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COURT OF APPEALS

APPEALS - INTERLOCUTORY ORDER - CERTIFIED AS FINAL JUDGMENT UNDER
MARYLAND RULE 2-602(B) - DISCOVERY ORDER - COLLATERAL ORDER
DOCTRINE

Facts: In January 2002, Alfred A. Lacer, Respondent, entered into a written employment contract with the St. Mary's County Board of County Commissioners (the "Board"), Petitioner, which provided that Lacer would act as the Chief Executive Officer of the County government, in the position of County Administrator, for a period of 4-1/2 years, subject to certain conditions. At that time, the then-members of the five-member Board were serving their second four-year term following election by the voters of St. Mary's County. The terms of the then-members of the Board expired in November 2002. Subsequently, a new five-member Board (the Board as composed and involved in the present action) was elected and seated in December 2002.

On 1 April 2003, after meeting for a public hearing and a scheduled executive session, the Board members convened a closed executive session, during which Lacer was not present. The meeting minutes indicate that the Board met in the closed executive session to discuss personnel issues and to give direction to staff. The meeting minutes indicate also that only the five Board members and the recorder were present. Following the closed session, the Board assembled in an open session and voted 3-2 to proceed on the personnel issues discussed in the closed executive session. In a letter dated 28 April 2003, the Board terminated Lacer from his position as County Administrator.

On 14 May 2003, Lacer filed in the Circuit Court for St. Mary's County a Complaint against the Board alleging breach of contract, wrongful discharge, a violation of the Maryland Wage Payment and Collection Law, Maryland Code (1991, 1999 Repl. Vol.), Labor and Employment Article, §§ 3-502 and 507.1, and a violation of the St. Mary's County Open Meetings Act, Maryland Code (1957, 2001 Repl. Vol.), Article 24, § 4-201, *et seq.* Lacer filed additionally a Motion for Partial Summary Judgment with regard to his claim for breach of contract. The Board also filed a Motion for Summary Judgment, in addition to its opposition to Lacer's motion. In response to Lacer's Notice of Taking Oral Deposition of the five Board members, the Board filed a Motion for Separation of Questions For Decision and for Stay of Discovery, as well as a Motion for Protective Order on the ground that the Board's substantive discussions during the closed executive session

regarding Lacer's termination were protected by the attorney-client privilege from discovery.

Following a hearing on the motions, the Circuit Court, in an order entered on 15 September 2003: (1) permitted discovery by Lacer into discussions during the closed executive session, yet stayed its effect to allow for any immediate appellate review that might be sought by the Board; (2) granted Lacer partial summary judgment, while denying the Board's summary judgment motion, as to liability only on the breach of contract claim; and (3) deferred decisions on various other discovery motions until resolution on appellate review of its order permitting discovery of the Board members. Also in its order, the Circuit Court purported to make the necessary certification for immediate appellate review and directed the entry of a final judgment under Maryland Rule 2-602(b).

The Board appealed. The Court of Special Appeals, in an unreported opinion, determined that, based upon its review of the record, the Circuit Court erred in its effort to expedite appellate review of the determinations reached in the order, save the discovery provisions, when it entered a final judgment under Maryland Rule 2-602(b). The intermediate appellate court, as to the discovery aspect, however, concluded that the collateral order doctrine enabled appellate review of that disposition. The court affirmed the provision of the Circuit Court's order permitting depositions of the Board members.

The Court of Appeals granted the Board's Petition for Writ of Certiorari. *St. Mary's County v. Lacer*, 389 Md. 398, 885 A.2d 823 (2005).

Held: The Court of Appeals VACATED the judgment of the Court of Special Appeals and REMANDED the case to that court with instructions to dismiss the appeal. The Court determined that the Court of Special Appeals properly declined appellate review of the Circuit Court's order granting partial summary judgment as to liability for breach of contract which the trial court certified as a final judgment pursuant to Maryland Rule 2-602(b). The Court recognized that an appeal under Rule 2-602(b), which is one of three limited exceptions to the general requirement of awaiting a final judgment before seeking appellate review, should be allowed in only the "very infrequent harsh case." Because the Circuit Court's order did not settle completely any of the matters in controversy or adjudicate completely the rights and liabilities of the parties (such as damages) and none of the pending claims were withdrawn, the Circuit Court's order was not final and appealable under Rule 2-602(b).

As to the discovery dispute, however, the Court concluded that, under the collateral order doctrine, the Court of Special Appeals improperly reviewed the portions of the Circuit Court's order. The Court emphasized that it has upheld the appealability of interlocutory discovery orders, under the collateral order doctrine (a second, "very narrow exception" to the final judgment requirement) only in a singular situation. That circumstance involved "trial court orders permitting the depositions of high level government decision makers for the purpose of extensively probing their individual decisional thought processes." The Court concluded that because the discovery provision of the Circuit Court's order in the present case permits an objective investigation into the facial statements and actions of the Board during the closed session meeting, as those discussions related to Lacer's employment contract with the Board and its subsequent termination of Lacer, the decision whether to admit into evidence the fruit of this type of inquiry and response would be reviewable adequately upon the conclusion of trial and entry of final judgment.

County Commissioners for St. Mary's County v. Alfred A. Lacer, No. 85, September Term, 2005, filed July 27, 2006. Opinion by Harrell, J.

ATTORNEYS - BAR ADMISSIONS - CRIMES OF MORAL TURPITUDE - REHABILITATION

Facts: In 1989, Emsean L. Brown, then 24, and an employee at the Citizen's Bank of Maryland ("Bank"), knowingly began providing customer information - specifically, customers' names, addresses, account numbers, and balances - to Ramona Baldwin, not an employee of the bank, who used the information to obtain Maryland drivers' licenses to gain access to monies from customers' accounts through checks and bank cards provided by Brown. When the Bank discovered the scheme it terminated Brown's employment. Brown subsequently confessed to his involvement and pled guilty to the crime of bank

fraud in the United States District Court for the District of Maryland. He was sentenced to ten months imprisonment, three years probation, and the payment of \$14,250.00 in restitution. He was released from prison in January of 1992, and, as a condition of probation, was required to pay \$100 each month toward his restitution. In January of 1995 Brown completed his probation and stopped making restitution payments.

In February, 1999 Brown applied to the University of Baltimore School of Law and marked "No" on his application in response to a question asking whether he had ever been charged with, arrested for, convicted of, pled guilty or nolo contendere to a violation of any law, and also to a question asking whether he had ever been discharged from employment. Brown, when applying for admission to the Maryland Bar, represented that he answered "no" the question regarding prior violations of law because he thought his conviction had been expunged. He also stated that he had notified the law school when he discovered his conviction had not been expunged. He never explained why he answered "no" to the discharge from employment question. Additionally, another question on the law school application required Brown to list all full-time employment and to account for all periods of time since high school graduation. In response, Brown wrote, "PLEASE SEE RESUME," and attached a resume that listed him as having been employed with the Richard Leahy Corporation from February, 1990 through August, 1992, although, in fact, Brown actually had been incarcerated from April, 1991 to January, 1992.

On May 16, 2003, Brown filed an application with the State Board of Law Examiners ("Board") for admission to the Maryland Bar pursuant to Rule 2 of the Maryland Rules Governing Admission to the Bar. On the application, Brown disclosed that in 1990 he was convicted of one count of bank fraud and that he failed to affirmatively answer the question on his law school application regarding whether he had ever been convicted of a crime. Brown did not reveal on his bar application that he also had failed to disclose on his law school application that he had been terminated from employment with the Bank or that he had failed to disclose his lapse in employment history because of his incarceration. Brown's bar application was forwarded to a member of the Character Committee who recommended that the Committee conduct a hearing regarding Brown's application because there were grounds for denying his application. Brown attended the hearing with counsel. The Committee recommended that Brown's application to the Bar be denied.

The State Board of Law Examiners subsequently conducted a hearing on Brown's application, which Brown also attended with

counsel. The record developed before the Board reflected that in October of 2004, Brown telephoned Ms. Dana Bruce, a paralegal with the Bank from which he was terminated, to discuss completion of his restitution, and that he initially identified himself to her as an attorney. The Board also was unable to ascertain whether Brown had satisfied his obligation to the Bank to make restitution. Testimony before the Board also revealed that none of the five witnesses presented by Brown at the hearing was aware of his failure to disclose his termination from employment and conviction of bank fraud on his law school application, the falsification of employment dates on the resume attached to the application, and his neglect in completing the court-ordered restitution. Moreover, none of Brown's employers prior to or during law school was aware of his conviction.

The Board ultimately recommended by a vote of four to three that Brown's application be accepted. A show cause hearing was held before the Court of Appeals to determine whether it should accept the Board's recommendation.

Held: The Court of Appeals held that when an applicant has engaged in criminal activity, to meet his or her burden of proving good moral character and fitness for the practice of law pursuant to Rule 5 (a) of the Maryland Rules Governing Admission to the Bar, the applicant must show that he has so convincingly rehabilitated himself that it is proper that he become a member of a profession which must stand free from all suspicion. The Court determined that, in light of Brown's dereliction in completing his court-ordered restitution, failure to disclose both his conviction and his termination from employment at the Bank on his law school application, concealment of his term of incarceration on the resume that he attached to that application, and recent misrepresentation of himself as a lawyer, Brown had failed to demonstrate that he had rehabilitated himself in the fifteen years since his conviction, and therefore denied his application.

In re Application Of Emsean Lavinci Brown, Misc. No. 10, September 2005 Term. Opinion filed on April 11, 2006 by Battaglia, J.

ATTORNEYS - MISCONDUCT - MARYLAND RULES OF PROFESSIONAL CONDUCT
1.3, 1.4(a), 8.1(a), AND 8.4(c) - SANCTION - INDEFINITE SUSPENSION

Facts: The disciplinary action against Norman Joseph Lee, III ("Respondent") arose out of his representation of Mr. John Henry Smith in a post-conviction and parole criminal matter. The Attorney Grievance Commission of Maryland ("Petitioner") charged Respondent with violating Maryland Rules of Professional Conduct ("MRPC") 1.3 (diligence), 1.4(a) (communication), 1.5(a) (fees), 1.16(d) (declining or terminating representation), 8.1(a) (Bar Admission and disciplinary matters), and 8.4(b), (c), and (d) (misconduct and misrepresentation). In his answer to the petition, Lee denied any misconduct. A two-day evidentiary hearing was held before the hearing judge of the Circuit Court for Baltimore County. After testimony from Respondent, Mr. Smith, Mr. Smith's wife, an official from the Western Correctional Institution ("WCI"), and Respondent's secretary, the hearing judge found by clear and convincing evidence that Respondent violated MRPC 1.3, 1.4(a), 8.1(c), and 8.4(a) by largely neglecting his client's case for nearly two years, failing to communicate with his client for nearly two years, failing to respond to his client's repeated requests for both information regarding the status of the matters for which he was retained and the return of transcripts and papers, and misrepresenting to Bar Counsel the reason for inactivity during the representation.

Respondent filed with this Court extensive exceptions to the hearing judge's written Findings of Fact and Conclusions of Law, disputing most of the factual findings. Petitioner did not file exceptions. Petitioner recommended the sanction of indefinite suspension. Respondent filed a Motion for Reconsideration Based on Fraud, Deceit, and Misrepresentation, supported by alleged new evidence that was not introduced or considered at the evidentiary hearing regarding Mr. Smith's alleged failure to receive legal correspondence from Respondent's office.

In *Attorney Grievance Commission v. Lee*, 387 Md. 89, 874 A.2d 897 (2005), the Court of Appeals remanded this matter to the hearing judge potentially to receive new evidence and to revisit, in light of any new evidence, her credibility determinations and findings of facts and conclusions of law as to certain witnesses and Respondent. The impetus of the remand was a factual dispute as to whether Mr. Smith received certain written communications claimed to have been sent to him from Respondent's law office. The hearing judge reviewed the new evidence, which was comprised of legal mail logs from the WCI. The hearing judge concluded that the new evidence had no material effect upon her original findings of fact and conclusions of law because she based her conclusions in

large part upon earlier testimony and exhibits offered by Respondent which were not impeached by the new evidence received at the remand proceeding. Neither Respondent nor Bar Counsel filed further written exceptions with the Court of Appeals to the hearing judge's supplemental Findings of Fact and Conclusions of Law confirming the violations previously found by her.

Held: Respondent's exceptions sustained in part and overruled in part. Indefinite suspension is the appropriate sanction for the violations.

As a threshold matter, the Court of Appeals determined that Respondent's failure to file additional exceptions to the hearing judge's supplemental Findings of Fact and Conclusions of Law did not bar the Court's consideration of Respondent's earlier exceptions, which remained relevant, according to the standard of Maryland Rule 16-759(b)(2)(B) and in light of the hearing judge's re-adoption in her supplemental decision of her earlier decision on virtually all material points.

The Court of Appeals sustained one of Respondent's exceptions regarding a finding that Respondent did not communicate with his client for nearly two years. The evidence established, by a preponderance standard, that the client received several items of correspondence from Respondent's office and engaged in several telephone calls with Respondent during the relevant period of time. Despite sustaining that exception, the Court overruled Respondent's other exceptions, and sustained the hearing judge's conclusions that Respondent violated MRPC 1.3, 1.4(a), 8.1(c), and 8.4(a).

The Court determined that indefinite suspension was warranted where Respondent violated MRPC 1.3, 1.4(a), 8.1(c), and 8.4(a), in connection with Respondent's misrepresentation to Bar Counsel the reasons for inactivity in the case. In determining the appropriate sanction for Respondent's misconduct, the Court also considered the absence of mitigating circumstances and the presence of prior MRPC violations, see *Attorney Grievance Comm'n v. Lee*, 390 Md. 517, 890 A.2d 273 (2006).

Attorney Grievance Commission v. Lee, AG No. 8, September Term, 2005, filed 26 July 2006. Opinion by Harrell, J.

ATTORNEYS - MISCONDUCT - MARYLAND RULES OF PROFESSIONAL CONDUCT
1.3, 1.4(a), 1.16, 3.2, 8.1(b), AND 8.4(d) - SANCTION - INDEFINITE
SUSPENSION

Facts: The disciplinary action against Norman Joseph Lee, III ("Respondent") arose out of his representation of Connie Marie Baker ("Complainant") in a Chapter 7 bankruptcy petition. The Attorney Grievance Commission of Maryland ("Petitioner") charged Respondent with violating Maryland Rules of Professional Conduct ("MRPC") 1.3 (diligence), 1.4 (communication), 1.16(d) (declining or terminating representation), 3.2 (expediting litigation), 8.1(b) (Bar Admission and disciplinary matters), and 8.4(d) (misconduct). Respondent filed his Answer to the Petition for Disciplinary Action late, more than a month after he was served with the charges. At the conclusion of a hearing on the Order of Default that was entered against Respondent, the hearing judge of the Circuit Court for Baltimore County granted Petitioner's Motion to Strike Respondent's Answer and received Petitioner's evidence. The hearing judge concluded that Respondent violated the MRPC as charged because he failed to: pursue diligently his client's bankruptcy matter in a timely manner, keep his client reasonably informed, return papers and unearned fees to his client upon termination of representation, respond to numerous requests of the Bankruptcy Trustee, and respond to Bar Counsel during the investigation.

Neither Petitioner nor Respondent filed exceptions with this Court to the hearing judge's written Findings of Fact and Conclusions of Law. Petitioner recommended that Respondent be suspended indefinitely from the practice of law. Respondent filed a Motion for Reconsideration Based on Fraud, Deceit, and Misrepresentation.

Held: Respondent's motion denied. Indefinite suspension is the appropriate sanction for the violations.

After reviewing Respondent's Motion for Reconsideration Based on Fraud, Deceit, and Misrepresentation, the Court of Appeals did not find it necessary to remand this matter to the hearing judge for reconsideration because Respondent failed to suggest with specificity in his motion any new facts material to the matter that were not, or could not have been, adduced at the hearing. Respondent asserted that the complaint should be dismissed because the Complainant later sought to withdraw the complaint after Respondent ultimately completed his representation of her. The Court noted that Bar Counsel is not obliged to dismiss a complaint solely at the complainant's request under Maryland Rule 16-731(b) (setting out the procedure for reviewing a complaint once it is

filed with the Attorney Grievance Commission).

Because neither Petitioner nor Respondent filed written exceptions to the hearing judge's findings of fact, the Court of Appeals accepted the hearing judge's findings of fact as established under Maryland Rule 16-579(2)(A). Upon the Court's *de novo* review of the hearing judge's conclusions of law, the Court concluded that Respondent violated MRPC 1.3, 1.4, 1.16, 3.2, 8.1(b), and 8.4(d).

The Court determined that indefinite suspension was warranted where Respondent violated MRPC 1.3, 1.4, 1.16, 3.2, 8.1(b), and 8.4(d). In determining the appropriate sanction for Respondent's misconduct, the Court also considered the absence of mitigating circumstances established by a preponderance of the evidence standard and the presence of prior MRPC violations, see *Attorney Grievance Comm'n v. Lee*, 390 Md. 517, 890 A.2d 273 (2006), and *Attorney Grievance Comm'n v. Lee*, ___ Md. ___ (2006) (AG No. 8, September Term, 2005) (filed 26 July 2006) (slip op.).

Attorney Grievance Commission v. Lee, AG No. 20, September Term, 2005, filed 31 July 2006. Opinion by Harrell, J.

CIVIL PROCEDURE - CLASS ACTIONS - LIMITATION OF ACTIONS

Facts: On August 13, 2001, respondent Nona Christensen ("Ms. Christensen"), in her individual capacity and in her capacity as the personal representative of her deceased husband, Russell Christensen ("Mr. Christensen"), brought a survival and wrongful death action against petitioners, who were all involved in the manufacture or sale of tobacco products. In her complaint, Ms. Christensen alleged causes of action for failure to warn, fraudulent misrepresentation, and civil conspiracy. She sought to recover compensatory and punitive damages. On September 25, 2002, the complaint was amended to add as plaintiffs Mr. Christensen's adult children, Lowell Christensen and Lisa Marie Christensen.

All of the petitioners save one, Giant Food LLC ("Giant"), were defendants in a prior putative class action suit filed in the Circuit Court for Baltimore City, which came before the Court of Appeals on a petition for a writ of mandamus in Philip Morris v. Angeletti, 358 Md. 689, 752 A.2d 200 (2000). The Philip Morris class action was filed on behalf of a state-wide class of users of tobacco products, and asserted several causes of action, including all those asserted in the complaint in this case. In Philip Morris, the Court issued a writ of mandamus directing the Circuit Court to decertify the plaintiff class it had certified. Mr. Christensen, although not a named party in the Philip Morris litigation, participated in the litigation, providing an affidavit and deposition testimony on behalf of the named plaintiffs.

The Circuit Court granted a motion for summary judgment by petitioners, concluding that respondents' claims were all barred by the statute of limitations. The Circuit Court rejected respondents' contention that the pendency of the Philip Morris class action tolled the statute of limitations for Mr. Christensen's claims, and concluded that there was no factual dispute that Mr. Christensen's claims had accrued prior to August 1998. On this basis, the Circuit Court concluded that the survival action was untimely. The Circuit Court also concluded that the wrongful death actions were untimely, reasoning that the expiration of the limitations period for Mr. Christensen's claims prior to the filing of the wrongful death action rendered the wrongful death claims untimely.

The Court of Special Appeals reversed the judgment of the Circuit Court with respect to the petitioners who were defendants in Philip Morris, holding that the pendency of the Philip Morris class action tolled the statute of limitations for Mr. Christensen's claims against them. The Court of Special Appeals vacated the grant of summary judgment to Giant, and remanded for reconsideration of this issue in light of Benjamin v. Union Carbide Corp., 162 Md. App. 173, 873 A.2d 463 (2005), which was decided after the Circuit Court's decision. We then granted certiorari.

Held: Affirmed in part, vacated in part. The primary question of law before the Court was whether Maryland law recognized a class action tolling rule such as the rule the United States Supreme Court articulated in American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), and Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983). Under this rule, the filing of a putative class action suit has the effect of tolling the statute of limitations for the filing of individual actions against the defendants named in the class action complaint asserting the claims raised in the

putative class action suit for the non-named members of the putative plaintiff class.

The Court of Appeals adopted a version of the American Pipe class action tolling rule. The Court endorsed the principal rationale for the rule: that a class action tolling rule promotes judicial economy by preventing putative class members from filing individual claims or motions for intervention in order to preserve their right to bring an action in the event that class certification is denied.

The Court, however, cautioned that the rule should be applied in such a way as to ensure that it is consistent with the purposes of statutes of limitations. Drawing from concurring opinions in American Pipe and Crown, Cork & Seal, the Court held that for a putative plaintiff class member to claim the benefit of class action tolling when filing an individual claim, the original class action complaint must give defendants adequate notice of the substantive claims asserted in a later-filed individual suit, and further must give the defendants adequate notice of the generic identity of putative class members.

Applying this holding to the facts at bar, the Court held that the statute of limitations applicable to the survival claim maintained on behalf of Mr. Christensen was tolled by the filing of the Philip Morris class action, and hence was timely. In support, the Court observed that the causes of action asserted in the survival action were all asserted in the original class action complaint, and that the Philip Morris petitioners had actual notice that the decedent was a member of the putative plaintiff class as a result of the decedent's participation in the class action litigation.

The Court further held that the wrongful death claims against the Philip Morris petitioners were timely. The limitations period applicable to a decedent's cause of action only acts to bar a wrongful death claim if it has run prior to the time of the decedent's death. Given that the limitations periods for Mr. Christensen's claims against the Philip Morris petitioners were tolled by the pendency of the Philip Morris class action, they did not expire prior to his death. Consequently, they did not bar the respondents' wrongful death claims. Thus, under the wrongful death statute, respondents had three years from the time of Mr. Christensen's death to bring a wrongful death claim. All the wrongful death claims were brought within this time period, so they were timely. Finally, the Court remanded the matter to the trial court to reconsider the grant of summary judgment to Giant in light of subsequent appellate discussion of the inquiry notice rule.

Philip Morris USA, Inc., et al. v. Nona K. Christensen, et al., No. 68, September Term, 2005, filed August 4, 2006. Opinion by Raker, J.

CONSTITUTIONAL LAW - FIFTH AMENDMENT PRIVILEGE AGAINST SELF-
INCRIMINATION - RIGHT TO COUNSEL - ATTORNEY-CLIENT PRIVILEGE; FIFTH
AMENDMENT - EVALUATION OF ASSERTION OF PRIVILEGE AGAINST SELF-
INCRIMINATION; DIRECT CRIMINAL CONTEMPT - PROCEDURES

Facts: On November 7, 2003, while the Petitioner, Jeffrey Smith, was serving a sentence for several drug violations, an Assistant State's Attorney in Baltimore City had Smith brought from prison to court to testify as a prosecution witness in a case in the Circuit Court for Baltimore City. When Smith was called to the stand, the State questioned him regarding his date of birth and the location of his residence but Smith refused to answer either question and instead asserted his Fifth Amendment privilege. The trial judge subsequently called a recess for lunch and called a public defender to represent Smith and advise him of his rights. When the trial reconvened, Smith's new appointed counsel informed the court that, based upon his discussions with his client, Smith had no constitutional basis for pleading the Fifth Amendment in this case. The trial judge subsequently informed Smith that if she determined that he could not properly invoke the Fifth Amendment, he could be imprisoned for contempt, and Smith indicated that he understood. When the State resumed its questioning, Smith again refused to answer and the judge declared him in contempt of court. Two days after the conclusion of the case, the same trial judge conducted a separately docketed hearing and imposed a five-month sentence for direct criminal contempt upon Smith.

Smith noted a timely appeal to the Court of Special Appeals which determined, in an unreported opinion, that the trial judge made an adequate independent determination of the validity of Smith's invocation of the Fifth Amendment and affirmed Smith's conviction of contempt. The Court of Special Appeals declined to

reach the issue of whether Smith was denied effective assistance of counsel because it determined that the issue should be presented in a post conviction proceeding.

Held: Reversed. The Court of Appeals held that the trial judge did not engage in an independent inquiry into the validity of Petitioner's invocation of the Fifth Amendment right against self-incrimination and did not consider the totality of the circumstances prior to pronouncing that Petitioner could not invoke the Fifth Amendment. The Court also determined that because the trial judge conducted a separately docketed hearing for the purpose of imposing sanctions for Petitioner's direct criminal contempt she was required to adhere to the procedures delineated in Maryland Rules 15-204, 15-205, and 15-207, which govern contempt proceedings, and with which she did not comply. Moreover, the Court of Appeals concluded that the record was adequately developed for it to address the issue of whether Petitioner was denied effective assistance of counsel. The Court held that Petitioner received ineffective assistance of counsel when his attorney disclosed the nature of his advice concerning the Fifth Amendment to the trial judge because a disclosure of counsel's advice to his or her client without the client's consent constitutes a violation of the attorney-client privilege.

Jeffrey Smith v. State of Maryland, No. 128, September Term, 2005, filed August 6, 2006. Opinion by Battaglia, J.

CRIMINAL LAW - DOCTRINE OF TRANSFERRED INTENT - JURY INSTRUCTIONS
- PLAIN ERROR ANALYSIS

Facts: Samuel Garrett was charged with two counts of first-degree murder, two counts of attempted first-degree murder, two counts of use of a handgun in the commission of a felony or crime of violence, and two counts of wearing a handgun. The theory of the State at trial was that Garrett shot one of his intended victims, William Harrison, at the Rainbow Carryout on Reisterstown

Road on November 1, 2002, at the same time that both Dawnika Taylor and Richard Washington, solely bystanders, were in the carryout. Garrett's only defense to the charges was that he was not the perpetrator of the crimes. Nevertheless, the State requested a jury instruction on transferred intent, which the trial judge incorporated into his instructions to the jury. Garrett did not object to the transferred intent instruction at trial and was subsequently convicted of two counts of first-degree murder, two counts of attempted first-degree murder, four counts of use of a handgun in the commission of a felony or crime of violence, and four counts of wearing and carrying a handgun.

Garrett noted a timely appeal to the Court of Special Appeals, and, in addition to challenging his convictions for first-degree murder, use of a handgun in the commission of a felony or crime of violence, and wearing and carrying a handgun on other grounds, contended that his convictions for attempted first-degree murder should be reversed because the jury instructions on transferred intent constituted plain error. The Court of Special Appeals held that plain error analysis was not applicable to Garrett's case and upheld his convictions for attempted first-degree murder under the theory of concurrent intent.

Held: The Court of Appeals held that the theory of transferred intent does not apply to inchoate crimes such as attempted first-degree murder and therefore this case was indistinguishable from that of *State v. Brady*, __ Md. __, __ A.2d __ (2006), in which the Court held that the Court of Special Appeals did not abuse its discretion in performing a plain error review and reversing a conviction for attempted murder after the jury had been instructed that the doctrine of transferred intent applied. The Court of Appeals therefore concluded that the intermediate appellate court should have applied a plain error analysis and reversed Garrett's convictions for attempted first-degree murder in light of the erroneous jury instruction.

Samuel Garrett v. State of Maryland, No. 9, September Term, 2005. Opinion filed on August 4, 2006 by Battaglia, J.

CRIMINAL LAW - FAKE CONTROLLED DANGEROUS SUBSTANCE - SUFFICIENCY OF EVIDENCE

Facts: On 22 June 2004, Donald Marcell Rivers, Sr., Petitioner, was convicted by a jury in the Circuit Court for Washington County of one count of possession of a noncontrolled substance with the intent to distribute as a controlled dangerous substance ("CDS") and one count of distribution of a noncontrolled substance that he had represented as a CDS, in violation of Maryland Code (2002), Criminal Law Article, § 5-617(a). The trial court merged the two convictions for sentencing purposes and sentenced Rivers to four and one-half years in prison.

On appeal to the Court of Special Appeals, Rivers contended that his convictions should be reversed because, among other reasons he advanced, the trial court denied erroneously his motion for a judgment of acquittal due to the insufficiency of evidence showing that the substance sold was noncontrolled. He asserted that the State's chemist who testified could not have determined reliably that a substance was a noncontrolled substance solely by conducting a combination of visual inspection and a single chemical procedure testing for the presence of cocaine. The intermediate appellate court rejected Rivers' contention, in an unreported opinion, and held that the State presented sufficient proof that the substance sold was a noncontrolled dangerous substance through the unobjected-to opinion testimony of the expert witness.

The Court of Appeals granted Rivers' Petition for Writ of Certiorari. *Rivers v. State*, 390 Md. 284, 888 A.2d 341 (2005).

Held: Affirmed. The Court of Appeals determined that there was sufficient evidence to establish that the substance in question was not a controlled dangerous substance. To prove that a substance is a noncontrolled substance, as defined in Maryland Code (2002), Criminal Law Article, § 5-101(s), the State is not required to identify the exact chemical composition of the substance. As the Court noted further, it may utilize instead a process of elimination to show that the substance is not a CDS. In this process of elimination, the Court recognized that the State may use circumstantial, as well as direct, evidence. The State introduced both circumstantial evidence and direct evidence in this process of elimination: Rivers sold a small piece of rocklike substance to a police informant for \$30 during a drug operation in an area known for illegal drug transactions; the packaging and the physical appearance of the substance were consistent with those of a \$30 piece of crack cocaine; and a forensic chemist visually examined the rocklike substance and concluded that the substance most likely could not be any controlled substance other than crack cocaine.

The Court determined that the State eliminated all possible CDS's other than cocaine with a reasonable degree of certainty.

The Court noted additionally that an experienced and well-qualified expert may employ in his or her scientific analysis a visual or tactile inspection of the substance in the effort to establish that it is not a controlled dangerous substance. The chemist testified, without objection, that the chemical test she conducted subsequent to the visual inspection showed that the substance, in fact, was not cocaine, and that, in her expert opinion, the substance in question was not a controlled dangerous substance. Therefore, viewing all the circumstantial and direct evidence in a light most favorable to the State, the Court concluded that the evidence was sufficient to prove that the substance in question was a noncontrolled substance.

Donald Marcell Rivers, Sr. v. State of Maryland, No. 105, September Term, 2005, filed July 27, 2006. Opinion by Harrell, J.

CRIMINAL LAW - MOTION FOR MISTRIAL - ACQUITTAL

Facts: Mr. Giddins was on trial for two counts of possessing a controlled dangerous substance with intent to distribute and two counts of possession of a controlled dangerous substance. During the course of the State's opening argument, Mr. Giddins's counsel objected to the State's references to information contained in the search and seizure warrant regarding the police's ongoing drug investigation of Mr. Giddins's place of business, and made a motion in limine to prevent the State from further mentioning those facts, which the court denied. The State continued with its opening arguments and again mentioned the police's ongoing drug investigation of Mr. Giddins's place of business, to which Mr. Giddins's counsel again objected. The judge then agreed to call a recess to instruct both the State and its law enforcement witnesses, out of the presence of the jury, not to speak to the facts alleged in the search and seizure warrant but instead to

limit their responses on the direct examination to the fact that an investigation was conducted, a warrant was issued, and the warrant was served on Mr. Giddins. When the trial reconvened, the State called its first witness and began to question him about the ongoing drug investigation of Mr. Giddins's place of business. Mr. Giddins's counsel immediately objected and moved for a mistrial, which the trial judge granted, explaining to the State that "[w]hen you say that [Mr. Giddins was] the target of the investigation, what you're doing is you're considering all the facts that are in the search warrant . . . not one bit of which . . . is going to be admissible."

Mr. Giddins subsequently filed a "Motion to Bar Retrial Following Mistrial (Double Jeopardy)," arguing only that his retrial was barred because of prosecutorial misconduct. The court denied Mr. Giddins's Motion to Bar Retrial Following Mistrial on the grounds that there was insufficient evidence that the State intentionally sabotaged a trial that was going badly, or had deliberately goaded Mr. Giddins into requesting a mistrial, and the Court of Special Appeals affirmed the denial, determining that Mr. Giddins' motion for a mistrial was not provoked by prosecutorial misconduct.

On writ of certiorari to the Court of Appeals, Mr. Giddins abandoned the issue of prosecutorial misconduct, but instead argued that his retrial was barred because the comments made by the trial judge in declaring the mistrial, specifically that the answers to some of the State's questions would not be admissible, constituted a ruling on the evidence and therefore an acquittal for purposes of double jeopardy.

Held: The Court of Appeals held that an acquittal is the resolution, correct or not, of some or all of the factual elements of the offense charged. The Court concluded that, because the trial judge's comments addressed the admissibility, and not the sufficiency, of the evidence, and because there was no evidence before the trial judge, other than the name and employment status of the State's first witness, at the time that he declared the mistrial, the declaration of the mistrial did not constitute an acquittal, and the State was not barred from retrying Mr. Giddins.

Damont Isaiah Giddins v. State of Maryland, No. 63, September Term, 2005. Opinion filed on May 12, 2006 by Battaglia, J.

CRIMINAL LAW - SENTENCING & PUNISHMENT - SENTENCE ON CONVICTION OF DIFFERENT CHARGES - CONSECUTIVE OR CUMULATIVE SENTENCES - DISPOSITION - LENGTH OF TOTAL OR AGGREGATE SENTENCE IN GENERAL - THE PLAIN LANGUAGE OF MARYLAND CODE (1999), § 9-105 OF THE CORRECTIONAL SERVICES ARTICLE DOES NOT PROHIBIT A TRIAL JUDGE FROM SENTENCING AN INDIVIDUAL TO SERVE MORE THAN A TOTAL OF EIGHTEEN MONTHS IN A LOCAL CORRECTIONAL FACILITY BASED UPON THE AGGREGATION OF A PRIOR SENTENCE ON AN UNRELATED OFFENSE WITH THE "THEN EXECUTED" SENTENCE.

Facts: On July 9, 2004, Tony Eugene Blickenstaff, appellant, received a one-year sentence to be served in the Frederick County Adult Detention Center ("FCADC"). The court's commitment order authorized work release. On November 2, 2004, appellant failed to return to the FCADC from his work release assignment. A warrant was issued, and on November 22, 2004, appellant was arrested in Florida and subsequently returned to the FCADC. On April 27, 2005, appellant pled guilty to first degree escape based on his failure to return to the FCADC pursuant to the terms of his work release. Appellant was offered a plea agreement providing for either a sentence of eighteen months in a local correctional facility or three years in the Division of Corrections. Appellant was sentenced to eighteen months in the FCADC to run consecutive to his original one-year sentence.

On May 20, 2005, appellant filed a Motion for Modification to Correct Illegal Sentence. On May 25, 2005, the motion was denied by the Circuit Court for Frederick County. Appellant timely noted an appeal to the Court of Special Appeals. The Court of Appeals, on bypass, granted certiorari. *Blickenstaff v. State*, 390 Md. 500, 889 A.2d 418 (2006).

Maryland Code (1999), §9-105 of the Correctional Services Article provides that "a judge may sentence an individual to a local correctional facility if: (1) the sentence to be then executed is for a period of not more than 18 months" Appellant argued that the trial judge illegally sentenced him to serve more than eighteen months in a local correctional facility by making the eighteen month sentence run consecutive to his original one-year sentence, thereby causing his total incarceration time to exceed eighteen months.

Held: Affirmed. The Court of Appeals found that the plain language of § 9-105 of the Correctional Services Article does not prohibit a trial judge from imposing a sentence to run consecutive to a sentence for a prior unrelated conviction. Section 9-105 provides that trial judges may sentence an individual to a local correctional facility if the sentence to be *then executed* is for a

period of not more than eighteen months. The only sentence *then executed* in this case was the eighteen month plea bargained sentence for the escape charge.

Tony Eugene Blickenstaff v. State of Maryland, No. 119 September Term, 2005, filed August 1, 2006. Opinion by Cathell, J.

CRIMINAL LAW - VOIR DIRE

Facts: The Petitioner, Raymond Alan Curtin, was charged with three counts of robbery with a deadly weapon, three counts of robbery, six counts of first degree assault, six counts of the use of a handgun in the commission of a crime of violence, and one count of common law conspiracy in relation to a robbery of a First Union Bank in Bowie, Maryland, in 2003. Curtin requested that the trial judge propound a question to the veniremen demanding whether any of them had "any strong feelings concerning the use of handguns that they would be unable to render a fair and impartial verdict based on the evidence," which the trial judge refused to ask. Alternatively, the trial judge did propound questions demanding whether any member of the jury panel ever worked in a bank, belonged to or had any association with any group or organization such as the NRA, or been the victim of a crime.

Curtin noted a timely appeal to the Court of Special Appeals which held, in a published opinion, that it was not an abuse of the trial judge's discretion to refuse to ask Curtin's handgun question because the jury was not required to analyze the "reasonableness" or "justifiableness" of the use of the gun in the instant case.

Held: The Court of Appeals determined that, based upon the limited nature of voir dire in Maryland, which restricts voir dire questions to those directed at eliciting juror bias, it only has found that the trial judge abused his discretion in refusing to propound a requested question when the charges against the defendant in and of themselves evoked strong feelings that could

have unduly biased a venireman. The Court concluded that, in the present case, in the light of the charges Curtin faced, specifically, armed robbery, use of a handgun in the commission of a crime of violence, first degree assault and conspiracy, a handgun question was not mandated merely because a handgun was used in the commission of the crime. Thus, the Court concluded that the trial judge did not abuse his discretion in refusing to propound the handgun question because an affirmative answer thereto would not have revealed a bias that would have constituted a basis for a strike for cause.

Raymond Alan Curtin v. State of Maryland, No. 114, September Term, 2005, filed July 31, 2006. Opinion by Battaglia, J.

FAMILY LAW - CHILD IN NEED OF ASSISTANCE - ADJUDICATORY HEARING - WAIVER OF RIGHT TO HEARING BY PARENT

Facts: The Montgomery County Department of Health and Human Services ("DSS") filed a petition requesting that Blessen H. be declared a Child In Need of Assistance ("CINA") and the Circuit Court for Montgomery County, sitting as the juvenile court, held an adjudicatory and disposition hearing to determine the veracity of the facts alleged in the CINA petition. During the hearing, the court called a recess to enable the parties to go through mediation and attempt to reach an agreement. When the hearing was reconvened, the parties placed an amended CINA petition on the record and counsel for Tynetta H., the mother of Blessen H., agreed to the stipulated facts alleged in the amended CINA petition. Through that agreement Blessen H. was declared a CINA and Ms. H.'s right to a contested adjudicatory hearing was waived.

Ms. H. noted an appeal to the Court of Special Appeals arguing that her counsel's waiver of her right to a contested adjudicatory hearing was insufficient because the hearing implicated her fundamental right to parent, and therefore that the trial judge was required to address her personally on the record to ensure that her

waiver of a contested adjudicatory hearing was knowing and intelligent. The Court of Special Appeals held that the trial judge was not required to personally address Ms. H. to ensure that her waiver of the contested adjudicatory hearing was knowing and intelligent.

Held: Affirmed. The Court of Appeals held that judges were required to personally address a party on the record only in limited circumstances in which the right sought to be waived was not only "fundamental," but was also one from which confinement could result. Because confinement could not be a direct result of the CINA proceedings, the Court of Appeals held that Ms. H. did not have a due process right to be personally addressed by the trial judge on the record to ensure that her waiver of the contested adjudicatory hearing was knowing and intelligent.

In re Blessen H., No. 71, September Term, 2005. Opinion filed May 11, 2006 by Battaglia, J.

FAMILY LAW - PATERNITY

Facts: In August, 2003, appellant Victoria Trembow filed a complaint seeking child support for her destitute adult child from appellee. Appellant alleged that, though never married to each other, the parties had a child, Ivan, who was born in March, 1983. In 1996, when Ivan was thirteen, he was diagnosed with a genetic bone disorder, as a result of which he had become permanently disabled before reaching the age of 18. Ivan resided with appellant, by reason of his physical disability, and was unable to earn sufficient means to provide for himself. Appellant never sought to establish appellee's paternity or collect child support from him prior to Ivan's reaching eighteen. Appellant filed the action individually, not on behalf of Ivan, who was, by then, 20, and the support she sought was to be paid to her, not Ivan. Appellant failed to allege that Ivan was or had ever been incompetent to pursue his own action if he chose to do so. The

court granted appellee's motion to dismiss but gave appellant leave to file an amended complaint. In July, 2004, Trembow filed an amended two-count complaint, alleging that appellee's paternity "needs to be determined so that Plaintiff can proceed with her request for child support for her disabled adult child." The action was brought solely by and for the benefit of Trembow. Appellee filed a second motion to dismiss which was granted without explanation. Trembow appealed and the Court of Appeals granted *certiorari* prior to proceedings in the Court of Special Appeals to determine whether the mother of a destitute adult child born out of wedlock is entitled to pursue a paternity action against the man she now claims is the father of the child and collect child support from him.

Held: Affirmed. A mother is not entitled to pursue a paternity action after the child has turned 18 and is no longer in high school. However, had paternity been established prior to obtaining age 18, the mother would be entitled to seek child support for the destitute adult child and the child, directly or, if incompetent, through a guardian, is independently entitled to seek to establish paternity prior to reaching the age of majority and upon the ascertainment of paternity, to recover child support both during minority and, as a destitute adult child, thereafter.

Victoria Trembow v. Alan Schonfeld, No. 64, Sept. Term 2005, filed June 8, 2006. Opinion by Wilner, J.

INSURANCE - NAMED DRIVER EXCLUSION

Facts: In December, 2000, Angela Zelinski and her young son, Dylan, were seriously injured when their car was struck, head-on, by a truck negligently driven by Robert Townsend, III (Robert III). The truck was owned by Mac's Septic Service, an unincorporated entity owned and operated by Robert Jr. and Louise Townsend, Robert III's parents. The truck was one of several vehicles insured under two insurance policies issued by petitioner with a policy liability

limit of \$500,000 and an umbrella policy of \$1,000,000. The basic policy listed seven persons as "operators" of the insured vehicles, including Robert III, and also contained a "Named Driver Exclusion" provision. The provision provided that if a named driver's license was suspended or revoked during the policy period, petitioner would offer to continue the policy with a named driver exclusion for that particular driver. Within three months of the policy being in force, petitioner discovered that Robert III's license had been suspended. Petitioner then offered the Townsends the option of either having the policy canceled or accepting an endorsement that excluded Robert III from the policy. The Townsends opted to exclude Robert III from the policy and obtained insurance through the Maryland Automobile Insurance Fund for Robert III. Shortly afterwards, the Zelinskis filed a claim with petitioner for damages arising out of the automobile accident.

In January, 2001, petitioner filed suit against Mac' Septic Service, the Townsends and Robert III in the United States District Court for the District of Maryland, seeking a declaratory judgment that petitioner had no duty to defend or indemnify those defendants against any claims or for any sums which they may incur and pay by reasons of injuries sustained by any member of the Zelinski family as a result of the December, 2000 accident. Although the Zelinskis were aware of the action and attended depositions taken in the case, they were not made parties by petitioner or the defendants. In September, 2002, the court granted petitioner's motion for summary judgment and entered an order declaring that petitioner was "relieved of any duty to defend or indemnify" the Townsends for any claims arising out of the December 2000 accident. While the declaratory judgment action was pending, Keith Zelinski, as Angela's guardian and Dylan's best friend, sued the Townsends in the Circuit Court for Cecil County to recover for injuries and losses sustained from the accident. In November, 2002, a jury returned a verdict finding that Robert III was negligent, that he was acting within the scope of employment at the time of the accident, and that Robert, Jr., and Louise were the owners of Mac's Septic Service. Judgments were entered against all three defendants in the total amount of \$1,717,488. In March, 2003, Keith Zelinski filed a writ of garnishment in the Circuit Court for Cecil County against petitioner, alleging that it held property of the judgment debtors, Robert Jr., Louise and Robert III. In November, 2003, the Circuit Court entered an order granting the amended motion to dismiss and quashing the writ of garnishment. Zelinski appealed.

Held: Reversed. Named driver exclusion provisions in commercial automobile insurance policies are not inconsistent with or prohibited by Maryland law. The named driver exclusion in the

policy in this case is valid.

Harleysville Mutual Insurance Co. v. Walter Zelinski, et al., No. 81, Sept. Term 2005, filed June 1, 2006. Opinion by Wilner, J.

REAL PROPERTY - EASEMENTS - CREATION, EXISTENCE, AND TERMINATION - PRESCRIPTION - ADVERSE CHARACTER OF USE - PRESUMPTION - A PRESUMPTION OF ADVERSE USE ARISES WHEN A PERSON HAS USED A RIGHT-OF-WAY OPENLY, CONTINUOUSLY, AND WITHOUT EXPLANATION FOR TWENTY YEARS, UNLESS THE USE APPEARS TO HAVE BEEN BY PERMISSION. IN CASES WHERE AN INDIVIDUAL RESIDES ON HIS OR HER PARENTS' PROPERTY FROM THE TIME HE OR SHE IS A MINOR, HIS OR HER USE OF THE PROPERTY SHALL BE DEEMED PERMISSIVE ABSENT ANY AFFIRMATIVE EVIDENCE OF A CHANGE IN CIRCUMSTANCES TO ADVERSE USE.

EASEMENTS - CREATION, EXISTENCE, AND TERMINATION - PRESCRIPTION - ADVERSE CHARACTER OF USE - THE USE OF A RIGHT-OF-WAY BY THIRD-PARTY INVITEES OF A PERSON WITH PERMISSION TO USE THE RIGHT-OF-WAY DOES NOT CONSTITUTE AN ADVERSE USE IN THE CONTEXT OF ESTABLISHING A PRESCRIPTIVE EASEMENT AS LONG AS THE USE IS WITHIN THE SCOPE OF THE PERMISSION.

Facts: This case concerns a disputed alleged right-of-way between two land owners. Ira R. Pusey, respondent, contended that he had a right-of-way to use a farm lane across R. Alan Banks, Jr.'s, et ux., petitioners, property in order to access a public road. The farm lane in question runs from the public road, across the Banks' property, over a neighboring property, and into respondent's property.

Respondent lived with his parents on what is now the Banks' property from the age of seventeen until approximately 1998. When the Banks' purchased their property in 1998, they were told by respondent that he had a right-of-way to use the farm lane. However, upon searching the land records they did not find any evidence of a deeded right-of-way. Nonetheless, the Banks' allowed

to respondent to use the farm lane for a period of time. Subsequently, they revoked their consent to respondent's use of the farm lane and erected obstacles to prevent his access. Respondent removed the obstacles and continued to use the farm lane.

Respondent's property was deeded to him by his father in 1954. Throughout the intervening years, respondent used the farm lane to cross over his parents' property and access his property. Respondent contended that this use established an easement by prescription over what is now the Banks' property.

The Banks' brought an action against respondent to enjoin him from using the farm lane. On October 26, 2004, the Circuit Court for Worcester County found that respondent had established an easement by prescription. In particular, the court found that respondent's use of the farm lane had been uninterrupted and exclusive for more than the prescriptive period of twenty years and that he was entitled to a presumption that the use was adverse. The court then found that the Banks' did not meet the burden of proving that respondent's use of the farm lane was not adverse.

On November 29, 2004, the Banks filed an appeal to the Court of Special Appeals. On December 13, 2005, the Court of Special Appeals affirmed the Circuit Court in an unreported opinion. On January 6, 2006, the Banks filed a petition for writ of certiorari. The Court of Appeals granted certiorari on March 9, 2006. *Banks v. Pusey*, 391 Md. 577, 894 A.2d 545 (2006).

Held: Reversed. The Court of Appeals found that a presumption of adverse use arises when a person has used a right-of-way openly, continuously, and without explanation for twenty years, unless the use appears to have been by permission. The Court held that a presumption of adverse use does not arise in favor of a person when that person begins to live jointly with and on his parents' property as a minor and then continues to live on the property along with his or her parents as an adult unless there is clear and convincing evidence that such a person was residing there, or using the property, against his or her parents' will. The Court also found that the use of the farm lane by third-party invitees of the respondent did not constitute adverse use because respondent impliedly had permission to use the farm lane and that such permission was conferred upon his third-party invitees.

R. Alan Banks, Jr., et ux. v. Ira R. Pusey, No. 135 September Term, 2005, filed August 1, 2006. Opinion by Cathell, J.

JUDICIAL APPOINTMENTS

On June 23, 2006 the Governor announced the appointment of CHRISTOPHER L. PANOS to serve on the District Court of Maryland. JUDGE PANOS was sworn in on August 3, 2006 and fills the vacancy created by the elevation of Timothy H. Doory to the Circuit Court.

ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals dated August 3, 2006 the following attorney has been disbarred from the further practice of law in this State:

QUINTON DELMAR ROBERTS

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By an Order of the Court of Appeals dated August 10, 2006, the following attorney has been suspended for ninety (90) days by consent, effective immediately, from the further practice of law in this State:

DORSEY EVANS, JR.

*

By an Order of the Court of Appeals dated August 10, 2006 the following attorney has been disbarred from the further practice of law in this State:

STEWART P. HOOVER

*

By an Order of the Court of Appeals dated August 22, 2006 the following attorney has been disbarred by consent from the further practice of law in this State:

ADIGUN S. BAKARE

*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective August 22, 2006:

MICHAEL S. RYAN, JR.

*