

Amicus Curiarum

VOLUME 21

ISSUE 9

september 2004

a publication of the office of the state reporter

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COURT OF APPEALS

ADMINISTRATIVE LAW – EXHAUSTION OF REMEDIES – LAND USE –
DEVELOPMENT RIGHTS AND RESPONSIBILITIES AGREEMENT (“DRRA”) (Md.
Code, Art. 66B § 13.01)

Facts: Maryland Code, Article 66B § 13.01, authorizes counties and municipalities exercising planning and zoning authority (other than Montgomery and Prince George’s counties) to enter into Development Rights and Responsibilities Agreements (DRRA) with developers as a means to “vest” the developers’ rights to develop property under the zoning enjoyed at the time of execution of the agreement, in return for acceptance by the developers of responsibilities and conditions in the manner in which the property is developed. The public benefits bargained for from the developer generally exceed those minimum requirements otherwise mandated or obtainable by application of other relevant zoning and planning laws. The present case involves how persons or entities aggrieved by the execution of such an agreement properly may obtain administrative and/or judicial review of the lawfulness of a DRRA.

On 17 September 2002, a DRRA was entered into by K. Hovnanian at Kent Island, L.L.C., and the County Commissioners of Queen Anne’s County regarding a mixed use project called the Four Seasons. Shortly thereafter, the Queen Anne’s Conservation Association, Inc., and seven individual plaintiffs (collectively “the Conservation Association”) filed a Complaint in the Circuit Court for Queen Anne’s County naming Hovnanian and the County Commissioners as defendants, and seeking a declaratory judgment as to the lawfulness of the DRRA. In response, the defendants filed a Motion to Dismiss urging that the Conservation Association failed to exhaust available, exclusive administrative remedies before seeking judicial scrutiny.

The Circuit Court entered judgment in the defendants’ favor, preeminently holding in its declaratory judgment that the Conservation Association failed to follow the statutory procedure for appeals of administrative decisions to the Board of Appeals of Queen Anne’s County. The result was dismissal of the Complaint because the Conservation Association, having missed the deadline for noting such an administrative appeal, could not now perfect one.

The Conservation Association appealed to the Court of Special Appeals. The Court of Appeals, on its own initiative, issued a writ of certiorari before the intermediate appellate

court decided the appeal.

Held: Affirmed. The Court of Appeals determined that Appellants proper recourse was an administrative appeal to the Board of Appeals of Queen Anne's County, under Maryland Code (1957, 2003 Repl. Vol.), Article 66B § 4.07, before seeking judicial review. The exhaustion doctrine enforces the notion that an administrative agency should have the opportunity to exercise its expertise and discretion first to resolve an issue.

Queen Anne's Conservation v. County Commissioners, No. 108, September Term, 2003, filed 29 July 2004. Opinion by Harrell, J.

ADMINISTRATIVE LAW – LAND USE – ZONING – VARIANCES – EXHAUSTION
OF ADMINISTRATIVE REMEDIES

Facts: Petitioner, Maryland Reclamation Associates, Inc. asked the Harford County Zoning Administrator ("the Zoning Administrator") for certain interpretations of the Harford County zoning ordinance, and particularly a 1991 amendment, as it may apply to a proposed rubble landfill on property owned by Petitioner. Maryland Reclamation Associates also sought a zoning certificate. Following a lengthy gestation period, the Zoning Administrator essentially ruled that the 1991 amendment applied to Petitioner's proposed rubble landfill and also denied the zoning certificate application. The result of these rulings meant that Petitioner, in order to establish the desired rubble landfill in accordance with the 1991 amendment's requirements, would need to apply to the Board of Appeals and obtain variances from those requirements. The contours of the available administrative processes Petitioner needed to pursue were explained to Petitioner by the Court of Appeals in earlier litigation. See *Maryland Reclamation Associates, Inc. v. Harford County*, 342 Md. 476, 677 A.2d 567 (1996).

Rather than seek variances, Maryland Reclamation Associates sought judicial review in the Circuit Court for Harford County challenging the legality of the Zoning Administrator's decisions. The Circuit Court affirmed the decision of the Board of Appeals.

Maryland Reclamation Associates appealed to the Court of Special Appeals. The Court of Appeals, on its own initiative, issued a writ of certiorari before the intermediate appellate court decided the appeal.

Held: Judgment of the Circuit Court vacated and case remanded with directions to stay the petition for judicial review. The Court of Appeals renewed its prior direction that Petitioner should have sought variances, before attempting to obtain judicial review of the adverse administrative decisions regarding the applicability of the 1991 amendments to the zoning ordinance. The exhaustion doctrine enforces the notion that an administrative agency should have the opportunity to exercise its expertise and discretion first to resolve a case before the judicial branch reviews the matter.

Maryland Reclamation Associates, Inc. v. Harford County, No. 105, September Term, 2003, filed July 30, 2004. Opinion by Harrell, J.

COMMERCIAL INSTRUMENTS - MULTIPLE PAYEES ON CHECKS - MARYLAND UNIFORM COMMERCIAL CODE - CHECK, AMBIGUITY, REQUIRED INDORSEMENT FOR STACKED PAYEE DESIGNATION

Facts: Harford Mutual Insurance Company issued a check, drawn on Allfirst Bank, in the amount of \$60,150.00, to payees as follows:

"Andrew Michael Bogdan, Jr., Crystal Bogdan
Oceanmark Bank FSB

Goodman-Gable-Gould Company".

The check was in payment of a casualty claim made by Bogdan on an insurance policy, issued by Harford Mutual, on commercial property owned by Bogdan and his wife and on which Oceanmark, the appellant's predecessor in interest, held a mortgage. Thus, the payees of the check were the property owners, the mortgage holder and the insurance agent who adjusted the casualty claim. In addition to the payees, the face of the check listed, in small print, the insurance policy number, claim identification number and the "loss date" and a small notation that read "MEMO Fire - building."

The check, indorsed only by the Bogdans and the insurance adjuster, was presented to the appellee, which cashed it. Michael Bogdan deposited the proceeds in a commercial account he held at the appellee bank. When the appellant filed its Complaint for Money Judgment, Bogdan had not distributed any of the proceeds of the check to the appellant.

Having failed in its attempt to obtain reimbursement from the appellee for negotiating the check without Oceanmark's endorsement, the appellant filed against the appellee, in the Circuit Court for Baltimore City, a Complaint for Money Judgment. Alleging conversion, it argued that the subject check was negotiable only if each of the listed payees indorsed it and, since the check was not indorsed by Oceanmark, the appellee improperly negotiated the check. After it filed its answer to the complaint, arguing as an affirmative defense, that the check was payable in the alternative pursuant to Maryland Code, (1975, 2002 Replacement Volume) § 3-110 (d) of the Commercial Law Article, the appellee moved for summary judgment on that basis. The appellant responded with its Cross-Motion for Summary Judgment.

The Circuit Court granted the appellee's motion for summary judgment. Interpreting § 3-110 (d) as resolving any ambiguity with respect to whether a check payable to two or more persons is payable jointly or in the alternative in favor of the latter, i.e., that such checks are payable in the alternative, and noting the parties' arguments acknowledging that the issue was whether the check was ambiguous, the court held:

"[o]n its face, the check is payable to two or more persons and has no intervening connectors, marks or punctuation, such as 'and', 'or,' or 'and/or'. Therefore, this court finds as a matter of law that the check is ambiguous as to whether or not it is payable

to the persons jointly or alternatively."

The appellant timely filed a Notice of Appeal to the Maryland Court of Special Appeals. The Court of Appeals issued a writ of certiorari before the intermediate appellate court considered the case. Pelican National Bank v. Provident Bank of Maryland, 369 Md. 659, 802 A.2d 438 (2002).

Before the Court of Appeals, the appellant argued that the Court announced, in Peoples National Bank v. American Fid. Fire Ins. Co., 39 Md. App. 614, 386 A.2d 1254 (1978), a bright-line rule which held that, checks with multiple payee designations without words or connectors to indicate that it was payable in the alternative, were deemed payable only jointly.

Held: Affirmed. Pursuant to Uniform Commercial Code, § 3-110 (d), which dictates the default rule that, when a check lists multiple payees in a manner that renders it ambiguous as to the indorsement necessary to negotiate the instrument, a check, made payable to multiple payees in stacked format, without any grammatical connector or punctuation, is ambiguous, and thus, payable in the alternative to any one of the named payees.

The Court noted that, prior to 1996, the controlling provision with respect to multiple payee instruments was Maryland Code, (1975, 1992 Replacement Volume) §3-116 of the Commercial Law Article. That section clearly and unambiguously announced a default rule that if a check is payable to two or more persons "not in the alternative," that is, without the word "or" or a symbol indicating alternative payment, it was presumptively payable only jointly, with the signatures of all the named payees. In 1996, however, the Maryland legislature replaced §3-116 with § 3-110 (d), which changed the default rule. Particularly, § 3-110 added a sentence, which stated that if a the payee designation is ambiguous as to whether it is payable jointly or in the alternative, the check is presumptively payable in the alternative. Because the payee designation was ambiguous, pursuant to § 3-110 (d), it was payable in the alternative.

The Court rejected the appellant's argument that Peoples National Bank v. American Fid. Fire Ins. Co., 39 Md. App. 614, 386 A.2d 1254 (1978), announced a bright-line rule that checks with multiple payee designations are payable only jointly, finding that the court, in that case, simply ruled in line with § 3-116, which controlled at that time. When § 3-110, was amended, however, the default rule changed and thus, warranted a different result than that of Peoples National Bank. To hold otherwise would thwart the legislative intent to change the presumption of

joint payment, mandated by § 3-116, to one of alternative payment, as contemplated by § 3-110.

Pelican National Bank v. Provident Bank of Maryland, No. 48, September Term, 2002, filed May 14, 2004. Opinion by Bell, C.J.

CONSTITUTIONAL LAW - FREE SPEECH - FIRST AMENDMENT ,MARYLAND ANNOTATED CODE § 13-209,WALK-AROUND SERVICES, FREE SPEECH, POLITICAL EXPRESSION, CAMPAIGN CONTRIBUTIONS, CAMPAIGN EXPENDITURES

Facts: The issue this case presents is whether the Maryland "walk around services" statute, codified during the relevant time period at Maryland Code (1957, 2002 Replacement Volume), Article 33, §13-209, which prohibits both a candidate and a candidate's campaign from paying for "walk around services or any other services as a poll worker or distributor of sample ballots, performed on the day of election" and any person from receiving payment in any form for such services, unconstitutionally violates the freedom of speech, as guaranteed by the First Amendment to the Constitution of the United States.

On November 5, 2002, Maryland held its general election for, inter alia, the offices of Governor and Lieutenant Governor. Shirley R. Brookins, Steven P. Martin and Rashida S. Hogg, the respondents, were charged, by indictment, in the Circuit Court for Prince George's County, with violating § 13-209, respondent Brookins by paying for walk around services provided by third parties on election day, and respondents Martin and Hogg by conspiring to violate the section and incurring an obligation to pay for walk around services provided on election day. More particularly, the State of Maryland, by the State Prosecutor, the petitioner, alleged that respondent Brookins, the operator of a temporary employment agency in the District of Columbia, used campaign funds of the Republican nominees for Governor and Lieutenant Governor (hereinafter referred to as "Ehrlich/Steele") to hire and pay approximately 200 residents of a homeless shelter

located in the District to provide walk around services on the general election day; that she transported them to the polls, where those walkaround services, i.e. accosting voters outside the polls, communicating a voting preference, and distributing Ehrlich/Steele campaign literature, were performed; and for which the respondent Brookins paid each worker the following day. The State alleged that respondents Martin and Hogg, hired Maryland residents, mostly high school and college students, and offered them cash amounts ranging from \$ 80.00 to \$ 110.00 to render walk around services on the day of the election, including distributing Ehrlich/Steele campaign materials, communicating to voters accosted outside the polls a voting preference and advocating for the election of Robert Ehrlich for Governor and Michael Steele for Lieutenant Governor.

The respondents filed in the Circuit Court for Prince George's County, Motions to Dismiss the indictments on the grounds that § 13-209 was unconstitutional in that it violated their First Amendment free speech rights both on its face and as applied in this case. The Circuit Court granted the respondents' motions, holding "§ 13-209 is facially unconstitutional" and, thus, violative of the First Amendment guarantee of freedom of speech. Specifically, the court concluded that the State's enunciated interest in curtailing the appearance of "undue influence and vote buying" was not so compelling or of sufficient "magnitude to warrant the curtailment of the Defendants' (and all others) freedom of speech" Pointing out that "Maryland already has a statute that addresses vote buying (§ 16-201)" and, thus, provides a remedy for the actions targeted by § 13-209, the Court also was of the view that the statute "lack[ed] detailed parameters" and, in any event, was not sufficiently narrowly tailored to meet the compelling State interest. Having determined that the statute was facially unconstitutional, the court declined to address the other issues raised in the case, including its constitutionality under the State Constitution.

The State timely noted an appeal to the Court of Special Appeals and, simultaneously, filed with the Court of Appeals a Petition for Writ of Certiorari. The Court of Appeals issued a writ of certiorari before there were any proceedings in the intermediate appellate court. State v. Brookins, 374 Md. 582, 824 A.2d 58 (2003).

On appeal, the respondents argued that, because the measure limits speech, the determination of whether it meets constitutional muster turns on the time-honored test of whether the State law is "narrowly tailored to meet a compelling state interest" to survive strict scrutiny. With regard to that standard, the respondents asserted that §13-209 is

unconstitutional because it neither enunciates a compelling state interest nor is sufficiently narrowly-tailored, and, thus, it impermissibly violates their right to freedom of speech guaranteed by the First Amendment of the United States Constitution.

The State argued that § 13-209 is constitutional. In support of its position, the State first argued that the Court should not apply strict scrutiny in its analysis of whether or not § 13-209 is unconstitutional. To the contrary, the State asserted that it should employ a less stringent standard because the provision is, at its heart, about the conduct of spending money, and only incidentally affects speech. The State alternatively argued that the provision is constitutional even under the strict scrutiny analysis because 1) the law was enacted to meet a compelling state interest, "to prevent real or apparent corruption of the electoral process", and 2) the provision was narrowly tailored to accomplish that objective.

Held: Affirmed. As an initial matter, the Court held that the speech in this case was not, at its core, about the conduct of spending money, but rather, targeted political speech and expression, one of the most critical areas afforded protection by the First Amendment. The appropriate constitutional standard under which the measure should be analyzed, therefore, is strict scrutiny.

The spending of money by a political candidate directly affects the ability of that candidate to disseminate his or her political message effectively. The Court held that, because the entire purpose of § 13-209 was to prevent that very political speech, it could not withstand constitutional muster under the First Amendment. In so holding, the Court relied on inter alia, Meyer v. Grant, 486, U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988) (holding that a regulation which prohibited the use of paid petition circulators to obtain signatures to place new laws or constitutional amendments on the ballot was unconstitutional because it limited political expression), and Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1979), in which the U.S. Supreme Court held that statutes limiting campaign contributions were constitutionally valid because they only incidentally affected speech, but held that statutes that limited campaign expenditures were unconstitutional because they directly impacted the quality and quantity of a candidate's political expression.

Furthermore, the Court distinguished §13-209 from the measure in Burson v. Freeman, in which the Supreme Court held

that a measure, which restricted vote solicitation within 100 feet of the polling place was necessary to serve the compelling state interests of protecting the right of the State's citizens to vote freely for the candidates of their choice and ensuring an election conducted with integrity and reliability and that it was narrowly drawn to accomplish those goals.

State of Maryland v. Shirley R. Brookins, No. 19, September Term, 2003, filed March 16, 2004. Opinion by Bell, C.J.

CONTRACTS- SOVEREIGN IMMUNITY- STATUTE OF LIMITATIONS- ACTION AGAINST STATE- MARYLAND RULE 2-101(b)

Facts: In sections 12-201 and 12-202 of the State Government Article (SG) the Legislature conditionally waived the State's sovereign immunity in actions filed in Maryland Courts based on written contracts provided that they are filed within one year of (1) the date the claim arose or (2) the completion of the contract giving rise to the claim.

In September, 1999, Ibnomer Sharafeldin sued the State Department of Public Safety and Correctional Services in U.S. District Court, alleging, among other things, breach of contract. The contract allegedly breached was a 1995 Settlement Agreement intended to resolve a discrimination claim that Sharafeldin had filed against the Department with the State Human Relations Commission and the Federal Equal Employment Opportunity Commission. In April, 2000, the Federal breach of contract action was dismissed on Eleventh Amendment sovereign immunity grounds. Sharafeldin then filed a similar claim in the Circuit Court for Baltimore City. On June 1, 2000, the State filed a Motion to Dismiss based on sovereign immunity grounds, which was denied by the Circuit Court. A jury subsequently returned a verdict in favor of then-Plaintiff Sharafeldin, the amount of which was reduced by remittitur. Following the judgment, the State and Sharafeldin appealed.

The Court of Appeals granted *certiorari*, prior to proceedings in the Court of Special Appeals, to review whether the one-year time requirement within SG §12-202 constitutes a condition precedent to the State's waiver of sovereign immunity that is jurisdictional in nature, or a statute of limitations.

Held: *Reversed*. SG §12-202 is not a mere statute of limitations but sets forth a condition to the action itself. Because the action was not filed in the Circuit Court within the one-year requirement set forth in SG §12-202, it is barred by sovereign immunity. Although Maryland Rule 2-101(b) could be read to save other actions, it cannot save an action subject to §§12-201 or 12-202 that is not filed in a Maryland Court within one year. Any other interpretation would, by judicial fiat, effectuate a waiver of the State's sovereign immunity beyond that decreed by the Legislature which this court has refused to do.

State v. Sharafeldin, No. 102, September Term, 2003, filed July 27, 2004. Opinion by Wilner, J.

CRIMINAL LAW - ATTEMPTED SECOND-DEGREE MURDER - THEORIES OF "CONCURRENT INTENT" AND "TRANSFERRED INTENT"

Facts: Harrison engaged in a shooting in Baltimore City on July 27, 2001. As a result of the incident, Harrison was charged in the Circuit Court for Baltimore City with, among other things, attempted second-degree murder and use of a handgun in the commission of a felony or crime of violence.

On June 12, 2002, Harrison was tried on an agreed statement of facts, which the prosecutor narrated for the record. The prosecutor stated that, on July 27, 2001, in the fifteen hundred block of Clifton Avenue, Cook, was standing and talking with

friends when he was struck in the neck with a bullet. According to the statement of facts, an investigation revealed that Harrison and another unknown person were shooting at someone known only to them as Valentine, and in the course of the shooting, accidentally struck the victim, Cook. The prosecutor's statement indicated that Harrison fired six bullets at Valentine and learned later that someone other than the intended target was struck.

Harrison was found guilty of attempted second-degree murder and the handgun charge. The trial judge imposed concurrent sentences of twelve years imprisonment for attempted second-degree murder and five years imprisonment for the handgun violation.

The Court of Special Appeals affirmed the convictions. In addition to affirming the handgun conviction, the court held that the evidence was sufficient to sustain Harrison's conviction of attempted second-degree murder of Cook. The court concluded that the conviction could not rest on the theory of "transferred intent" because, according to the court, the doctrine only applies when a defendant shoots at his target, misses, and an unintended victim receives a *fatal* injury. Nevertheless, in the court's view, the evidence did support a finding of the requisite intent, under the theory of "concurrent intent." The court held that the jury could infer that Harrison "intentionally created a 'kill zone' to accomplish the death of Valentine, the primary victim," and, therefore, the jury could also infer that Harrison had a concurrent intent to kill Cook, who was among those "gathered at the scene of the crime."

The Court of Appeals granted Harrison's petition for a writ of certiorari to consider whether the evidence was sufficient to support a conviction of attempted second-degree murder.

Held: Reversed. The evidence fails to support a conviction for attempted second-degree murder based on the theory of "concurrent intent." Although the stipulated facts show that the defendant fired six shots at an intended victim, missed that person, and hit and injured an unintended victim, the facts do not prove that the injured victim inhabited the "kill zone" when the defendant fired the shots. Furthermore, the State's reliance on the doctrine of "transferred intent" also fails inasmuch as that doctrine does not apply to a charge of attempted murder.

Gerard Harrison v. State of Maryland, No. 70 September Term, 2003, filed August 4, 2004. Opinion by Battaglia, J.

CRIMINAL LAW – CONTEMPT – MULTIPLE CONVICTIONS DURING SINGLE PROCEEDING

Facts: Patrick Darnell Smith was convicted of multiple drug-related charges. After discharging his trial counsel, he represented himself at a hearing on his motion for a new trial. During the course of the hearing, Smith summarily was found in direct criminal contempt of court on two separate occasions for using the word "fuck." At the end of the hearing, Smith launched into an extended, profane diatribe against the judge. Consequently, Smith was found in contempt a third time and the proceedings were quickly drawn to a close.

Held: Affirmed. When it appears to a trial judge that finding an individual in contempt has allowed the court to return to its regular business, a judge thereafter, if necessary, may find that person in contempt for a subsequent offense during the same, continuous proceeding. Should a judge determine, however, that finding an individual in contempt fails to curtail the immediate disruption to the proceeding, the judge should not continue to find the individual in contempt, but instead employ alternative remedies. As the trial judge in Smith's case followed these procedures and acted reasonably under the circumstances, there was no error in convicting Smith for three acts of contempt.

Patrick Darnell Smith v. State, No. 134, September Term, 2003, filed 29 July 2004. Opinion by Harrell, J.

CRIMINAL LAW - DEFENDANT'S POST-ARREST SILENCE - MIRANDA V. ARIZONA - EVIDENCE OF PRE-MIRANDA

SILENCE - ABUSE OF DISCRETION - CLEARLY ERRONEOUS - MISTRIAL

Facts: During the trial for alleged controlled dangerous substance (CDS) violations, the prosecutor asked a police officer if the defendant, after arrest, but prior to being given *Miranda* advisements, denied his involvement in the underlying drug sales. The defense objected and a bench conference ensued during which the officer told the judge, outside the jury's hearing, that he could not remember whether the defendant denied his involvement. After the bench conference, the trial judge, in open court, sustained the objection, but told the jury:

"I'm basically telling you what the police officer said. Number one, he didn't give any *Miranda* warnings and two, [the defendant] didn't say anything about his involvement in the case or not his involvement in the case because he wasn't asked. Okay. So there is no more information on that score. He wasn't asked whether he was involved and he didn't respond."

Three subsequent defense witnesses testified that the defendant had not been involved in narcotics sales, and that he denied his involvement at the time. The defendant was convicted and appealed. The Court of Special Appeals, in an unreported opinion, affirmed.

Held: Reversed. Post-arrest silence is inadmissible as substantive evidence of a criminal defendant's guilt because it is usually more prejudicial than probative. Any inference of guilt on the basis of the defendant's silence was unjustified; he may simply have been exercising his constitutional right to remain silent. This is true regardless of whether his silence preceded the recitation to the defendant of *Miranda* advisements. The trial judge erred by effectively telling the jury that the defendant remained silent regarding his involvement, both because the judge's instruction was not supported by the officer's testimony and because post-arrest silence is inadmissible. The judge's instruction probably led the jury to believe that the defendant had not denied his involvement, and effectively impeached in advance the testimony of three defense witnesses who

testified that the defendant actually denied his involvement. The judge abused his discretion by failing to correct the jury's misapprehension of the testimony and by denying the subsequent defense motion for a mistrial. The case was remanded for a new trial.

Nathaniel Kosh v. State, No. 121, September Term, 2003, filed 28 July 2004. Opinion by Harrell, J.

FOOD STAMPS - EXCESS SHELTER COST DEDUCTION

FOOD STAMPS - APPEAL

Facts: Christopher worked for the Library of Congress until she was terminated on December 23, 1994 "for reasons of disability." Christopher has challenged her termination, maintaining that she is not disabled and that she should be reinstated. Christopher has not received any disability benefits and alleges that her appeal of her termination has prevented her from recovering such benefits.

In 1995, Christopher began receiving food stamps for "an assistance unit of one person." When Christopher first applied for food stamps with the Montgomery County Department of Health and Human Social Services (the "Department"), she received an "uncapped excess shelter cost deduction." The "excess shelter cost deduction" allows applicants to subtract from their gross income a limited or "capped" amount of allowable shelter costs such as heating costs. The amount of the excess shelter cost deduction is "capped" for most food stamp applicants. Elderly or disabled households, however, are eligible for an unlimited or "uncapped" deduction, which allows them to subtract all of their "excess shelter costs" from their gross income.

In April 2002, the Department determined that Christopher was eligible to continue to receive food stamps, and approved her

for \$135 per month for a six month period. On May 18, 2002, the Department sent Christopher a notice informing her that it had changed her food stamp payment to \$110, explaining that the \$135 amount was incorrect because Christopher was "erroneously receiving an uncapped shelter deduction based upon disability." In its notice to Christopher, the Department stated that, in order to receive the uncapped shelter cost deduction, food stamp recipients must either be at least 60 years old or be receiving disability benefits under COMAR 07.03.07.02B(6). Christopher was 57 at the time and was not receiving disability benefits. Arbitration proceedings are still pending to resolve whether Christopher was properly terminated based on her alleged disability.

An administrative hearing regarding the Department's decision to reduce Christopher's food stamp allotment was held on September 24, 2002. The Administrative Law Judge concluded that, because Christopher was not receiving disability benefits, she was not entitled to the uncapped shelter cost deduction under COMAR 07.03.07.02B(6). The Circuit Court for Montgomery County affirmed the ALJ's decision.

Christopher appealed, urging she should be "deemed to be constructively receiving disability benefits" under the relevant COMAR regulations. She also argued that "constructive receipt means that [she] is 'receiving' benefits for purposes of the statute and regulation, but the *amount* of the benefits actually received is zero due to [her appeal of the Library of Congress' disability determination]."

Held: Affirmed. The Court held that a plain reading of COMAR 07.03.17.02B revealed that, unless the individual is a veteran, the definition of "disabled" for the purposes of the food stamp program requires the individual to actually receive some kind of disability-related benefit. With respect to the uncapped shelter cost deduction's disability requirement, the Court explained that Section 2012(r)(2) of the Food Stamp Act and Section 271.2 of Title 7 of the Code of Federal Regulations defines a "disabled member" of a household eligible for food stamps in terms of someone who receives benefits. COMAR 07.03.17.02B(6) likewise defines disabled for the purposes of the Food Stamp Program as someone who receives certain disability benefits.

The Court rejected Christopher's argument that she should be deemed to have "constructively received" disability benefits

because her appeal prevented her from receiving the disability benefits she might otherwise be entitled to. The Court reasoned that, if it accepted Christopher's argument, it would be expanding the definition of disabled beyond the confines of a state regulation that is derived from federal law. Given that States must comply with federal guidelines and risk financial penalties by not doing so, the Court stated that it would not impose "constructive receipt" onto the Maryland regulation, which must conform with federal law.

The Court also concluded that "constructive receipt" would contravene the "purpose, aim, or policy" of the Food Stamp Program as it has been established in federal law. In Christopher's case, factoring in "constructive benefits" would create an inaccurate net income, thus defeating the program's purpose to distribute food stamps based on a household's actual financial need. Factoring constructive benefits of zero also would obfuscate the program's goal of calculating income as accurately as possible.

Luella D. Christopher v. Montgomery County Department of Health and Human Services, September Term, 2003, Filed May 12, 2004.
Opinion by Battaglia, J.

GIFTS - CONDITIONAL GIFTS - STATUTE OF LIMITATIONS
EQUITY - DETERMINATION OF THE CLAIM

Facts: In 1992, the Ver Bryckes provided \$200,000 to their son, John, and his wife, Lisa, in order to help them buy Rabbit Hill, a property located next door to the Ver Bryckes. The Ver Bryckes wanted to be close to their grandchildren and hoped that John and Lisa would care for them in their old age.

The \$750,000 property included a house and a cottage. In order to help John and Lisa purchase the property, the Ver Bryckes

borrowed \$200,000 to give to them by securing a thirty-year mortgage against their home. As part of the arrangement, Mr. Ver Brycke signed a "gift letter" to his mortgage company, stating that he would give a "gift of \$200,000" to his son.

On September 30, 1992, John and Lisa bought Rabbit Hill. At settlement, in order to avoid the tax consequences that would result from the gift, Mr. Ver Brycke wrote a check for \$160,000 to be held in an escrow account at the title company handling the transaction. Next, he and his wife each wrote four separate checks for \$10,000 to John and Lisa who immediately endorsed the checks, totaling \$40,000, to the title company. The Ver Bryckes then had sixteen promissory notes drawn up for \$10,000 each and executed a purchase money deed of trust granting them a lien, secondary to Norwest Mortgage's first deed of trust, on Rabbit Hill. Meanwhile, John's sister contributed \$200,000 towards the total \$750,000 purchase price, and John and Lisa conveyed the one acre parcel containing the cottage to her. As a result, with the Ver Bryckes' \$200,000 gift, John's sister's \$200,000 contribution, and after borrowing \$300,000 from Norwest Mortgage and contributing \$50,000 of their own funds, John and Lisa acquired Rabbit Hill, consisting of the main house and two acres for \$550,000.

John and Lisa never moved into Rabbit Hill, although, after the settlement, they did begin renovating it. John and Lisa lived with the Ver Bryckes until the summer of 1993, when they moved to the parents' summer cottage, which was also located in Anne Arundel County.

While John and Lisa worked on Rabbit Hill, the Ver Bryckes cancelled the \$10,000 notes in 1993 and 1994, totaling \$80,000. In 1995, Rabbit Hill remained uninhabitable. The parents did not cancel the notes for 1995 and 1996. Then, in 1997, John and Lisa separated, and divorce proceedings began in January 1998. In July 1998, the Ver Bryckes recorded the deed of trust executed on September 30, 1992, as security for the \$200,000. In November 1999, John and Lisa contracted to sell Rabbit Hill for \$980,000, and the settlement was scheduled for March 1, 2000. John and Lisa divorced on October 2, 2000.

Claiming breach of deed of trust and notes, unjust enrichment, and promissory estoppel, the Ver Bryckes sued their son, John, and his former wife, Lisa, in order to recover as restitution the \$200,000 they turned over to John and Lisa to help them buy Rabbit Hill. The Ver Bryckes based their claims of unjust enrichment and promissory estoppel on the theory that they gave John and Lisa a

conditional gift. They also argued that they should receive a pro rata share of the profit John and Lisa received from the sale of Rabbit Hill.

Based on the jury's findings that the Ver Bryckes gave John and Lisa a conditional gift of \$200,000, the trial court entered judgments in favor of the Ver Bryckes on their unjust enrichment and promissory estoppel claims. On appeal, the Court of Special Appeals held that the Ver Bryckes gave John and Lisa a conditional gift of \$200,00 but the three-year statute of limitations barred \$40,000 of the judgment because the jury had determined that the Ver Bryckes knew that their conditional gift would not be satisfied on or before January 1, 1995, a date which was past the three-year limitations period. With respect to the \$160,000 that had been secured by a deed of trust, the Court of Special Appeals held that the twelve-year statute of limitations period under Section 5-102(a) of the Courts & Judicial Proceedings Article applied.

The Court of Appeals issued a writ of certiorari to determine whether the Court of Special Appeals erred when it applied the twelve-year statute of limitations period rather than the three-year statute of limitations period to the Ver Bryckes' claim against John and Lisa.

Held: Reversed the Court of Special Appeals; affirmed the Circuit Court for Anne Arundel County. Although the Court agreed with the Court of Special Appeals that the Ver Bryckes gave John and Lisa a conditional gift of \$200,000, it concluded that the Court of Special Appeals erred when it held that the three-year statute of limitations period barred a portion of the Ver Bryckes' claim, amounting to \$40,000. It also disagreed that the twelve-year statute of limitations period applied to the \$160,000 portion of their claim, which was secured by a deed of trust. In addition, the Court addressed the Court of Special Appeals' discussion of equity versus law, holding that, when characterizing whether a claim sounds in law or in equity, the determination is dependent upon the remedies sought by the parties.

The Court first explained that, in limited instances, "[a] donor may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it." Concluding that the Ver Bryckes gave John and Lisa a conditional gift of \$200,000, the Court then explained that, in conditional gift situations, the three-year statute of limitations period begins to run when the donor knew or should have known the

condition failed. Disagreeing with the Court of Special Appeals that the jury had determined that the Ver Bryckes knew by January 1, 1995, that the gift failed because the question put to the jury on this point was ambiguous, the Court then concluded that, under the facts of the case, it was not clear that the condition would not be met until the property was sold.

The Court also determined that the Court of Special Appeals erred with respect to the precise nature of the Ver Bryckes' conditional gift. According to the Court, when characterizing whether a claim sounds in law or in equity, the determination is dependent upon the remedies sought. Because the Ver Bryckes sought to recover \$200,000, the Court determined that their restitution claim was for money and thus was a claim at law.

Finally, the Court agreed with the Court of Special Appeals that the Ver Bryckes were not entitled to prejudgment interest as a matter of right, explaining that, generally, prejudgment interest is left to the discretion of the fact finder.

Ver Brycke v. Ver Brycke, No. 54, September Term, 2003, Filed February 13, 2004, opinion by Battaglia, J.

MANDAMUS - NATURE AND GROUNDS

Facts: In the fall of 1999, Gail Wilson, a Personnel Specialist for the Department of Public Safety and Correctional Services, filed two grievances against the Department regarding the Department's handling of her leave of absence due to medical problems.

Although Wilson complied with the Department's sick leave policy and had never been examined by the State Medical Director,

she was informed that the State Medical Director had determined she was able to perform her duties and that she had to either "report to work immediately" or resign from her position. Wilson was told that, if she did not report to work by October 26, 1999, it would be assumed she had resigned from her position. Wilson responded by letter on October 25 saying she could not return to work until she received permission from her physician. She did not return to work on October 26. On November 2, 1999, Wilson was notified that her employment had been terminated as of that date because she had been "absent without notification to [her] supervisor since October 26, 1999."

Wilson ultimately submitted two "State Personnel Management System Appeal and Grievance Forms" related to this matter. The first grievance, dated October 28, 1999, requested that the Department "[r]escind the memo, accept my physician's certificates, and credit me with sick leave until I am released by a real physician." When Wilson was notified that she was being terminated on November 2, 1999, she filed another grievance, complaining that the Department's actions "were arbitrary and capricious, since my supervisor received a doctor's certificate from me on October 25 certifying me unable to work through November 1." Wilson requested the following remedy: "Rescind the termination, accept my certificate, restore my lost pay, return me to my previous position at Pre-Release and stop the harassment."

On May 15, 2000, the Administrative Law Judge decided that the Department incorrectly determined that Wilson had resigned without notice, ordering that Wilson be reinstated and that the November 2 letter informing her of her termination be expunged from her personnel records. On the day after the ALJ's Order, Wilson's attorney sent a letter to the Department, but not to the ALJ, asking that Wilson "be returned to her former status effective November 2, 1999, and compensated accordingly by placing her on administrative leave with pay from that date to her return." Wilson was reinstated on July 5, 2000. For the eight-month period between the date Wilson was allegedly terminated, November 2, 1999, and the date she was reinstated, the Department did not award Wilson back pay, retirement benefits, or any sick and vacation leave.

On July 27, 2000, Wilson's attorney sent the ALJ a letter complaining of the Department's delay in reinstating Wilson and requesting him to provide Wilson with "full back pay and benefits" by either enforcing his May 15 Order or correcting it. On August 17, 2000, the ALJ sent the Department a letter expressing his concern that his Order had not been followed in a timely manner. He noted that he had "no jurisdiction to *force* the agency to do

anything. A Writ of Mandamus or other Circuit Court action would be needed to enforce my Order."

A year later, on August 14, 2001, Wilson filed a "Petition for Writ of Mandamus and/or Writ of Certiorari" in the Circuit Court for Anne Arundel County. On June 25, 2002, the trial judge granted the Department's Motion to Dismiss, stating that the ALJ ordered that Wilson be reinstated and nothing more. If Wilson was dissatisfied with the ALJ's Order, the trial judge explained, "the proper course of action would have been to file a timely motion to revise or reconsider his order to include the more specific relief she now requests." The Court of Special Appeals affirmed the trial court's ruling in an unreported decision. The Court of Appeals issued a writ of certiorari to determine whether Wilson's mandamus action was proper.

Held: The ALJ's Order did not provide Wilson with a clear legal right to receive back pay, accrued leave, and retirement benefits, and thus, she was not entitled to mandamus relief.

The Court of Appeals began by discussing the history and nature of the writ of mandamus, explaining that a mandamus action fails when the right pursued is doubtful. The Court concluded that Wilson's mandamus action did not lie because she had no clear or indisputable right to back pay, accrued leave, or retirement benefits. Wilson did have a clear and undisputable right pursuant to the ALJ's Order to be reinstated, with which the Department complied.

The Court also observed that, in her argument, Wilson incorrectly conflated what are really two different types of mandamus actions: one for the judicial enforcement of non-discretionary acts, the other for the judicial review of adjudicatory administrative decisions. Requiring a public official to perform a non-discretionary duty or function - to enforce the law - is the original common-law function of mandamus. Mandamus may also issue, the Court explained, for the purpose of judicial review of administrative decisions where there is "both a lack of an available procedure for obtaining review *and* an allegation that the action complained of is illegal, arbitrary, capricious or unreasonable." When Wilson argued that her mandamus action was proper to enforce the Order because the Department's actions were arbitrary and capricious, she merged two different lines of analysis.

Additionally, the Court rejected Wilson's argument that reinstatement necessarily included by implication back pay, accrued leave, and retirement benefits under the State's employee grievance process. The Court then determined that the ALJ's letter to the Department expressing his concern that his Order had not been implemented in a timely fashion was not an exercise of his authority to reconsider or correct his Order.

Gail Wilson v. Stuart Simms, et al., No. 72, September Term, 2003, Filed March 11, 2004. Opinion by Battaglia, J.

TAXATION - MANUFACTURER'S EXEMPTION

TAX-PROPERTY - DEFINITION OF MANUFACTURING

Facts: In the Port of Baltimore, Consolidation Coal Sales Company ("CCSC"), a subsidiary of Consol Energy, Inc. ("Consol"), operates a terminal that receives, stores, and ships coal to domestic and international markets on behalf of coal producers, coal brokers, and utilities. CCSC claimed that the "blending" activities that occurred at its facility constituted manufacturing for the purposes of a manufacturing exemption from Maryland personal property tax.

CCSC receives the majority of its coal by railway. The trains are brought to its "dumper facility," where a "dumper" empties the rail cars. The coal then is discharged across a "grisly," which screens away unwanted material that may get into the coal during transit. Next, the coal moves into "hoppers" that collect and discharge the coal onto a conveyor belt where it moves through a series of "transfer points." The coal, ultimately, is taken to stockpiles, where it is moved through "stacker reclaimers," large machines that have "bucket wheels" that both stack the coal for storage purposes and reclaim the coal when it is to be shipped.

The coal is stored in different stacks based on its grade. When coal is reclaimed to be shipped, it can be mixed with other grades of coal as it is sent back down the conveyor belt. A typical CCSC cargo contains a mix or "blend" of coal from three to six stockpiles.

CCSC filed personal property tax returns with the Maryland State Department of Assessments and Taxation ("SDAT") for the machinery and equipment at its Baltimore facility for the 1997-1999 tax years. CCSC did not report any of its personal property as manufacturing property and stated that the nature of its business in Maryland was "exportation of coal."

On May 19, 2000, CCSC filed amended returns for 1997-1999, and submitted an "exemption application for manufacturing and research and development, stating that most of its property was used in manufacturing." CCSC sought to amend its returns for the prior three-year period for 1997-1999. In addition to its effort to amend its 1997-1999 returns, CCSC claimed in its 2000 tax return that its equipment was used in manufacturing and that the nature of its business in Maryland was "coal blending" instead of "exportation of coal."

On January 21, 2001, SDAT rejected CCSC's application for a manufacturing exemption, denied CCSC the manufacturing exemption for the years 1997-2000, and issued a notice of assessment for CCSC's property at \$12,641,700 for 2000. CCSC appealed. SDAT issued final notices of assessment to CCSC and concluded that CCSC was not legally entitled to a manufacturing exemption.

On September 13, 2001, CCSC appealed to the Maryland Tax Court. SDAT and the Mayor and City Council of Baltimore responded. After the Tax Court upheld SDAT's assessments, CCSC filed a timely petition for judicial review in the Circuit Court for Baltimore City. The Circuit Court reversed the Tax Court, concluding it had "erroneously interpreted the tax statute, specifically §1-101(r), and misapplied it to the facts" because "CCSC's blending activities are a substantial step in the substantial transformation of coal."

SDAT, the Mayor and City Council of Baltimore, and CCSC noted appeals to the Court of Special Appeals, and this Court issued, on its own initiative, a writ of certiorari prior to any proceedings in the intermediate appellate court.

Held: Circuit Court reversed. The Court held that Section 7-225 of the Tax-Property Article, which provides a tax exemption from personal property used in manufacturing, did not apply to CCSC. Because Section 7-225(c) clearly and unambiguously excluded "property . . . used primarily in . . . storage, shipping [or] receiving" from the exemption, the Court concluded that CCSC is disqualified from receiving the tax exemption based on the Tax Court's finding that the CCSC facility is "a very large scale and sophisticated storage, shipping,[and] receiving facility."

In addition, the Court held that CCSC's activities do not qualify as manufacturing under Section 1-101(r) of the Tax-Property Article. With respect to Section 1-101(r)(2)(ii), the definition of manufacturing includes "the operation of machinery and equipment used to extract and process minerals." Because the plain language of the statute requires machinery to extract *and* process minerals in order to be classified as manufacturing equipment, the Court concluded that CCSC does not meet this definition of manufacturing as its facility does not extract minerals.

Finally, as for the more general definition of manufacturing in Section 1-101(r)(1) of the Tax-Property Article, the Court held that CCSC does not meet it either. Under Section 1-101(r)(1), "[m]anufacturing' means the process of substantially transforming, or a substantial step in the process of substantially transforming, tangible personal property into a new and different article of tangible personal property by use of labor or machinery." In this case, the Court concluded, the coal remains coal: the product leaves the CCSC facility in the same state as when it arrives. Therefore, the Court held that CCSC's activities do not constitute manufacturing because the coal is not changed into a "new and different article."

State Department of Assessments and Taxation et. al. v. Consolidation Coal Sales Company, No. 135, September Term 2003, opinion by Battaglia, J.

COURT OF SPECIAL APPEALS

CIVIL PROCEDURE - COLLATERAL ESTOPPEL - FINAL JUDGMENT - PENDING APPEAL

COLLATERAL ESTOPPEL - FINAL JUDGMENT - MOOTNESS ON APPEAL

AFFIRMATIVE DEFENSES - COLLATERAL ESTOPPEL - FAILURE TO RAISE IN ANSWER

Facts: Appellee Lake Hallowell Homeowners Association filed an injunction action in the Circuit Court for Montgomery County against appellant Brian Campbell, seeking the removal of a basketball hoop and car from appellant's lawn. Appellant countered that he and his family had been the targets of discrimination. Dismissing that claim as "bizarre," the circuit court granted the injunction. While appellant's appeal from that injunction was pending in the Court of Special Appeals, he filed a derivative action in the circuit court against the Association and its Board of Directors, again asserting that the Association's injunction action against him was motivated by discrimination.

Before this Court ruled on the appeal of the injunction, Campbell moved out of the Lake Hallowell Community. Thus, this Court dismissed the appeal of the injunction on the ground that it had become moot.

After this Court issued its opinion dismissing the appeal of the injunction, but before the mandate in the injunction appeal had been issued, the Association moved for summary judgment in the derivative action. In doing so, it argued that appellant's discrimination claim had been decided, and rejected, in the injunction action and that relitigation of that issue in the derivative action was barred by collateral estoppel. The circuit court agreed with the Association, and, although it had never raised this affirmative defense in its answer, it granted summary judgment against appellant on that basis.

Held: Affirmed. Although the mandate in the injunction appeal had not yet been issued, and thus the appeal from the injunction was still technically pending, a pending appeal does not

affect the finality of the lower court judgment for purposes of *res judicata* or collateral estoppel. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which undermines the purpose of *res judicata*: to avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions. Furthermore, the danger that an erroneous judgment will affect the rights of the parties in subsequent and related litigation, while an appeal of that judgment is pending, is avoidable. In an appropriate case, the trial court in the second proceeding may simply stay that proceeding, pending appellate review of the judgment, whose validity is at issue.

Nor did this Court's dismissal of the appeal of the injunction as moot vitiate the preclusive effect of the injunction. The general rule is that where a party to a judgment cannot obtain the decision of an appellate court because the matter determined in the lower court is moot, the judgment is not conclusive against him in a subsequent action on a different cause of action. An exception to that rule, however, is that *res judicata* and collateral estoppel still attach when the party against whom the defense is raised is the party who causes the case to become moot. That, of course, happened in this case. Campbell moved out of the community, thereby rendering the injunction moot. Hence, he may not now avoid the preclusive effect of the circuit court judgment.

Furthermore, despite the Association's failure to properly raise the defense of collateral estoppel, the circuit court did not err in granting summary judgment on that ground. Maryland Rule 2-323(g) enumerates various affirmative defenses, including collateral estoppel and *res judicata*, that must be set forth by separate defenses. The failure of a defendant to do so bars the defendant from relying on the defense to obtain judgment in its favor. The Association failed to do so. Nevertheless, in the interest of judicial economy, the court may *sua sponte* invoke *res judicata* or collateral estoppel to resolve a matter before it. Thus, even though the Association failed to raise the defense of collateral estoppel, the circuit court did not commit reversible error in granting summary judgment in favor of the Association on that ground.

Brian Campbell v. Lake Hallowell Homeowners Ass'n, No. 1132, September Term, 2003, filed July 1, 2004. Opinion by Krauser, J.

CIVIL PROCEDURE - JUDICIAL ESTOPPEL - WORKERS' COMPENSATION;
SUBROGATION; L.E. § 9-902 - THIRD PARTY TORTFEASOR - INDEMNITY -
SPECIAL OR JOINT EMPLOYER.

Facts: In May 1995, Bernard Windsor, Jr., an employee of Chaney Enterprises Limited Partnership ("Chaney"), was injured while on the fourth day of being on "loan" to Genstar Stone Products Company, now known as Redland Genstar, Inc. ("Genstar"). On that day, Windsor attempted to clear a root or stick from the conveyer belt of the machine he was operating. He was "dragged" into the machine and suffered injuries to his arm, chest, and head. After a number of surgeries, Windsor had a 70% loss of function in his left arm.

After his accident, Windsor filed a claim with the Workers' Compensation Commission ("WCC" or "Commission"), naming Chaney as his employer. On the original report of injury filed by Chaney with the WCC, Chaney indicated that the accident occurred at the premises of Genstar. In response to a question on the form that asked whether the injury occurred "on [the] employer's premises?", Chaney typed "SUBROGATION." Chaney promptly began making worker's compensation payments to and on behalf of Windsor, without contesting the claim. Because Chaney did not contest the compensation claim, the WCC issued an Award of Compensation, ordering Chaney, as the sole employer, and its insurer, to pay temporary total disability benefits to Windsor of \$525 per week, as of May 29, 1995. Neither Chaney and its insurer appealed from that order. Payments from Chaney or its insurer continued for five years, without objection.

In 1998, the Windsors, along with Chaney's insurer, filed a third party tort suit against Genstar, alleging negligence. In response to the suit, Genstar did not aver that it was not liable because it was Windsor's joint employer. Instead, Genstar asserted that it was not negligent and that, in any event, Windsor was contributorily negligent.

Approximately five and a half years after Windsor's accident, Chaney filed a two-count suit against Genstar, seeking indemnification for the workers' compensation benefits paid to or for Chaney since 1995. Chaney alleged, *inter alia*, that the parties had entered into an oral agreement in which Chaney agreed to lend Windsor to Genstar and, at the time of the accident, Genstar was Windsor's "special employer," with "exclusive control" over Windsor. Upon Genstar's motion, the circuit court remanded the case to the WCC for a determination of whether Genstar was the

special employer of Windsor at the time of his accident. Both tort suits were stayed pending the decision of the WCC.

The Commission ruled that "the employer Chaney Enterprises is estopped from impleading Redland Genstar after six years; and ... that Chaney Enterprises is the correct employer; based on the doctrine of estoppel." The circuit court affirmed the WCC.

Held: Judgment affirmed. When Chaney submitted its report of injury to the WCC, as required by Labor and Employment Article ("L.E.") § 9-707, it never alerted the WCC to its contention that Genstar was a dual employer or Windsor's special employer, despite Chaney's knowledge that Windsor had been loaned to Genstar and the accident occurred at Genstar's premises. The Court held that, if Chaney believed that, at the relevant time, Windsor's injury did not arise out of and in the course of Windsor's employment with Chaney, it should have asserted that contention by filing issues with the WCC to contest the claim. Moreover, if Chaney considered Genstar a dual or special employer, it should have sought to implead Genstar in proceedings before the Commission. Had Chaney timely alerted the Commission to an issue concerning the correct employer, the WCC would have had an opportunity to undertake an investigation, as contemplated by L.E. §§ 9-714 and 9-715.

The Court stated that Chaney's conduct contravened the important principles of judicial economy that the Workers' Compensation Act was designed to achieve, as recognized by the Court in *Temporary Staffing, Inc. v. J.J. Haines & Co., Inc.*, 362 Md. 388 (2001). As a result of Chaney's course of conduct, "all relevant employers" were not "part of a Commission proceeding that include[d] the determination of liability between them for workers' compensation benefits...." *Temporary Staffing, Inc.*, 362 Md. at 404. Consequently, and contrary to the intention of the Legislature, all issues in regard to compensation benefits could not be "resolved in one proceeding...." *Id.* Instead, appellant created "the necessity of multiple suits," *id.*, when, almost six years after the accident, it filed suit against Genstar, predicated on the contention that Genstar was Windsor's special or dual employer. Chaney had the knowledge necessary to file suit earlier, but did not do so. Instead, Chaney seemed to anticipate recovery from Genstar through a third party tort action, pursuant to its right of subrogation.

Moreover, when Chaney inserted the word "SUBROGATION" in its report to the WCC, in the space immediately after it noted that the accident did not occur on Chaney's premises, Chaney represented to

the WCC, in effect, that Genstar was a third party tortfeasor, not a joint or special employer; Chaney could not have had a claim for subrogation if Genstar was a special or joint employer. Chaney's use of the term "subrogation" was not inadvertent; it constituted an assertion by Chaney that it believed it was entitled, as the compensation payer, to obtain reimbursement from a third party tortfeasor, by way of subrogation, for its compensation payments.

Moreover, Chaney's course of conduct in failing to file any issues to contest the compensation claim; in failing to request a hearing with the WCC; and in failing to note an appeal from the WCC's award of benefits, provide support for the conclusion that Chaney regarded Genstar as a third party tortfeasor, rather than a special or joint employer.

Chaney's failure to contest the compensation claim led the Commission to issue an award of July 18, 1995, in which it identified Chaney as the sole employer, and required Chaney and its insurer to pay benefits to Windsor. In addition, Chaney's belated assertion was detrimental to Genstar, given that Chase, the Genstar foreman at the time of the accident, has since died. Based on Chaney's submissions and representations to the WCC, the Court concluded that the doctrine of judicial estoppel operated to bar Chaney from belatedly asserting that Genstar was a joint employer.

Chaney Enterprises Limited Partnership v. Bernard R. Windsor, Jr., et al., No. 00715, September Term, 2003, filed July 16, 2004. Opinion by Hollander, J.

CONTEMPT OF COURT - CONSTRUCTIVE CIVIL CONTEMPT - MOOTNESS - WRIT OF BODY ATTACHMENT SUBJECT TO APPEARANCE BOND PENDING CONTEMPT HEARING - PROVISION FOR PURGING CONTEMPT - WHERE FATHER WHO WAS

ALLEGED TO BE IN CONTEMPT OF COURT FOR FAILURE TO COMPLY WITH ORDER TO MAKE CHILD SUPPORT PAYMENTS WAS DETAINED PURSUANT TO WRIT OF BODY ATTACHMENT UNTIL HEARING WAS HELD, CHALLENGE TO DETENTION WAS RENDERED MOOT WHEN HEARING WAS CONDUCTED; WHERE FATHER WHO FAILED TO COMPLY WITH ORDER TO MAKE CHILD SUPPORT PAYMENTS WAS FOUND IN CONSTRUCTIVE CIVIL CONTEMPT AND WAS JAILED PENDING COMPLIANCE WITH PURGE PROVISION, CHALLENGE TO DETENTION WAS RENDERED MOOT BY COMPLIANCE WITH PURGE PROVISION AND RELEASE FROM JAIL; ALTHOUGH ISSUE WAS MOOT, WHERE FATHER ALLEGED AT CONTEMPT HEARING THAT HE WAS UNABLE TO AFFORD SUPPORT PAYMENTS, AND CONTEMPT HEARING WAS CONTINUED BUT FATHER FAILED TO APPEAR ON SECOND DATE, COURT'S ISSUANCE OF WRIT OF BODY ATTACHMENT SUBJECT TO FULL CASH APPEARANCE VIOLATED MD. RULE 15-207(c)(2); ALTHOUGH ISSUE WAS MOOT, WHERE PURGE PROVISION REQUIRED THAT FATHER SELL ASSET AND REMIT PROCEEDS TO BUREAU OF SUPPORT ENFORCEMENT, FATHER CLEARLY HAD NO PRESENT ABILITY TO PAY AND DETENTION OF FATHER PENDING COMPLIANCE WITH PURGE PROVISION WAS IMPROPER.

Facts: In 1993, a Massachusetts court ordered the appellant, David Young, to make regular child support payments. The order was eventually transferred to Maryland, where Young resides, and Young was to make his payments to the Bureau of Support Enforcement of the Talbot County Department of Social Services. Young was more than \$30,000.00 in arrears in March of 2002, when the Bureau of Support Enforcement filed, in the Circuit Court for Talbot County, a petition to hold Young in constructive civil contempt of court.

A hearing was held, and Young alleged that he was disabled and unable to pay. The case was continued, but Young failed to appear for the second hearing date. The court issued a writ of body attachment subject to a full cash appearance bond of \$15,000.00.

Young was eventually detained pursuant to the writ of body attachment and was unable to make the bond. He was detained for more than a month before the contempt hearing was held. At the hearing, Young maintained that he was disabled but acknowledged that he had a Coca Cola memorabilia collection that was worth about \$5,000.00. The court found Young in constructive civil contempt and ordered him jailed for five months and 29 days or until he purged the contempt by selling his memorabilia collection and remitting the proceeds to the Bureau of Support Enforcement. Young spent almost three weeks more in jail before an agent sold the collection.

Prior to his release from jail, Young noted an appeal to the Court of Special Appeals. He argued that the trial court erred by

detaining him on the writ of body attachment and by continuing the detention, upon the contempt finding, until he complied with the purge provision.

Held: Appeal dismissed as moot. The Court of Special Appeals determined that Young's pre-hearing detention on the writ of body attachment was rendered moot when the contempt hearing resumed and the writ expired. His continued detention was pursuant to the contempt order rather than the writ. Young's detention pursuant to the contempt order was rendered moot when he complied with the purge provision and was released from jail.

For guidance purposes, the Court explained that Md. Rule 15-207(c)(2) does not authorize the detention of an alleged civil contemnor who fails to appear for a hearing. The rule permits the court to enter an order directing a sheriff or other peace officer to take custody of the alleged contemnor and bring him or her before the court for the scheduled hearing, or to proceed *ex parte*. The alleged contemnor may not be detained pending a later hearing.

The Court also explained, for guidance purposes, that where a person found in constructive civil contempt for failure to make child support payments does not have the *present* ability to pay, the person may not be detained pending the purging of the contempt. Young could not comply with the purge provision of the contempt order until he could sell his Coca Cola memorabilia collection. His detention prior to the sale was improper.

David Young v. Tami Fauth, No. 0448, September Term, 2003, filed July 19, 2004. Opinion by Smith, J. (retired, specially assigned).

CRIMINAL LAW - EVIDENCE - ADMISSIBILITY OF A PRIOR CONVICTION OF A CRIME OF VIOLENCE - SENTENCING - ENHANCED PENALTIES

Facts: A jury in the Circuit Court for Baltimore City

convicted appellant, Charles Stanley, of possession of a firearm after a prior conviction of a crime of violence and of discharging a firearm within the City of Baltimore. The trial court sentenced appellant to five years' incarceration without the possibility of parole for possession of a firearm and a concurrent sentence of time served for the discharging a firearm conviction.

A Baltimore City Police Officer responded to a call for the discharging of a firearm at appellant's residence. The officer asked appellant if he had a firearm, and appellant responded that he had a handgun inside his house, but that he had dropped it into the heating duct. Appellant led the officer to the basement where the officer recovered a loaded .32-caliber handgun from within the heating duct. The cylinder of the gun contained four rounds of ammunition and two empty shell cases. Appellant told the officer that he had fired the gun twice out the bedroom window to see if the gun was operational.

Appellant contends that the convictions should be reversed under the plain error doctrine because at the time of his trial this Court had decided *Carter v. State*, 145 Md. App. 195 (2002), but that case was reversed by the Court of Appeals decision in *Carter v. State*, 374 Md. 693 (2003), after his conviction.

Appellant further contends that the trial court imposed an illegal sentence under Md. Code, Art. 27, section 449(e).

Held: Affirmed. A review of the *Carter v. State* decisions reveals Maryland case law at the time of appellant's trial required that the trial court perform a balancing test before disclosing the name and nature of a defendant's prior convictions to the jury. Appellant argued that his previous second degree assault convictions should not have been disclosed to the jury. However, appellant did not request a stipulation, nor did he request a balancing test. Further, defense counsel elicited the underlying facts of appellant's prior convictions during trial and made a jury nullification argument. Considering these factors, the Court could not say that appellant's failure to stipulate or ask for a balancing test was not the result of a strategic trial decision; thus, the Court declined to consider whether the trial court committed plain error in admitting evidence of appellant's prior convictions.

Appellant further argued on appeal that Md. Code, Art. 27, section 449(e), an enhanced penalty statute, required convictions

of both a crime of violence and a felony before a sentence of a term of years without parole could be imposed. Interpretation of the language of the statute, including an examination of the section in context and in conjunction with the statutory scheme as a whole, supports the view that the legislature intended

§ 449(e) to apply to a person previously convicted of either a felony or a crime of violence. Although the plain meaning of

§ 449(e) may suggest that it applies to persons convicted of both a crime of violence and a felony, such a conclusion requires rendering a portion of the statute superfluous and produces an illogical result. Section 449(e) applies to "a person who was previously convicted of a crime of violence as defined in

§ 441(e)" or of a violation of Article 27 § 286 or § 286A. Article 27 §§ 286 and 286A prohibit various drug crimes. None of the offenses prohibited by those statutes is a "crime of violence as defined in § 441(e)." It would be illogical for the legislature specifically to have listed §§ 286 and 286A in

§ 449(e) if it intended that the section apply only to persons who have previously been convicted of both a felony and a crime of violence. In addition, § 445(d)(1) does not prohibit possession of any firearm, but of a "regulated firearm." Reading § 449(e) together with § 445(d)(1) indicates that the phrase, "who is in possession of a firearm as defined in § 445(d)(1)(i) and (ii) of this article," refers to a person who is in possession of a regulated firearm and that the legislature used the word "and" because the definition of "regulated firearm" is the same in § 445(d)(1)(i) as it is in § 445(d)(1)(ii). As seen above, section 445(d)(1) lists subsections (i) and (ii) in the disjunctive. Analysis of the legislative history of the statute and the language of the revised statute, Md. Code (2003), Public Safety Article, sec. 5-133(c), also indicate that the section was not intended to require a previous conviction of both a crime of violence and a felony. Accordingly, we held that Article 27,

§ 449(e) applies to defendants who have previously been convicted either of a felony or a crime of violence; thus, the trial court properly sentenced appellant under the statute.

Charles Stanley v. State of Maryland, No. 345, September Term, 2003, filed June 22, 2004, Opinion by Eyler, James R., J.

HABEAS CORPUS - FINALITY OF JUDGMENT - MOTION TO ALTER OR AMEND FILED WITHIN TEN DAYS OF JUDGMENT - RIGHT TO APPEAL - PETITION FOR WRIT OF HABEAS CORPUS - WHERE INMATE FILED MOTION TO ALTER OR AMEND JUDGMENT DISMISSING PETITION FOR WRIT OF HABEAS CORPUS WITHIN TEN DAYS OF ENTRY OF JUDGMENT, THEN INMATE NOTED APPEAL, APPEAL WAS FROM JUDGMENT DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND NOT MERELY FROM DENIAL OF MOTION TO ALTER OR AMEND - WHERE INMATE'S PETITION FOR WRIT OF HABEAS CORPUS CHALLENGED LEGALITY OF CONVICTIONS, APPEAL FROM JUDGMENT DISMISSING PETITION WAS NOT AUTHORIZED BY STATUTE AND WAS THEREFORE DISMISSED.

Facts: Rodney S. Green, the appellant, is committed to the custody of the Commissioner of Correction and is serving a term of confinement for second degree murder and carrying a concealed weapon. Green filed a petition for writ of *habeas corpus* in the Circuit Court for Baltimore City, by which he challenged the legality of his convictions. The court dismissed the petition and, within ten days of the dismissal, Green filed a motion to alter or amend judgment. The court denied the motion and Green noted an appeal to the Court of Special Appeals.

The appellee, who was the warden of the correctional institution in which Green was incarcerated, moved to dismiss the appeal on the ground that an appeal from a decision in a *habeas corpus* case must be authorized by statute, and no statute authorizes an appeal from a *habeas corpus* case in which the legality of a sentence is challenged. Green countered that his appeal was from the denial of his motion to alter or amend judgment and not from the *habeas corpus* case.

Held: Appeal dismissed. The Court of Special Appeals assumed, without deciding, that a right to appeal would lie from the denial of a motion to alter or amend judgment when no right of appeal would lie from the underlying decision in a *habeas corpus* case. It nevertheless concluded that Green had no right to appeal.

The Court explained that, when a motion to alter or amend judgment is filed within ten days of the judgment, the judgment loses its finality until the motion is decided. Here, the dismissal of Green's petition for writ of *habeas corpus* was not a final judgment until the motion to alter or amend was denied. The Court explained that Green's appeal, filed after the denial of the motion, was necessarily from the judgment dismissing the petition.

The Court of Special Appeals further explained that an appeal

may be taken from a final order in a *habeas corpus* case only where specifically authorized by statute. It determined that no statute authorizes an appeal when the arguments set forth in the petition for writ of *habeas corpus* challenge the legality of a criminal conviction.

Rodney S. Green v. Ronald Hutchinson, Warden, No. 1916, September Term, 2003, filed July 20, 2004. Opinion by Smith, J. (retired, specially assigned).

LAW ENFORCEMENT OFFICER'S BILL OF RIGHTS (LEOBR) - NOTICE - NATURE OF THE INVESTIGATION

Facts: Appellee, Sergeant Dale Marshall of the Ocean City Police Department, appellant, apprehended a suspected bank robber on January 8, 2002. Subsequently, appellee received a complaint notice that he was under investigation with respect to his "actions prior to and after the capture." Appellee appeared for scheduled interrogations on two occasions and refused to answer any questions because appellant would not provide him with additional information with respect to the nature of the complaint. As a result, appellant, through its chief, sanctioned appellee for violating departmental rules and suspended appellee from work for sixty-four hours without pay. Appellee sought review of the decision in the Circuit Court for Worcester County. The circuit court, interpreting the provision in the Law Enforcement Officer's Bill of Rights (LEOBR), requiring that appellee be informed in writing of the "nature of the investigation" prior to interrogation, found that the notice was insufficient. Thus, the resulting discipline occurred in violation of the LEOBR.

Held: Affirmed. Under the LEOBR, Article 27, section 728 (b)(5)(i)(now Maryland Code, Public Safety, section 3-104d)(2)), a law enforcement officer under investigation shall be informed of the "nature of the investigation" prior to any interrogation. A determination of what constitutes sufficient notice of the nature

of the investigation must be made on a case by case basis. Notification to the officer that a complaint had been made concerning the officer's actions prior to and after the officer's capture of a suspected bank robber without information as to the nature of the investigation was insufficient to inform the officer under the LEOBR.

Ocean City Police Department v. Dale C. Marshall, No. 1678, September Term, 2003, filed July 19, 2004. Opinion by Eyler, James R., J.

REAL PROPERTY - COMMERCIAL BROKER'S LIEN:

Facts: All of the individuals involved in the controversy are the grandchildren and great-grandchildren of the late David W. and Annie Chertkof. As a result of the dispute, appellant, Howard L. Chertkof & Co., Inc., filed in the Circuit Court for Baltimore County a petition to establish a broker's lien, pursuant to RP Art. § 14-304. Howard Chertkof was the president and principal of appellant.

Appellant lodged the petition against Howard Chertkof's cousins, Joseph Gimbel, Helene Miller, Stephanie Prince, Jeffrey Clayton, Donald Brown, and Martha Lee Fendler, appellees. The petition related to the property located at 439-51 Eastern Avenue in Essex, which is now leased to the State of Maryland. Initially, appellant sought a lien of \$54,862.50, but later amended the claim to \$67,237.50. Appellant's claim is predicated largely on a Management Agreement executed in April 1988.

Following the sale of the property to appellees, appellant filed a petition for a broker's lien. The circuit court issued an order directing appellees to show cause why the lien should not issue. Appellees duly responded.

The court, finding probable cause to believe that appellant

was entitled to a lien, by memorandum and order established an interlocutory lien and identified four issues to be decided at trial. Following a bench trial, another member of the court ruled that appellant was not entitled to a broker's lien and entered judgment terminating the interlocutory lien.

Held: Reversed. Section 14-305 of the Real Property Article sets forth what must be contained in an owner's answer to a claimant's petition to establish a commercial broker's lien, and describes the consequences of the owner's failure to comply with the statute's provisions. Owners' failure either to plead certain defenses in their answer to claimant's petition to establish a broker's lien, or thereafter to seek modification of the interlocutory order identifying the issues to be tried, precluded litigation of the defenses at trial. The trial court erred when it relied on these previously unidentified issues in ruling that claimant was not entitled to a broker's lien.

Howard Chertkof & Co. v. Joseph Gimbel, et al., No. 1367, September Term, 2002, filed June 1, 2004. Opinion by Barbera, J.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated July 29, 2004, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

JOHN WILSON DAVIS

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By an Order of the Court of Appeals of Maryland dated August 6, 2004, the following attorney has been suspended for one (1) year, effective immediately, from the further practice of law in this State:

HARRISON B. WILSON, III

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By an Order of the Court of Appeals of Maryland dated August 19, 2004, the following attorney has been disbarred by consent, from the further practice of law in this State:

ARNOLD S. KAPLAN

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JUDICIAL APPOINTMENTS

On June 9, 2004, the Governor announced the appointment of MICKEY JOSEPH NORMAN to the Circuit Court for Baltimore County. Judge Norman was sworn in on July 13, 2004 and fills the vacancy created by the retirement of the Hon. John F. Fader, II.

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On June 14, 2004, the Governor announced the appointment of EDWARD P. MURPHY to the District Court for Baltimore County. Judge Murphy was sworn in on July 15, 2004 and fills the vacancy created by the retirement of the Hon. I. Marshall Seidler.

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On June 14, 2004, the Governor announced the appointment of SALLY C. CHESTER to the District Court for Baltimore County. Judge Chester was sworn in on July 22, 2004 and fills the vacancy created by the retirement of the Hon. Gordon Boone.

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On June 29, 2004, the Governor announced the appointment of TIMOTHY E. MEREDITH to the Court of Special Appeals (Fifth Appellate Circuit) of Maryland. Judge Meredith was sworn in on August 2, 2004 and fills the vacancy created by the elevation of the Hon. Clayton Greene, Jr. to the Court of Appeals.

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On July 29, 2004, the Governor announced the appointment of THOMAS FLATER STANSFIELD to the Circuit Court for Carroll County. Judge Stansfield was sworn in on August 27, 2004 and fills the vacancy created by the retirement of the Hon. Raymond E. Beck, Sr.

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