. Cannon prior to their marriage. Mrs. Cannon and her two children from a prior marriage lived with Mr. Cannon in his townhouse for approximately two years prior to the Cannons becoming engaged. In November 1992, the parties engaged to be married, but delayed the eventual ceremony in order to save money for the wedding and the purchase of another home. By September 1993 Mr. Cannon purchased a new home in New Market, using the net proceeds from the sale of his townhouse and a mortgage obtained on his credit worthiness. The house was titled in his name alone. While planning the purchase of the New Market home, the parties discussed each other's financial contribution to pay the new mortgage. Mrs. Cannon and her two children moved into the home and she made monthly contributions towards the mortgage and living expenses.

In April 1994 Mr. Cannon first broached the subject of an antenuptial agreement with Mrs. Cannon ostensibly because he was concerned about the possible spillover effects of a prior bankruptcy proceeding initiated by Mrs. Cannon and her first husband in 1986. Mr. Cannon was concerned that some of Mrs. Cannon's creditors might pursue his pre-marital assets and any jointly-held assets acquired after the parties were married. Although the exact effect the bankruptcy may have had on these assets went undescribed, the alleged threat purportedly would lose its efficacy by 1996.

Mr. Cannon presented the proposed Agreement to Mrs. Cannon on or about 10 May 1994. She did not seek independent legal advice regarding the Agreement. She signed and had the Agreement notarized at a local bank branch office on 27 May 1994, although she would later claim that she signed the Agreement in the New Market home the very day Mr. Cannon presented it to her.

The Agreement included sections that preserved individually titled personal property to each party in accordance with a schedule incorporated by reference (and attached to the Agreement), fixed liability for debts incurred by either party both prior to and during the anticipated marriage, called for Mrs. Cannon to pay Mr. Cannon $1,000.00 per month for household expenses during the marriage (including the mortgage), mutually waived alimony if the Cannons divorced, preserved Mr. Cannon's sole ownership of the New Market home (which remained titled solely in his name), and allowed Mr. Cannon the right to eject Mrs. Cannon from the New Market home after providing sixty days notice, but allowed her and her children exclusive use of the home during that sixty day period.

On 25 June 1994 the parties married. In 2001, the Cannons

separated and Mrs. Cannon and her two children from her previous marriage moved out of the New Market home. Mrs. Cannon filed in the Circuit Court for Frederick County in July of 2002 for an absolute divorce and alleged that the antenuptial agreement was invalid. She also asked for alimony.

After an interlocutory hearing, the Circuit Court concluded in an oral opinion that the Agreement was invalid. The trial court also initially concluded that the Agreement contained a sufficient disclosure of the parties' assets and that Mrs. Cannon had knowledge of Mr. Cannon's assets at the time the Agreement was executed. The Circuit Court concluded also that Mrs. Cannon appreciated the legal effect of the Agreement and entered it voluntarily. The court found that she had the opportunity to seek legal advice and she chose to remain unadvised.

The trial court held that the alleged existence of a confidential relationship did not result in Mr. Cannon bearing the burden of proof of the Agreement's validity. Nonetheless, the Circuit Court ultimately held that Mrs. Cannon relied on an oral understanding that the Agreement would terminate after the unquantified bankruptcy threat subsided in 1996, even though the Agreement contained no express language concerning the bankruptcy threat or a termination clause. As such, the court held that Agreement, which under its reasoning would have been valid up to 1996, was invalid thereafter. The Circuit Court awarded *pendente lite* alimony to Mrs. Cannon.

Mr. Cannon appealed to the Court of Special Appeals. In its reported opinion, the intermediate appellate court reversed the Circuit Court and declared the Agreement valid. *Cannon v. Cannon*, 156 Md. App. 387, 846 A.2d 1127 (2004). The Court of Special Appeals held that the trial court misapplied the significance of the confidential relationship in its analysis of the Agreement. In the opinion of the Court of the Special Appeals, the alleged presence of a confidential relationship ultimately is a question of fact that, if found by the trial court, merely placed the burden of proof of the validity of the Agreement on Mr. Cannon. A confidential relationship did not exist in this case, however, and Mrs. Cannon's reliance on the Agreement allegedly terminating in 1996 misapplied the importance of the alleged confidential relationship. As a result, the Court of Special Appeals held that the remaining factors found by the Circuit Court indicated that the Agreement was valid.

The Court of Appeals granted Mrs. Cannon's petition for writ of certiorari to review the alleged existence and effect of a confidential relationship and the validity *vel non* of the Agreement. *Cannon v. Cannon*, 382 Md. 346, 855 A.2d 349 (2004).

Held: Court of Special Appeals's judgment affirmed, but on different reasoning. The Court held that a confidential relationship exists as a matter of law between parties entering an antenuptial agreement. When parties in a pre-marital relationship enter into an agreement where the consideration for the agreement is the impending marriage, a confidential relationship necessarily arises. This legal presumption, however, may be rebutted.

This confidential relationship, when a dispute erupts as to the efficacy of the agreement, places the burden of proof on the party seeking to enforce the antenuptial agreement. The party seeking to enforce an antenuptial agreement must prove that an overreaching did not occur, such that there was no unfairness or inequity to the other party at the time the agreement was entered. *Hartz v. Hartz*, 248 Md. 47, 57, 234 A.2d 865, 871 (1967).

The agreement in the present case was valid because Mrs. Cannon had adequate pre-execution disclosure and knowledge of Mr. Cannon's financial and property items at issue, knew the effect of her waiver(s), and entered voluntarily the agreement, although without the advice of legal counsel. Thus, execution of the Agreement was not an exercise in overreaching.

Cannon v. Cannon, No. 48, September Term, 2004, filed 12 January 2005. Opinion by Harrell, J.

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TAXATION — INHERITANCE AND GIFT TAXES — LEGACY, INHERITANCE, AND TRANSFER TAXES — STATUTORY PROVISIONS — IN GENERAL — WHEN AN ESTATE HAS NO FEDERAL ESTATE TAX LIABILITY, WITHOUT UTILIZING THE FEDERAL CREDIT FOR STATE DEATH TAXES, THE COMPTROLLER MAY NOT ASSESS THE ESTATE MARYLAND ESTATE TAX.

Facts: Appellant Comptroller of the Treasury assessed Appellee Blaine T. Phillips, executor of the estate of Donald P. Ross, Jr., Maryland estate tax plus interest.

Donald P. Ross, Jr., a Delaware resident, died on June 30, 2000. Ross's estate included an interest in Maryland property. The estate was entitled to a federal credit for tax on prior

transfers for the property Ross inherited from his mother, who predeceased him by five days. As this credit rendered the estate's federal tax liability zero, the estate did not take the federal credit for state death taxes.

Appellee filed the Maryland estate tax return on the same day as the federal estate tax return. Since the Maryland estate tax is calculated based on the federal credit for state death taxes and the estate did not take that credit, the estate did not remit any Maryland estate tax.

Appellant sent appellee a Deficiency Notice indicating Maryland estate tax liability plus interest. Following a Protest by appellee and an Assessment by appellant, appellee appealed to the Maryland Tax Court. The Tax Court held a hearing and issued an oral decision reversing the Assessment, finding that no Maryland estate tax was due. Appellant sought judicial review in the Circuit Court for Talbot County. Following a hearing, the Circuit Court issued an opinion affirming the Tax Court. Appellant appealed to the Court of Special Appeals. Before the Court of Special Appeals considered the case, the Court of Appeals granted certiorari on its own initiative.

Held: Affirmed. The Court held that when an estate has no federal estate tax liability, without utilizing the federal credit for state death taxes, the Comptroller may not assess the estate Maryland estate tax. The Court reasoned that holding otherwise would be inconsistent with the state estate tax's purpose. The state estate tax is not an additional tax. Rather, it is a "pick up" tax, meant to take advantage of the federal government's revenue sharing through the federal credit for state death taxes. The Court analyzed the relevant Maryland statute and concluded that it did not permit the Comptroller to assess estate tax when the estate's federal estate tax liability was zero without utilization of the credit for state death taxes. Finally, the Court found support from similar cases in other states.

Comptroller of the Treasury v. Blaine T. Phillips, Executor of the Estate of Donald P. Ross, Jr., No. 46, September Term 2004, filed January 13, 2005. Opinion by Raker, J.

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TORTS – MALPRACTICE, NEGLIGENCE, OR BREACH OF DUTY – PARTICULAR PROCEDURES – OBSTETRICS, GYNECOLOGY, AND REPRODUCTIVE HEALTH – WRONGFUL CONCEPTION OR PREGNANCY RESULTING IN BIRTH OF HEALTHY CHILD

Facts: Petitioners James and Corinne Dehn brought suit against respondent Glenn Edgecombe and others for damages resulting from the birth of an unplanned child. Petitioners alleged that Dr. Edgecombe had acted negligently in failing to refer Mr. Dehn for a semen analysis following a vasectomy negligently performed by another physician. Mrs. Dehn was not a patient of Dr. Edgecombe's, and in fact had never met Dr. Edgecombe prior to the day of trial. The Circuit Court dismissed all of Mrs. Dehn's claims at the close of plaintiffs' evidence. While the jury found that Dr. Edgecombe had acted negligently, it also found contributory negligence on the part of Mr. Dehn. The court accordingly entered judgment in favor of respondents. Petitioners appealed to the Court of Special Appeals, which affirmed.

Before the Court of Appeals, petitioners argued that Mrs. Dehn should have been able to maintain an independent cause of action against Dr. Edgecombe. They contended that the "wrongful pregnancy" case of *Jones v. Malinowski*, 299 Md. 257, 473 A.2d 429 (1984), contemplated implicitly that each parent would have an independent cause of action against a negligent physician. Petitioners also contended that an independent cause of action had accrued to Mrs. Dehn because it was foreseeable that a doctor's post-vasectomy advice to a husband could have serious effects on the wife, by virtue of the legal responsibilities which attach to both parents on the birth of a child, and because the physical consequences of a negligent vasectomy which results in pregnancy are more serious for the wife than for the husband.

Held: Affirmed. The Court began by noting that, in Maryland, negligent sterilization is a species of medical malpractice, which is itself an action in negligence. To state a claim in negligence, a plaintiff must assert a legally cognizable duty. In a medical malpractice action, a duty exists ordinarily in the context of a physician-patient relationship. While certain exceptions exist to this rule, they arise only in highly unusual circumstances.

The Court concluded that *Jones* had not created, implicitly or explicitly, such an exception. Although *Jones* involved an action by two plaintiffs – husband and wife – against a surgeon who had negligently performed a tubal ligation on the wife, both plaintiffs in that case stood before the Court in the same posture. Neither spouse's complaint had been dismissed, and neither spouse had been found to be contributorily negligent. Thus, the question of whether the suit should properly have been brought by only the wife

had no relevance to the outcome of *Jones*, and was not decided by the Court.

The Court further declined to recognize such an exception on the facts of the instant case. It noted that foreseeablity alone was insufficient to create a duty between a physician and a third party in the absence of a "special relationship." While the Court left open the possibility that a duty of care could extend from a surgeon who actually performed a negligent sterilization to the non-patient spouse, it refused to find a duty where Dr. Edgecombe had not actually performed the operation, had attended Mr. Dehn only on unrelated medical matters, and had never met Mrs. Dehn prior to trial.

James W. Dehn *et ux*. v. Glenn R. Edgecombe *et al*., No. 117, September Term, 2003, filed January 14, 2005. Opinion by Raker, J.

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ZONING AND PLANNING - PROCEEDINGS TO PROCURE - IN GENERAL -PLANNING BOARD PROPERLY CONSIDERED FINAL PLAT WHILE PETITION FOR REVIEW OF PRELIMINARY PLAT APPROVAL REMAINED PENDING IN CIRCUIT COURT.

ZONING AND PLANNING - EFFECT OF DETERMINATION; REVOCATION - VESTED OR PROPERTY RIGHTS - TIME PERIOD WITHIN WHICH APPLICANT MUST TAKE FURTHER ACTION TO OBTAIN FINAL PLAT IS TOLLED DURING PERIOD OF JUDICIAL REVIEW, BUT A DEVELOPER WHO SEEKS BUILDING PERMITS DURING THE JUDICIAL REVIEW PERIOD DOES SO AT OWN RISK.

Facts: In January 1998, respondents Samuel T. Wood and Green Hotels, Inc. ("Green Hotels") submitted an application for preliminary major subdivision plat approval to respondent Prince George's County, Maryland Planning Board of the Maryland-National Capital Park and Planning Commission ("Board") to construct a shopping center in Prince George's County on land that abuts the municipal boundaries of petitioner, City of Bowie ("City"). Green Hotels submitted the required Transportation Facilities Mitigation Plan ("TFMP") with its application. The Board approved the preliminary plat and the TFMP on June 18, 1998.

The City sought review of the TFMP approval through the Prince George's County Council, sitting as the District Council, and filed a petition for judicial review in the Circuit Court for Prince George's County of the preliminary plat approval. In April 2000, the District Council reversed the Board's TFMP approval. In June 2000, the Board granted Green Hotels' request for a one-year extension to the preliminary plat approval's validity, thus extending the validity to June 18, 2001. On June 8, 2001, Green Hotels submitted a final plat for approval, but the Board returned the final plat to Green Hotels due to the District Council's reversal of the TFMP.

In September 2001, the Court of Appeals issued its decision in *County Council of Prince George's County v. Dutcher*, 365 Md. 399, 780 A.2d 1137 (2001), invalidating the District Council's authority to review planning board action on preliminary plans of subdivision under Prince George's County Code § 24-124 (a)(6)(D). Consequently, the circuit court issued an order in November 2001, vacating the District Council's reversal of Green Hotels' TFMP approval. The City then amended its pending preliminary plat approval petition to include an appeal of the reinstated TFMP approval. In December 2001, Green Hotels refiled for final plat approval.

In January 2002, the circuit court affirmed the Board's preliminary plat approval. The Court of Special Appeals affirmed in an unreported December 2003 opinion. The Court of Appeals declined to grant a writ of certiorari in April 2004, thus effectively exhausting the City's appeals of the preliminary plat approval.

The Board scheduled the final plat to be considered at its January 3, 2002, meeting. The City objected to the Board's consideration, citing lack of individualized notice, but the hearing proceeded as scheduled and the Board approved the final plat at its meeting.

In February 2002, the City filed a petition for judicial review of the Board's final plat approval, and sought a stay to prevent Green Hotels from obtaining building permits to proceed with construction; no stay was granted. In an April 2003 opinion and order, the circuit court upheld the final plat approval. The Court of Special Appeals affirmed in an unpublished February 2004 decision. The Court of Appeals granted a writ of certiorari in June 2004.

Held: It was not improper for the Board to approve the final subdivision while a petition for judicial review of the related preliminary plat of subdivision remained pending in the Circuit Court for Prince George's County. Once a developer has received final plat approval, that developer may seek to obtain building

permits and to begin construction, but the developer undertakes such actions at his own risk that the underlying preliminary plat approval might ultimately be invalidated. The Board's act in consideration of the final plat is a ministerial function and the Board evaluates the final plat only for substantial conformance with the preliminary plat plus the satisfaction of any relevant conditions that were imposed at the preliminary plat approval stage. While the preliminary plat approval is under legal challenge, the time period in which the applicant must take further action to obtain final plat approval is to be tolled.

City of Bowie, Maryland v. Prince George's County, Maryland Planning Board of the Maryland-National Capital Park and Planning Commission, *et al.* No. 36, September Term, 2004, filed December 16, 2004. Opinion by Cathell, J.

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COURT OF SPECIAL APPEALS

CIVIL PROCEDURE - JUDICIAL ESTOPPEL – JUDICIAL ESTOPPEL PREVENTS SUBSEQUENT TORT SUIT WHEN PLAINTIFF-EMPLOYEE HAD ALREADY PERSUADED THE WORKERS' COMPENSATION COMMISSION TO GRANT AN AWARD BASED ON A CLEARLY INCONSISTENT FACTUAL PREDICATE.

Facts: Carl Abrams ("Abrams"), brought a workers' compensation claim against his former employer, American Tennis Courts, Inc. ("ATC"). Abrams's claims alleged that he had been severely injured at work when he slipped and fell down a flight of stairs. The workers' compensation commission (the "Commission"), believing that Abrams's version of facts was true, ordered the workers' compensation carrier to pay Abrams some $185,000 for lost wages and medical expenses incurred due to Abrams's injury.

Over one year later, while Abrams was still receiving those benefits, ATC discovered that the story upon which Abrams based his workers' compensation claim was false.

The Commission subsequently held a hearing on the matter. At the hearing, appellant steadfastly maintained that his original story was true. Nevertheless, evidence was introduced that Abrams was struck by a box on the side of a truck owned by his employer, ATC, and driven by one of ATC's foremen. A witness testified that the injury occurred after Abrams stepped out of the vehicle and reached in to the cab to get his jacket. As he did so, the truck started moving and Abrams was injured. The commissioner disbelieved appellant and held that the he had not sustained an accidental injury arising out of and in the course of employment. Accordingly, the commissioner rescinded Abrams's previous award and ordered him to repay the compensation carrier the $185,000 he had received.

Abrams filed a Petition for Judicial Review of the commissioner's decision. But before any ruling on that petition was made, he filed a second workers' compensation claim. This time, Abrams alleged that "when my foreman came to pick me up for work, the company truck he was driving struck me." The commissioner ruled that she would not allow Abrams's second claim to be re-litigated while his first claim was on appeal. Abrams

filed a petition for judicial review of that decision.

The circuit court consolidated both cases and affirmed the commissioner's decisions, finding that Abrams's accident occurred while he was going to work and, therefore, did not arise out of or in the course of his employment.

Abrams then filed a tort suit against ATC, alleging that he was truck by ATC's truck while he was walking on a public street. ACT moved for summary judgment. The court granted the motion on the ground that Abrams's claim was barred by the doctrines of res judicata and collateral estoppel. ATC prevailed on its motion and Abrams filed the first of two appeals.

The Court of Special Appeals reversed the court's order granting summary judgment because summary judgment was not justified on the ground relied upon by the motions judge. The case was remanded to the circuit court. ATC again moved for summary judgment, this time contending that Abrams was judicially estopped from pursuing the tort suit. The trial court again granted ATC's motion for summary judgment, and a second appeal was filed.

Held: Judgment affirmed. The Court held that the doctrine of judicial estoppel barred Abrams from bringing the tort suit because ATC had proven all facts necessary for the application of that doctrine, *viz*: (1) the party to be estopped had adopted a position in a later proceeding that is clearly inconsistent with an earlier position; (2) the party to be estopped successfully persuaded an earlier tribunal to accept its position; and (3) the party to be estopped would derive an unfair advantage or impose an unfair detriment on the other party if it were permitted to adopt the inconsistent position.

The Court held that Abrams was initially successful because the commissioner accepted his earlier untruthful version as to how he came to be injured and, accordingly, granted him an award. The fact that the comissiomner later rescinded that award and ordered Abrams to return the $185,000 to ATC did not make the collateral estoppel inapplicable because Abrams was impecunious and could not possibly return the value of the benefits he obtained by his intentional misstatements to the Commission. Thus, Abrams had "succeeded" before the Commission inasmuch as he successfully collected benefits worth $185,000 from ATC based on a clearly inconsistent version of events than that alleged in his subsequent tort suit.

Abrams v. American Tennis Courts, Inc., No. 2517, September Term, 2003, filed December 9, 2004. Opinion by Salmon, J.

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CRIMINAL LAW - SEARCH AND SEIZURE - EVIDENCE - MOTION TO SUPPRESS - STANDING.

EVIDENCE - SUFFICIENCY OF THE EVIDENCE - MURDER.

EVIDENCE - SUFFICIENCY OF THE EVIDENCE - CRIMINAL AGENCY.

Facts: Officer William Moore was found dead in his home. There were multiple impact sites found on Moore's face and nose, indicating that his death was the result of multiple blows. The bloodstains on the walls indicated a struggle. Evidence recovered from the scene included: 39 fingerprint lift cards, a pair of sweatpants, running shoes, tennis shoes with suspected blood, and a Rubbermaid trash can lid.

Appellant was a squatter and trespasser living in a vacant home in Baltimore City. A search warrant was executed at a vacant Housing Authority property, where police officers recovered photographs, mail addressed to and from appellant, and a Rubbermaid trash can.

A former inmate incarcerated with appellant at Central Booking testified that appellant told him that he had gotten into a fight with the victim and killed him. Appellant explained to the inmate that the he initially went to Moore's home to rob him. Appellant also admitting taking a cellular phone from the victim and selling it to someone in the neighborhood where he lived.

Robert Jones a/k/a Cyrstal Whiting, who identified himself as appellant's "wife" testified that around the time of the murder appellant left their home and returned a few hours later with a bite or cut mark on his chin and a swollen finger. According to Jones, appellant explained that he had been in a fight with someone, who may have stopped breathing. Jones testified that appellant returned with a cell phone and $40 in cash. Furthermore, Jones identified the Rubbermaid trash can as being the one in the bedroom that he and appellant shared. Jones explained that appellant brought the trash can into their room.

Held: During a suppression hearing, appellant attempted to suppress the evidence recovered from the vacant home. Because the Housing Authority could enter the premises or could permit anyone else to do so, and because appellant had no right to exclude anyone from the premises, lock or no lock, any expectation appellant had

that the police would not enter the premises was unreasonable. Appellant had no reasonable expectation of privacy in the premises.

Appellant also challenged the evidence as insufficient to sustain his convictions. He contended that there was no evidence of premeditation or deliberation and that the evidence was insufficient to prove his criminal agency. The blood stains on the wall in the victim's home; the multiple impact sites on the victim's face and nose; and the testimony that indicated that no single blow killed the victim was clearly sufficient to permit the jury to conclude that there was a long struggle and that appellant had more than enough time to decide to kill the victim. Furthermore, the evidence supports the conclusion that the struggle resulted from the victim's efforts to defend himself. Moreover, even though there was no eyewitness placing appellant at the victim's home at the time he was killed, the circumstantial evidence was sufficient to support a conviction. There was testimony that, on or near the date of the crime, appellant had left his home and returned with a bite or cut mark on his chin and a swollen finger; appellant admitted getting into a fight with someone, who may not have been breathing when appellant left; and appellant admitted to a former inmate that he had killed a correctional officer who lived near him and that he took a cell phone from the officer.

Wesley Whiting A/K/A Jeffrey Wilson A/K/A Lynell Whiting v. State - No. 1052, September Term, 2002, filed December 23, 2004. Opinion by Kenney, J.

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FAMILY LAW – ATTORNEY'S FEES - PAYMENT OF REASONABLE ATTORNEY'S FEES FROM MARITAL PROPERTY DOES NOT CONSTITUTE DISSIPATION OF MARITAL ASSETS.

Facts: Appellant, Michael Allison ("Michael") and appellee/cross-appellant, Carol Ann Allison ("Carol Ann"), were divorced in the Circuit Court for Anne Arundel County. Carol Ann was 64 years old at the time of divorce. Michael was twenty years younger.

The circuit court awarded Carol Ann $2,300 in permanent alimony, granted her a $17,500 monetary award, and ordered Michael to pay her either $21,450.18 or the balance of his 401K plan, whichever was less.

Evidence introduced at trial showed that Carol Ann suffered from several serious physical problems that made it difficult for her to work. Thus, Carol Ann elected to receive social security benefits at the age of sixty-two. As of the October 18, 2002, divorce hearing, her social security income totaled only $499 per month. She had no other income. Michael had no health problems that affected his ability to work. He earned $6,966.97 per month (gross) as of the divorce hearing.

In January 2002, Michael borrowed $15,500 from his 401K plan, of which he used $4,000 to make a court-ordered contribution to Carol Ann's attorney's fees and the remainder to pay his own attorney's fees. Michael later re-paid $1,835 of that loan. The court ruled that his use of marital funds to pay his own attorney's fees constituted dissipation of marital property.

Held: Reversed in part and affirmed in part. The Court held that use of marital property to pay reasonable attorney's fees did not constitute dissipation of marital assets. The Court recognized that this is an issue of first impression in Maryland and that a split of authority exists amongst sister states regarding the issue. Nevertheless, the Court reasoned that, given Michael's limited assets and his relatively high monthly expenses, and the fact that in Maryland all post-separation pre-divorce income is deemed to be marital property, he, like many other parties in a divorce action, had little choice but to pay Carol Ann's court-ordered attorney's fees and his attorney's fees out of marital property. Moreover, his expenditures were not made for the "principal purpose" of reducing marital assets available for the monetary award. Therefore, the expenditures do not meet the definition of "dissipation."

In her cross-appeal, Carol Ann argued that the trial judge erred in ordering Michael to pay "either $21,450.18 or the balance of Michael's 401K plan." The Court agreed and instructed the trial court, upon remand, to specify a definite sum.

Michael Allison v. Carol Allison, No. 207, September Term, 2003, filed October 28, 2004. Opinion by Salmon, J.

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FAMILY LAW - CHILD IN NEED OF ASSISTANCE (CINA) - IN RE: ANDREW A., 149 MD. APP. 412 (2003) - DETERMINATION, BASED ON PRIOR CONDUCT OF APPELLANT, OF "SUBSTANTIAL RISK OF HARM" IN CINA PROCEEDING; LOWER COURT PROPERLY DETERMINED THAT MADELINE C. WAS AT SUBSTANTIAL RISK OF HARM IN CASE WHERE APPELLANT HAD FRACTURED ARM OF OLDER BROTHER AND SUBJECTED HIM TO FORTY-FOUR UNNECESSARY DOCTOR VISITS, SUFFERED FROM DEPRESSION, REFUSED TO SEEK HELP OR SHOW ANY CHANGE OR IMPROVEMENT IN HER CONDITIONS THAT WOULD LEAD TO CONCLUSION THAT SECOND CHILD, MADELINE - ALTHOUGH NOT YET SUBJECTED TO HARM - WOULD, IN FACT, BE SUBJECTED TO THE SAME HARM INFLICTED UPON NATHANIEL; LOWER COURT ALSO PROPERLY FOUND, TAKING JUDICIAL NOTICE OF THE CINA PROCEEDINGS INVOLVING NATHANIEL A. AND MADELINE C., THAT SHIRAH A., APPELLANT'S THIRD CHILD, UNBORN AT THE TIME OF THE EARLIER PROCEEDINGS, WAS ALSO AT SUBSTANTIAL RISK OF HARM BASED ON THE FINDINGS OF CINA IN THOSE EARLIER PROCEEDINGS.

Facts: The Montgomery County Department of Health and Human Services (Department) filed shelter care petitions concerning Nathaniel A. and Madeline C. A hearing ensued and the circuit court found that Mother had abused Nathaniel by fracturing his arm and exposing him to excessive and unnecessary medical treatment. The circuit court then found that, based on the abuse to which Nathaniel was exposed, Madeline was at a significant risk of being harmed. Both children were consequently found to be children in need of assistance (CINA). Shirah A. was subsequently born to the same Mother and was immediately placed in the care of the Department. At a hearing, the State offered the record from the Nathaniel and Madeline hearing, as well as a CINA petition, into evidence. The circuit court took judicial notice of the record, reviewed it and the petition, and, after affording the parties an opportunity to present additional evidence, found Shirah to be at a substantial risk of harm and, therefore, CINA.

Held: Affirmed. The circuit court did not err in finding appellant's three children to be CINA. CINA allegations must be proven by a preponderance of the evidence. After finding Nathaniel to be a CINA based on the physical abuse, excessive medical treatment, and the fact that appellant had sought no treatment, the circuit court found Madeline to be a CINA based on the substantial risk of harm she would incur if she continued to reside with appellant. Although Madeline was never harmed, to be declared a CINA, we have held that it need only be proven that she is at a "substantial risk of harm." *In re: Andrew A.*, 149 Md. App. 412 (2003); *In re: William B.*, 73 Md. App. 68 (1987).

We declared in *William B.* that "the judge need not wait until

the child suffers some injury before determining that he is neglected. This would be contrary to the purpose of the CINA statute. The purpose of the act is to protect children – not to wait for their injury." Therefore, based on appellant's treatment of Nathaniel, we may find Madeline is at risk, and consequently CINA, even though she has not been physically harmed. Neither parent was able or willing to care for the children and the circuit court, therefore, was not in error in finding them CINA.

Additionally, the circuit court did not inappropriately conduct Shirah's hearing. The State offered the prior hearing's transcript, as well as Shirah's CINA petition, to prove Shirah was in fact a CINA. After taking judicial notice of the prior hearing, the circuit court extended an opportunity to appellant to present witnesses, even the same witnesses from the prior hearing, and further explained to appellant her right to "present her defense to the State's evidence." Appellant chose not to call any witnesses or dispute the State's evidence until after Shirah was found to be a CINA. Appellant was a party to the prior proceeding, she had the opportunity to defend herself through cross-examination, she was represented by counsel at both hearings, the facts were identical, the transcripts were identified and moved into evidence, neither party demonstrated circumstances had changed, and the circuit court independently analyzed the evidence before it made its own judgment.

The opportunity to present evidence showing changed circumstances is essential. Here, the circuit court permitted the parties to do so. As the hearing was appropriately conducted, the same analysis subsequently holds true for Shirah, as it did for Madeline. We do not focus on whether there was actual harm to Shirah, rather, we must determine, based on appellant's prior conduct, whether Shirah would be at "a substantial risk of harm." Appellant's ability to care for Nathaniel is probative of her ability to care for Shirah. The circuit court did not err in finding Shirah to be a CINA.

In Re: Nathaniel A. and Madeline C., No. 2850, September Term, 2003 and In Re: Shirah A., No. 610, September Term, 2004 (consolidated), decided January 3, 2005. Opinion by Davis, J.

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FAMILY LAW - CHILD SUPPORT - MODIFICATION - INCARCERATION

Facts: On June 13, 1985, Nedia Barrett gave birth to Damien Von Wheeler, now emancipated. By a "Waiver of Constitutional and Statutory Rights and Admission of Paternity," entered April 15, 1992, appellant, Vyron Wheeler, *pro se*, admitted paternity. Shortly thereafter, by Order dated April 29, 1992, the Circuit Court for Prince George's County ordered appellant to pay $280 per month in child support.

On December 20, 2002, appellant filed a motion to modify his child support obligation, claiming a "substantial change in circumstances" as a result of his lengthy federal prison sentence. At the time of his motion for modification, appellant's obligation amounted to $280 per month plus $70 per month toward arrears of $8047.25. In his motion, appellant requested that his "current support order be reduced or terminated as appropriate...."

By "Order" of March 7, 2003, the court, *inter alia*, suspended appellant's child support obligation, retroactive to the date he filed his motion for modification, through the period of his incarceration. In addition, the court directed appellant to notify the court and the Office of Child Support Enforcement (the "Office") of his release from incarceration within three days of release. The Order also provided for reinstatement of appellant's child support obligation upon his release; directed appellant to notify the court and the Office of his residential and work addresses within thirty days of his release; ordered a hearing on appellant's motion for modification within ninety days of his release from incarceration and notification to the court of his residential address; and directed that the court dismiss appellant's modification motion if he failed to comply with the notification requirements.

On June 13, 2003, appellant filed a Motion to Vacate the court's Order of March 7, 2003. By Order entered June 11, 2003, the court denied appellants motion to vacate.

Held: Judgment affirmed.

The Court agreed with the State that the circuit court "'has already granted Mr. Wheeler all of the relief available to him under Maryland law.'" Looking to *Wills v. Jones*, 340 Md. 480 (1995), the Court was mindful that the circuit court lacked authority under the "comprehensive scheme with regard to child support[,]" codified in Title 12 of the Family Law Article ("F.L.") of the Maryland Code (1999 Repl. Vol.). But, relying on *Payne v. v. Payne*, 132 Md. App. 432, 440 (2000), the Court was satisfied that the court's action was consistent with a modification of appellant's support obligation during the period of his

incarceration. It said: "The court clearly modified appellant's support obligation, as requested by appellant in his motion to modify, when it suspended appellant's child support obligation from the date of his motion through the entire period of his incarceration.

Moreover, the Court noted that appellant's son "is already emancipated" and, "[a]s a practical matter, the court's Order reinstating appellant's support obligation upon his release will apply only to arrearages that were in existence prior to the filing of the modification request." Finally, the Court concluded that, upon appellant's release, "the court will be in a position to determine whether appellant is able to pay the arrearages" and, at that time, "can determine whether its Order should be made retroactive to the date of appellant's release."

Vyron Wheeler v. State of Maryland t/u/o Nedia Barrett, No. 00337, September Term, 2003, filed December 27, 2004. Opinion by Hollander, J.

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STATE PERSONNEL AND PENSIONS ARTICLE (SPP); AUTOMATIC TERMINATION FROM EMPLOYMENT; ADMINISTRATIVE LAW JUDGE (ALJ) AS FACT-FINDER AND FINAL DECISION MAKER IN CONTESTED CASE HEARING.

Facts: On October 5, 2002, Audrey Neal, a Correctional Dietary Officer II, and four inmates were at the Maryland Correctional Institute for Women (MCIW) in Jessup, preparing meal trays in a dining room. One inmate, Kelly Ramsburg, bumped into Neal several times and giggled, and Neal told her to be more careful with the trays. When Ramsburg bumped into Neal again, Neal put her arms around Ramsburg's neck in a choking gesture and said, "If I choked you, would you think it was funny or an accident?"

An inmate who witnessed the incident reported it to Captain Jacqueline Craig, who then questioned Ramsburg and Neal about it. Ramsburg said that she thought the choking gesture had been a joke, and Neal acknowledged that she had placed her hands around Ramsburg's neck but had not applied any pressure. Furthermore, a medical check revealed no bruises or marks on Ramsburg's neck.

Based on this information, Capt. Craig prepared a written memorandum of the incident, noting that Neal's actions were "unprofessional" and fell short of the "appropriate disciplinary action" she should have taken with Ramsburg. Capt. Craig forwarded the report to Warden Marsha Maloff.

Warden Maloff reviewed Neal's disciplinary history and found that, in the 12 months prior to the incident, Neal had been issued two "Level I" reprimands and a "Level II" reprimand, the latter reprimand being more severe than the former ones. Additionally, prior to those reprimands, Neal had been disciplined for five infractions, including a "Level I" reprimand and two "Level II" reprimands. Based on this information, Warden Maloff recommended that Neal's employment be terminated. In a Notice of Termination, Warden Maloff commented that Neal's actions constituted a "Third Category Infraction," which, under the "Standards of Conduct" for the Department of Public Safety and Correctional Services ("Department"), was an automatic ground for terminating employment. The Department's Secretary, and subsequently the Department of Budget and Management, approved the termination. Neal challenged the termination, and, pursuant to SPP section 11-110(b)(1)(ii), the appeal was transferred to the Office of Administrative Hearings for a contested case hearing.

On May 19, 2003, the ALJ issued a written opinion based on the evidence adduced at the hearing, which included all of the reports and personnel records for Neal as well as the testimony of Neal, Warden Maloff, Captain Craig, and a lieutenant. The ALJ found that Neal's conduct was "unprofessional" but did not involve excessive force or threaten the safety of the workplace, which was the ground upon which the automatic termination rested. The ALJ further found that the evidence did not support a finding of the use of excessive physical force, which is prohibited by Standard II.Y. Thus, the ALJ found that the Third Category Infraction, under Standard IV.E.3 (a)(7), was not supported by the evidence. Furthermore, the ALJ found no violation of Standard II.B.2, which concerns unprofessional working relationships with others, because Ramsburg was not an employee, and no violation of Standard II.B.3, because Neal's conduct was not offensive by community standards. However, the ALJ found that the conduct did constitute conduct unbecoming and thus violated Standard II.B.1, and was "unjustifiably offensive" to *Ramsburg*, a ward of the State, and thus violated COMAR 17.04.05.04(4). Pursuant to Standard IV.E.1 (a), these findings constituted a First Category Infraction. Finding the evidence legally insufficient to support a Third Category Infraction, and thus warrant automatic termination, the ALJ reversed the termination, reinstated Neal, and imposed a four-week suspension without pay.

On June 16, 2003, the Department pursued an action for judicial review. Neal did not file a response to the petition

within thirty days, a requirement of Maryland Rule 7-204(c). On July 28, 2003, the Department filed a motion to stay the ALJ's decision, to which Neal responded in opposition on August 13, 2003. The court granted in part and denied in part the Department's request for a stay, and held a judicial review hearing on October 15, 2003. At the outset of the proceeding, the Department moved to preclude Neal from participating, since she had not filed a response to the petition for judicial review. The court denied the motion and affirmed the ALJ's decision. The Department then appealed to the Court of Special Appeals.

Held: Affirmed. The Court of Special Appeals held that the circuit court did not abuse its discretion when it permitted Neal to have party status in the judicial review of the case. The Court reasoned that Neal did not abandon her party status when she did not file a timely response to the Department's petition for judicial review, as was required of her pursuant to Rule 7-204, and when she only filed a Rule 7-205 opposition to the Department's motion to stay the ALJ's decision. The Court noted that Rule 7-204 expressly grants a court the discretion to extend the time for filing a response to a petition for judicial review and does not preclude treating Neal's opposition motion as a late-filed response, since the response under Rule 7-204 requires only a statement of the intent of the person filing it to participate in the action for judicial review. The Court concluded that by filing the opposition to the motion to stay coupled with appearing at the hearing, Neal acted to maintain her party status.

The Court further held that the circuit court did not abuse its discretion in allowing Neal to present oral argument at the hearing, notwithstanding that Neal did not provide a Rule 7-207 memorandum containing a statement of material facts and legal argument. The Court noted that subsection (d) of Rule 7-207 provides that a person who has not filed a memorandum could present argument to the circuit court at its discretion. Because Neal's opposition motion was filed well before the hearing, the Court reasoned that there was no prejudice to the Department from Neal being permitted to appear and present oral arguments to the court.

The Court further held that the ALJ did not act arbitrarily or capriciously in imposing a disciplinary sanction on Neal of a one-month suspension without pay. The Court noted that the ALJ concluded that the evidence adduced at the hearing did not support a finding that Neal's conduct threatened the safety of the workplace and thus did not amount to a Third Category Infraction, thereby warranting automatic termination under SPP section 11-105. The Court further noted that based on these findings, the ALJ imposed a sanction for the First Category Infraction, taking into account Neal's prior infractions and the sanctions imposed for them. The Court held that implicit in the ALJ's decision was the finding that automatic termination was unreasonable and that the

ALJ need not have made an express finding on this point. The Court further held that it is within the ALJ's authority, after finding that the appointing authority's decision to automatically terminate Neal was unreasonable, to determine whether the other charges were supported by the evidence; to consider any mitigating factors; to rescind the termination; and to impose a modified sanction on the other charges.

Department of Public Safety and Correctional Services v. Neal, No. 2588, September Term, 2003, filed December 30, 2004. Opinion by Eyler, Deborah S., J.

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TORTS - LAST CLEAR CHANCE DOCTRINE - ELEMENTS OF THE DOCTRINE ARE PRIMARY AND CONTRIBUTORY NEGLIGENCE OF THE PARTIES, A SHOWING, BY THE PLAINTIFF, OF SOMETHING NEW AND SEQUENTIAL WHICH AFFORDS THE DEFENDANT A FRESH OPPORTUNITY (OF WHICH THE DEFENDANT FAILS TO AVAIL HIMSELF OR HERSELF) TO AVERT THE CONSEQUENCE OF HIS ORIGINAL NEGLIGENCE - LOWER COURT ERRED IN INSTRUCTING JURY ON LAST CLEAR CHANCE AND DENYING DEFENDANT'S MOTION JNOV IN CASE IN WHICH ESTATE OF 16-YEAR-OLD UNLICENSED, INTOXICATED DRIVER, SUED THE 29-YEAR-OLD DEFENDANT/PASSENGER ON THE THEORY THAT HE HAD THE LAST CLEAR CHANCE TO PREVENT THE MINOR FROM STRIKING THE FRONT OF ANOTHER CAR, CAUSING VEHICLE IN WHICH THEY WERE RIDING TO FLIP OVER AND COMING TO REST ON ITS ROOF, KILLING THE 16-YEAR-OLD DRIVER - BECAUSE NEGLIGENCE OF THE PARTIES WAS CONCURRENT AND THERE WAS NO FRESH OPPORTUNITY ON THE PART OF DEFENDANT TO AVOID THE DANGER AND BECAUSE PARTY IN HELPLESS PERIL AND PARTY IN POSITION TO AVOID DANGER BY REASON OF BEING IN CONTROL OF THE DANGEROUS INSTRUMENTALITY WERE THE SAME PERSON, LAST CLEAR CHANCE DOCTRINE WAS INAPPLICABLE TO THE INSTANT CASE.

Facts: Shereka Jones, a minor who was not licensed to drive, perished in an automobile accident when, after drinking with friends, the vehicle she was driving struck another vehicle and slid into a ditch. The mother of the decedant, Gail Anderson, filed a claim against Renardo Clyburn, a passenger during the accident and owner of the vehicle, and her insurer Nationwide Mutual Insurance Company. Clyburn's insurer paid the $20,000 limit on Clyburn's policy to Anderson and a jury found against Nationwide

in the amount of $155,000, which was later reduced to $80,000. Appellee Anderson argued that Clyburn had the last clear chance to avoid the accident when he allowed the unlicensed minor to drive his vehicle after drinking and had the opportunity to grab the steering wheel during the accident. Appellant Nationwide averred that appellee cannot recover under the doctrine of last clear chance because Jones' contributory negligence occurred concurrently with that of Clyburn's. Appellant, therefore, claimed that the trial court should not have instructed the jury on the doctrine of last clear chance and its motion for judgment notwithstanding the verdict should have been granted.

Held: The trial court erred when it instructed the jury on the doctrine of last clear chance and denied appellant's motion for JNOV. In *Carter v. Senate Masonry, Inc.*, 156 Md. App. 162 (2004), this Court held that the doctrine of last clear chance allows a contributorily negligent plaintiff to recover damages from a negligent defendant if the defendant is negligent, the plaintiff is contributorily negligent, and the plaintiff makes a showing of something new or sequential, which affords the defendant a fresh opportunity to avert the consequences of his or her original negligence. Therefore, if the defendant had the last clear chance to avoid the harm, the plaintiff's negligence is not a proximate cause of the result. Thus, in order for the doctrine to apply, the acts of each party must be sequential and not concurrent.

No evidence created a jury question as to whether Clyburn had the last clear chance to avoid the accident. Clyburn's initial act of negligence was allowing an underage person to drive his vehicle after consuming alcoholic beverages. Jones, in turn, was contributorily negligent because she drove the vehicle with the knowledge that she was unlicenced and had previously consumed alcoholic beverages. Clyburn did not commit a negligent act after these two acts occurred as Clyburn never had control of the vehicle once they began to drive and, therefore, he was not in a position to avoid the accident. Jones committed the last negligent act by colliding with the other vehicle, causing the accident. Absent any new evidence that Clyburn had the opportunity to avoid the accident, the doctrine is inapplicable to these facts.

The trial court erred in instructing the jury on the doctrine of last clear chance and in denying appellant's motion for JNOV.

Nationwide Mutual Insurance Co. v. Gail Anderson, Individually, Etc., No. 2055, September, Term, 2003, decided December 23, 2004. Opinion by Davis, J.

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TORTS - MEDICAL MALPRACTICE – DOCTOR NOT REQUIRED TO OBTAIN INFORMED CONSENT FROM PATIENT FOR DECISION TO CONTINUE PATIENT'S PREGNANCY.

Facts: On October 17, 1998, Tracy Crew-Taylor sought treatment at Harbour Hospital Center. She was thirty weeks pregnant and expecting triplets. Tests performed that day were "non-reassuring" for each of the fetuses and showed that one of the fetuses, Che Taylor, was not getting enough oxygen or nutrients. Additional tests showed that Mrs. Crew-Taylor was suffering from gestational diabetes, which posed a serious threat to her and the fetuses.

Dr. Pedro Arrabal was Mrs. Crew-Taylor's treating physician. He attributed the non-reassuring test results to her gestational diabetes. Rather than ordering immediate delivery of the pre-term fetuses, he injected his patient with insulin to reduce her high blood sugar levels and scheduled a biophysical profile examination for October 19.

The examination conducted on October 19 showed that Che was suffering from severe bradycardia (a reduced heart rate) and an agonal heartbeat, which meant that Che was almost dead. Dr. Arrabal ordered an immediate Caesarian section. The three babies were born on October 19. Che was born without a heart rate or pulse. He was revived but remained in a vegetative state and died from his pre-birth injuries on December 6, 1999.

Mrs. Crew-Taylor brought suit against Dr. Arrabal and Harbour Hospital Center, Inc., for medical negligence, wrongful death, and failure to obtain informed consent. A trial was held before a jury in the Circuit Court for Baltimore City. Mrs. Crew-Taylor testified that Dr. Arrabal never told her about the non-reassuring test results. She further testified that Dr. Arrabal neither informed her of the reasons for his decision to continue her pregnancy nor explained the risks and benefits of immediate delivery.

An expert witness for the plaintiff testified that Dr. Arrabal deviated from the standard of care because he failed to inform Ms. Crew-Taylor of the non-reassuring test results. The defendants' experts testified that it was reasonable for an expectant mother to be informed of possible alternate treatments and that Dr. Arrabal should have told Che's parents that the test results were non-reassuring.

Appellants made a motion for judgment as to plaintiffs' lack of informed consent claim at the close of all the evidence. The court denied the motion. The jury found in favor of the plaintiffs on both the medical negligence and informed consent claims. They awarded $843,065.90 to Che's estate, of which $636,414.90 was attributed to past medical expenses. The jury awarded Mrs. Crew-Taylor $1,400,000 (which, due to the "cap" statute, the judge reduced to $778,837.50), and Mr. Taylor $150,000 in non-economic damages (reduced to $83,662.50)..

Held: Reversed as to the judgment in favor of Che Taylor's estate for past medical expenses; all other judgments affirmed.

The Court held that the trial court erred when it denied appellants' motion for judgment as to plaintiffs' lack of informed consent claim. Relying on *Reed by Campagnolo*, 332 Md. 226 (1993), the Court concluded that Dr. Arrabal's decision to continue Mrs. Crew-Taylor's pregnancy was not an affirmative violation of Mrs. Crew-Taylor's physical integrity. Therefore, he was not required to obtain her prior informed consent. A new trial was not warranted, however, because appellants were not prejudiced by this error. The lack of informed consent claim and the claim for deviation from the appropriate standard of care claims were simply separate theories as to why Dr. Arrabal was negligent. The jury found against the appellants on both theories. The damages awarded to Mrs. Crew-Taylor and Che Taylor's estate would not have changed no matter which theory was chosen by the jury.

The Court also held that the trial court erred in allowing the jury to consider whether Che's estate was entitled to recover for past medical expenses. The Court held that the right to recover past medical expenses incurred by a tortiously injured minor is ordinarily vested in the child's parents. While there are exceptions to that rule, the evidence did not establish the applicability of any exceptions. More specifically, contrary to appellees' argument, Che's parents were not shown to be "unable or unwilling" pay for his past medical expenses. To the contrary, the evidence was unrebutted that Mrs. Crew-Taylor's insurance paid the entire medical bill.

Arrabal v. Crew-Taylor, et al., No. 27, September Term, 2003, filed December 3, 2004. Opinion by Salmon, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated January 5, 2005, the following attorney has been disbarred by consent from the further practice of law in this State:

JOE C. ASHWORTH
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JUDICIAL APPOINTMENTS

Chief Judge Robert M. Bell has appointed the HON. BEN C. CLYBURN as the new Chief Judge of the District Court of Maryland effective December 29, 2004. Judge Clyburn replaces the Hon. James N. Vaughan who retired.

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Due to the results of the November election, PAUL G. GOETZKE will serve as a judge for the Circuit Court for Anne Arundel County. JUDGE GOETZKE was sworn in on December 17, 2004 and replaces Judge David S. Bruce.

*

Due to the results of the November election, PAUL F. HARRIS, JR. will serve as a judge of the Circuit Court for Anne Arundel County. JUDGE HARRIS was sworn in on January 3, 2005 and replaces Judge Rodney C. Warren.

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On January 5, 2005, the Governor announced the appointment of Joan Bossman Gordon to serve on the District Court for Baltimore City. JUDGE GORDON was sworn in on January 26, 2005 and fills the vacancy created by the retirement of the Hon. Gale E. Rasin.

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