

Amicus Curiarum

VOLUME 27

ISSUE 2

FEBRUARY 2010

A Publication of the Office of the State Reporter

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COURT OF APPEALS

Norman A. Lockshin, M.D., P.A., et al. v. Barbara S. Semsker, individually and as personal representative of the estate of Richard H. Semsker, et al., No. 78, September Term 2009, Filed 12 January 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/78a09.pdf>

CIVIL PROCEDURE - HEALTH CARE MALPRACTICE CLAIMS - NON-ECONOMIC DAMAGES CAP - THE PLAIN MEANING OF MARYLAND CODE, COURTS AND JUDICIAL PROCEEDINGS ARTICLE § 3-2A-09(a), WHICH STATES THAT THE NON-ECONOMIC DAMAGES CAP FOR HEALTH CARE MALPRACTICE CLAIMS CONTAINED IN § 3-2A-09(b) APPLIES TO "A VERDICT UNDER § 3-2A-06 OF THIS SUBTITLE," PROVIDES THAT THE CAP APPLIES TO ALL HEALTH CARE MALPRACTICE CLAIMS BROUGHT UNDER SUBTITLE 3-2A, INCLUDING THOSE FOR WHICH ARBITRATION HAS BEEN WAIVED PURSUANT TO §§ 3-2A-06A OR 3-2A-06B.

Facts: In late 1998, Richard Semsker visited the dermatology offices of Norman A. Lockshin, M.D., P.A. ("Lockshin, P.A."), upon referral from his internist, Dr. Lawrence Marcus. Semsker was seen by Dr. Norman Lockshin, who removed a cyst and wrote to Dr. Marcus that Semsker had a dark brown 6 millimeter nevus, or skin malformation, that should be excised. According to Semsker, neither Dr. Marcus nor Dr. Lockshin informed him of the presence of the nevus.

In September 2004, Semsker returned to Lockshin, P.A. to have cysts on his upper back examined and to undergo a full body skin check. He was examined by Dr. Michael Albert, a dermatologist employed by Lockshin, P.A., who documented two benign cysts, an atypical nevus on Semsker's upper right back, and a 1.3 centimeter congenital nevus on his lower back (the same nevus that had grown from 6 millimeters when Dr. Lockshin examined it in 1998). Dr. Albert recommended removal of the cysts and the atypical nevus, but recommended only regular monitoring of the congenital nevus, rather than its removal. As recommended, the upper-back cysts and atypical nevus were removed.

On 3 August 2006, shortly after Semsker's wife, Barbara, noticed that the nevus Dr. Albert had not recommended be removed had changed color, Semsker returned to Lockshin, P.A., where the nevus was excised by Dr. Benjamin Lockshin. Shortly afterward, it was determined that the nevus had turned into a malignant

melanoma which had metastasized to dozens of lymph nodes in Semsker's groin and lower abdomen. Radiation and other treatment failed to halt further metastasis.

On 30 March 2007, Semsker and his wife filed with the Director of the Health Care Alternative Dispute Resolution Office a claim under Maryland Code, Courts and Judicial Proceedings Article¹ § 3-2A-04(a)(1)(i) for medical malpractice against Dr. Albert; Lockshin, P.A.; Dr. Norman Lockshin; Dr. Kendall Hash (another employee of Lockshin, P.A.); and Dr. Marcus, alleging misdiagnosis of his cancer. Mr. and Mrs. Semsker elected to waive arbitration pursuant to § 3-2A-06B(b)(1) on 19 June 2007, and, one day later, filed in the Circuit Court for Montgomery County a complaint for medical malpractice. In the plaintiffs' Joint Pretrial Statement and a Supplement thereto, it was stipulated that they were claiming "the maximum allowable" under the then current non-economic damages cap provided in § 3-2A-09(b)(2), "which is \$812,500."

On 15 October 2007, while the case was pending in the Circuit Court, Semsker passed away due to his cancer. On 19 December 2007, Mrs. Semsker filed a Second Amended Complaint, converting the case to a wrongful death and survival action on behalf of Semsker's estate (for which she is the personal representative) and adding the Semskers' two adult daughters, Meryl and Julia Semsker, as plaintiffs. Prior to trial, the remaining Semskers dismissed voluntarily and with prejudice all claims against Dr. Hash.

The trial was conducted before a jury beginning on 3 November 2008. At trial, the Semskers introduced, without objection, evidence of \$415,781 in incurred medical expenses. A portion, the amount of which is disputed, of that \$415,781 represents medical costs that were written-off by Semsker's health care providers. Evidence of such write-offs was not presented by the defense at trial.

On the final day of trial, the Semskers reached a joint tortfeasor settlement with Dr. Marcus in the amount of \$1 million and granted Dr. Marcus a standard joint tortfeasor release, the purpose of which was to provide an automatic credit to any non-settling defendants who were held liable ultimately to the Semskers in the present case. The release described the credit as "an automatic reduction of any future verdict or judgment

¹All citations to the Maryland Code appearing herein refer to the Courts and Judicial Proceedings Article.

against any non-settling tortfeasor" of "all damages . . . recoverable" by the Semskers "to the extent of the *pro rata* share[] of [Dr. Marcus] or *pro tanto*, whichever is greater."

On 14 November 2008, the jury returned a special verdict in favor of the Semskers, finding Dr. Albert liable individually for medical malpractice. The jury found Dr. Norman Lockshin, the owner of the professional association bearing his name, not liable to the Semskers. In its verdict, the jury awarded the Semskers \$5,805,000 in compensatory damages, which included a total of \$3 million in non-economic damages. The verdict was applied by stipulation to Dr. Albert's employer, Lockshin, P.A. (who, along with Dr. Albert, comprise "the Physicians" hereafter), on a *respondeat superior* basis.

Following post-trial motions, the Circuit Court issued an order and opinion holding that, under the purportedly clear language of § 3-2A-09(a), which states that the non-economic damages cap appearing in § 3-2A-09(b) applies "to an award under § 3-2A-05 of this subtitle or a verdict under § 3-2A-06 of this subtitle," the cap on non-economic damages did not apply to the present case because it involved an unarbitrated claim brought pursuant to § 3-2A-06B. In addition, the court, assuming hypothetically that the cap applied to unarbitrated claims, held that any *pro rata* reduction based on Dr. Marcus' joint tortfeasor settlement should be calculated prior to application of the cap, and that the Semskers could recover for past medical expenses that had been written off by Mr. Semskers' health care providers because the Physicians failed to adduce at trial any evidence of such write-offs.

The Semskers and the Physicians each petitioned this Court for a writ of certiorari, prior to action on appeal to the Court of Special Appeals. We granted their petitions to consider: (1) whether the Circuit Court erred in holding that the cap on non-economic damages in health care malpractice claims contained in § 3-2A-09 does not apply to claims in which arbitration has been waived under §§ 3-2A-06A or 3-2A-06B; (2) whether the Circuit Court erred in holding that, if the cap does apply to claims in which arbitration has been waived, the court should apply a *pro rata* joint tortfeasor reduction prior to applying the limitation on non-economic damages; and, (3) whether the Circuit Court erred in holding that § 3-2A-09(d)(1) does not mandate a reduction of the verdict to exclude past medical expenses that were not, and will not be paid by or on behalf of, the patient, where the defendants failed to offer evidence of those expenses at trial, deferring such to post-verdict proceedings.

Held: Reversed and remanded. The Court held that: (1) the non-economic damages cap provided for in § 3-2A-09(b) applies to all healthcare malpractice claims brought under subtitle 3-2A, including the present case for which arbitration had been waived pursuant to § 3-2A-06B; (2) the non-economic damages cap should be applied to the jury's verdict prior to application of the pro rata credit provided for in Dr. Marcus' joint tortfeasor settlement and release; and, (3) the defendants did not waive their right to any potential reduction under § 3-2A-09(d) based on write-offs by Mr. Semsker's health care providers due to their failure to adduce at trial evidence of such write-offs.

Regarding the applicability of the non-economic damages cap to unarbitrated claims, the Court agreed with the Circuit Court's conclusion that the language in § 3-2A-09(a) was plain, but differed as to the plain meaning of that language. After stating the pertinent principles of sound statutory construction, the Court described the four distinct ways in which a health care malpractice claim may arrive in a Maryland circuit court: (1) full arbitration under § 3-2A-05, requiring only confirmation of the arbitration award by the court; (2) arbitration under § 3-2A-05 followed by rejection of the award by a party under § 3-2A-06(a) and the filing of an action to nullify the award and proceed to trial; (3) mutual waiver of arbitration under § 3-2A-06A; and, (4) unilateral waiver of arbitration under § 3-2A-06B.

The Court noted that §§ 3-2A-06A and 3-2A-06 address solely the procedures for waiving arbitration in health care malpractice claims; neither section makes any mention of verdicts or court procedures following waiver of arbitration. Both sections, however, provide explicitly that, [i]n any case subject to this section, the procedures of § 3-2A-06(f) of this subtitle shall apply." Section 3-2A-06(f) provides for itemization of the jury's verdict into specific categories, the filing of objections to the jury's verdict based on its excessive nature, and the circuit court's consideration and resolution of any objections. Thus, the Court found, because a verdict attained following waiver of arbitration is subject to the procedures of § 3-2A-06(f), it therefore constitutes "a verdict under § 3-2A-06 of this subtitle." As such, the non-economic damages cap of § 3-2A-09(b) is applicable to the claim.

Concerning the order of operation of applying the cap on non-economic damages and the pro rata credit for Dr. Marcus' joint tortfeasor settlement, the Court reviewed the specific language of the release in the present case. Although the release called for the pro rata reduction of any "verdict or judgment," the Court noted that, under the language of § 3-2A-

09(b), which states that a verdict "may not exceed" the applicable cap, any verdict rendered by a jury exceeding the amount of the cap inherently is a verdict in the amount of the cap from the moment it is rendered. Thus, the appropriate order of operations is to apply first the cap to the jury's verdict for non-economic damages per § 3-2A-09(b), followed by a credit for the joint tortfeasor settlement.

As to whether the defendants were required to present at trial evidence of certain write-offs by Semsker's health care providers in order to rely on the provisions of § 3-2A-09(d)(1) limiting a verdict for past medical expenses to "[t]he total amount of past medical expenses paid by or on behalf of the plaintiff . . . and . . . [t]he total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay," the Court noted that presentation of such evidence to the jury during trial would constitute impermissible collateral source evidence. Based on the fact that § 3-2A-09(d)(1) makes no mention of the common law collateral source rule, and the long-standing principle of statutory interpretation that the common law will not be deemed repealed by implication, the Court interpreted the mandate of § 3-2A-09(d)(1), consistent with the collateral source rule, to provide that evidence of write-offs should be considered by the court in a post-verdict remittur setting, similar to the procedures found in §§ 3-2A-05(h) and 3-2A-09(c), rather than being presented to the jury during trial.

Earlene Burnside, et. ux. v. Randall V. Wong, et al., No. 4, September Term 2009. Opinion filed January 7, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/4a09.pdf>

CIVIL PROCEDURE - VENUE

Facts: Earlene Burnside filed a complaint in the Circuit Court for Baltimore City against Dr. Randall Wong alleging medical malpractice, lack of informed consent, and loss of consortium stemming from his treatment of her for a degenerative eye disease. Dr. Wong filed a Motion to Dismiss for Improper Venue on the bases of Sections 6-201(a) and 6-202(8) of the Courts and Judicial Proceedings Article, Maryland Code (1974, 2002 Repl. Vol.), asserting that he neither resided nor carried on a regular business in Baltimore City, and that the alleged misdiagnosis, negligent medical treatment, and failure to obtain informed consent took place solely in Baltimore County. After a hearing in which the parties argued venue only on the basis of Section 6-201(a), the Circuit Court transferred the case to Baltimore County. Thereafter, Mrs. Burnside filed a Motion to Reconsider, Alter, Amend, or Revise the ruling, relying for the first time primarily on Section 6-202(8), arguing that a cause of action arises for purposes of venue, when facts exist to support each element of a negligence claim, namely duty, breach, and injury. Mrs. Burnside asserted that under Section 6-202(8), her "first eye injury while under Dr. Wong's care" occurred in Baltimore City, where she resided, because her eye condition deteriorated there. The Circuit Court denied the Motion, and the Court of Special Appeals affirmed.

Held: The Court of Appeals affirmed. The Court reviewed the legislative history of Section 6-202(8) as well as prior decisions considering the language of "first injury" and where the "cause of action ar[ose]," and determined that the alleged misdiagnosis and failure to obtain informed consent, whereby Mrs. Burnside's eye condition was allowed to progressively worsen, constituted an injury such that the cause of action arose in Baltimore County. The Court reasoned that Mrs. Burnside's disease must have been germinating for Dr. Wong's negligent acts to constitute misdiagnosis and mistreatment. The Court further held, relying on its recent decision in *Nodeen v. Sigurdsson*, 408 Md. 167, 178, 968 A.2d 1075 (2009), that the relevant time for determining venue under Section 6-201(a), pertaining to carrying on a regular business or engaging in a vocation, is the time suit was brought. The Court also rejected Mrs. Burnside's argument that because Dr. Wong maintained "active privileges" at Mercy

Medical Center and "teaching privileges" at the University of Maryland School of Medicine, venue was proper in Baltimore City. Rather, the Court reasoned that merely having such privileges, without exercising them, as here, was insufficient to confer venue in Baltimore City.

* * *

Richard C. Smith v. State of Maryland, No. 1, September Term 2009, filed on December 30, 2009, Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2009/1a09.pdf>

CRIMINAL LAW - APPEALS - INCONSISTENT VERDICTS

Facts: On two separate occasions, Ruben Levell and Joseph Durbin were robbed at gunpoint by two men. Richard C. Smith was accused of participating in the robberies. The victims of the robberies identified Smith as one of the two robbers, although both victims admitted that they could not be certain. Smith was charged with eight counts, including, robbery with a dangerous weapon, use of a handgun in the commission of a felony, first degree assault, and conspiracy to commit robbery with a dangerous weapon. Smith claimed there was insufficient evidence to identify him as one of the alleged robbers, and even if he was accurately identified, the evidence was insufficient to show that he had aided and abetted the gunman. The Circuit Court for Montgomery County convicted Smith on two of the eight counts: robbery with a dangerous weapon and use of a handgun in the commission of a felony. The Circuit Court dismissed the first degree assault charge.

The Court of Special Appeals reversed both convictions because it concluded they were inconsistent with the acquittal for first-degree assault. The Court of Special Appeals remanded the case to the trial court with instructions to enter a guilty verdict against Smith for misdemeanor theft, an offense that was never charged or pursued at trial. Smith petitioned to the Court of Appeals.

Held: The Court of Appeals held that the intermediate appellate court's remand to the trial court with directions to enter a verdict of guilty for an offense that was never charged or pursued at trial was impermissible for two reasons. First, the intermediate appellate court reversed the conviction for robbery with a dangerous weapon because it was inconsistent with his acquittal for first-degree assault. That reversed conviction, however, provided the only basis for directing the trial court to enter a judgment of guilty against Smith for misdemeanor theft. A court may not rely on a conviction that has been reversed for inconsistency as the basis for directing a trial court to enter a judgment of guilty for a lesser included offense. A conviction reversed for inconsistency is not sufficiently reliable to be the basis for a conviction of a lesser included offense because there can be no confidence in the judge's rationale for reaching the inconsistent verdict. *Johnson*

v. State, 238 Md. 528 (1965). Second, neither Smith nor the State had an opportunity to present arguments regarding misdemeanor theft in the trial court. A trial court may not convict a defendant of an uncharged lesser included offense unless the parties are given an opportunity to present arguments on that offense in the trial court.

Gauvin v. State, No. 148, September Term, 2008, filed December 18, 2009. Opinion by Murphy, J.

<http://mdcourts.gov/opinions/coa/2009/148a08.pdf>

CRIMINAL LAW - EVIDENCE - EXPERT TESTIMONY - MARYLAND RULE 5-704(B)

Facts: Appellant was stopped by the Calvert County Sheriff's office. A search of Appellant's car revealed two hand rolled cigarettes, two eye droppers containing PCP, two glass bottles of PCP, a jar of parsley soaked with PCP, plastic gloves and twenty-one "hand rolling" papers. A search of Appellant's person also turned up \$240 in cash.

At trial, a certified drug recognition expert testified that Appellant was under the influence of dissociative anesthetic and narcotic analgesic and unable to drive. First Sergeant McDonough testified as an expert in narcotics. Appellant objected to McDonough being admitted as an expert in the field of phencyclidine, however, McDonough was admitted as an expert subject to cross examination. McDonough was later asked whether he had formed an opinion as to the Appellant's use of the PCP - personal or distribution. Over Appellant's objection, McDonough answered that based on other factors the evidence here would indicate to him that the Appellant had the PCP with the intent to distribute.

Held: The Court of Appeals held that Md. Rule 5-704(b) prohibits expert testimony that the defendant had or did not have the criminal intent that is an element of an offense. This rule, however, does not prohibit expert testimony explaining why an item of evidence is consistent with a particular mental state. The prosecutor's question - "whether or not the PCP that was seized from [Appellant] was for her personal consumption or for distribution?" sought an answer that is prohibited by Md. Rule 5-704(b). However, McDonough's answer did not speak to Appellant's specific intent, but instead, stated what the factual circumstances indicated to an experienced officer. Ultimately, the court held that an appellant is not entitled to a new trial on the ground that the trial court erroneously overruled the Appellant's objection to a question that called for an answer prohibited by Md. Rule 5-704(b) if the record shows that the testimony presented after the erroneous ruling did not violate the rule.

Emma Elder v. Cherry Elder Smith, Personal Representative of the Estate of Colonel Percy Elder, Sr., No. 34, September Term 2009. Opinion filed January 13, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/34a09.pdf>

ESTATES AND TRUSTS - PRIORITY OF LIENS - JURISDICTION OF ORPHANS' COURT

Facts: Emma Elder and Colonel Percy Elder were married in 1976, but after twenty-six years of marriage and the birth of two children, they were divorced in the Baltimore City Circuit Court in 2002. Emma was awarded a total of \$31,500 as a marital award and was to receive one-half of the proceeds of a sale of property located in Anne Arundel County known as "Beales Trail." Emma Elder's \$31,500 marital award was not reduced to judgment and remained unsatisfied at the time of Mr. Elder's death. Mr. Elder died on November 8, 2005 in Baltimore County. Subsequently, Emma obtained an order from the Circuit Court for Baltimore City reducing her marital award to a judgment against Colonel Percy Elder. The Circuit Court also issued an Order of Substitution, substituting Cherry Elder Smith, as the Personal Representative of the Estate of Colonel Percy Elder, as the judgment debtor. Emma Elder then recorded the judgment in Anne Arundel County, intending to thereby attach a lien against the Beales Trail property. Prior to the sale of Beales Trail, the Orphans' Court ordered Emma to release her lien, reasoning that her monetary award, reduced to judgment and recorded as a lien after Mr. Elder's death, was not entitled to priority within the context of estate administration. The Court of Special Appeals affirmed, holding that the statutory scheme embodied in the Estates and Trusts Article governing creditors' claims, does not permit "a creditor with a pre-death claim to enhance the priority of its claim after the debtor dies."

Held: The Court of Appeals affirmed. The Court reviewed the statutory scheme governing estate administration, their legislative history, as well as the statutory schemes in other states and determined that a lien cannot be created against a debtor's interest in real property after the debtor's death, because upon death, title to real property passes out of the hands of the decedent, pursuant to Section 1-301(a) of the Estates and Trusts

Article, Maryland Code (1974, 2001 Repl. Vol.). The Court further held, however, that as a court of special and limited jurisdiction, the Orphans' Court for Baltimore County was without authority to affect the lien recorded in Anne Arundel County, either directly, or by ordering Emma Elder to release her lien. The Court reasoned that although an orphans' court has the ability to effectuate the administration of an estate, only circuit courts, as courts of original and general jurisdiction, have the authority to enter judgments upon which liens are based and to order their release. The Court concluded that although the lien held by Emma Elder on the Beales Trail property is not afforded priority, the release of the lien must be effected in a different manner.

In re Adoption/Guardianship of Alonza D., Jr. and Shaydon S., No. 41, September Term 2009. Opinion filed January 19, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/41a09.pdf>

FAMILY LAW - ADOPTION

Facts: Petitioner, Alonza D., Sr. ("Mr. D.") was twenty-one years old and his girlfriend Lacoie S. ("Ms. S.") was eighteen years old when Alonza D., Jr. ("Alonza") was born on March 13, 2000. The couple had a second child, Shaydon S. ("Shaydon") on July 14, 2001. Mr. D. and Ms. S. separated in 2001. The Baltimore City Department of Social Services became involved with the children shortly after the couple separated, having received a report that the children were neglected and living in squalor. Although the Department considered a placement with Mr. D., a "Home Health Report" conducted by the Department indicated that the home in which Mr. D. resided was in need of a lead abatement, which did not occur. The children were then placed in foster care with Cecilia B. ("Ms. B.") and were adjudicated children in need of assistance (CINA) on May 6, 2002.

On March 17, 2004, the Department filed Petitions for Guardianship with the Right to Consent to Adoption, seeking termination of Ms. S's and Mr. D.'s parental rights. Ms. S. later consented to termination of her parental rights. At the time, Alonza was four years old, Shaydon was two years and eight months old, and both had lived with Ms. B. for over two years. After hearings conducted on November 2, 2006 and February 8, 2007, the Circuit Court for Baltimore City terminated Mr. D.'s parental rights, emphasizing the length of time the children had been in foster care as the determinative factor. Mr. D. filed an appeal to the Court of Special Appeals, which affirmed. The Court of Appeals granted certiorari and subsequently issued a per curiam order, *In re Adoption/Guardianship of Alonza Lynn D., Jr. and Shaydon Stevie S.*, 403 Md. 424, 942 A.2d 755 (2008), vacating the Court of Special Appeals' decision, and remanding the case to the Circuit Court for reconsideration in light of *In re Adoption/Guardianship of Rashawn H. and Tyrese H.*, 402 Md. 477, 937 A.2d 177 (2007). The Circuit

Court thereafter held a hearing as directed and once again terminated Mr. D.'s parental rights, reasoning that the length of time Alonza and Shaydon were in foster care constituted "exceptional circumstances" under the standard enunciated in *In re Adoption/Guardianship of Rashawn H.* The Court of Special Appeals affirmed.

In the Court of Appeals, Mr. D. argued that the Circuit Court and Court of Special Appeals erred in identifying the length of time Alonza and Shaydon had been in foster care and the children's apparent bond with Ms. B. as exceptional circumstances, warranting termination of his parental rights. He asserted that the Department failed to meet its evidentiary burden that continuation of the parental relationship would prove detrimental to the children's best interests, as required by *In re Rashawn H.* The Department countered that Mr. D. and his sons have been separated for nearly eight years, and that a "lengthy parent-child separation and a corresponding growth in ties between a child and his prospective adoptive parents, such that the child would suffer serious and lasting emotional or psychological harm," constitutes exceptional circumstances.

Held: The Court of Appeals reversed. The Court reviewed statutory factors outlined in Section 5-313 of the Family Law Article, Maryland Code (1984, 2004 Repl. Vol.), governing termination of parental rights, prior decisions considering "exceptional circumstances," as well as decisions from other states, and determined that the Circuit Court failed to articulate any finding that a continued parental relationship with Mr. D. would prove detrimental to the best interests of the children, as required by *In re Rashawn H.* The Court further reasoned that in focusing primarily on the length of time the children were in foster care, the Circuit Court apparently overlooked the need to express findings regarding "the child's feelings toward and emotional ties with the child's natural parents" as required by Section 5-313. The Court vacated the judgment of the Court of Special Appeals and remanded the case to the Circuit Court for further proceedings in which detriment to the children be explored and explicit findings developed.

Curtis O. Rosemann v. Salsbury, Clements, Bekman, Marder & Adkins, LLC, No. 39, September Term 2009, filed 13 January 2010. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/39a09.pdf>

JUDGMENTS - MONEY PAYABLE IN THE EVENT OF PERSONAL INJURY - EXEMPTION FROM EXECUTION - MONEY RECEIVED AS PART OF A SETTLEMENT IN A PERSONAL INJURY CASE IS EXEMPT FROM EXECUTION ON A JUDGMENT FOR CHILD SUPPORT ARREARAGES.

Facts: Curtis O. Rosemann ("Mr. Rosemann"), the custodial parent of two minor children, filed writs of garnishment in the Circuit Court for Howard County seeking to execute on two judgments against his former wife, Rosalind Rosemann ("Ms. Rosemann"), for unpaid child support obligations. The writs sought to garnish funds that a law firm held for the benefit of Ms. Rosemann in connection with the settlement of a civil claim against an airline for alleged personal injuries she suffered as a passenger. The Circuit Court held that the money was exempt because it was compensation for personal injury, and therefore protected by § 11-504(b)(2) of the Courts and Judicial Proceedings Article, Md. Code Ann. (1974, 2006 Repl. Vol. & Supp. 2009), a statute providing that "money payable in the event of sickness, accident, injury, or death of any person, including compensation for loss of future earnings" is exempt from execution on a judgment. This exemption includes money payable on "account of compromises." The Court of Special Appeals affirmed. The Court of Appeals granted Mr. Rosemann's petition for a writ of certiorari to consider whether money received as part of a settlement is exempt from execution on a judgment for child support arrearages. 408 Md. 487, 970 A.2d 892 (2009).

Held: Affirmed. The Court of Appeals held that money received as part of a settlement in a personal injury case is exempt from execution on a judgment for child support arrearages under § 11-504(b)(2). Article III, § 44 of the Maryland Constitution directs the General Assembly to pass laws to protect from execution a reasonable amount of the property of the debtor. Section 11-504 of the Courts and Judicial Proceedings Article purports to carry out this mandate by exempting from execution various types and amounts of property, including money payable in the event of personal injury. The statute does not include language providing that such funds may be executed upon when the judgment represents child support arrearages. The Court explained that the purpose of the personal injury exemption is to withhold from creditors's reach funds necessary to recompense the debtor for injuries to her or his physical person, to make the

debtor whole in the eyes of the law, and to restore human capital to the extent monetarily possible. The money that Ms. Rosemann received was to compensate her for an alleged injury. The airline agreed to pay the money as part of a compromise in which she agreed not to pursue further her lawsuit against it. Thus, the Court held that the settlement funds fall squarely within the personal injury exemption.

In the face of the plain language of the statute and its clear applicability to the facts of the present case, Mr. Rosemann urged the Court to hold that the money received by Ms. Rosemann is not exempt because the underlying judgments on which he sought to execute represent child support arrearages. He asked the Court to carve-out an exception to the statute solely on the ground of general public policy, based largely on recent statutory changes (unrelated to the statute in this case) making it easier to collect such arrearages or put pressure on the debtor to pay up.

It is well established that, in Maryland, a parent has a duty to support his or her children. To ensure that parents fulfill this duty, the Citizens of Maryland and the General Assembly have taken several steps to ensure that non-supporting parents honor their obligations. For example, Article III, § 38 of the State Constitution provides that a person may be imprisoned for non-payment of child or spousal support. Additionally, the State may suspend the driver's license, see Md. Code Ann. Fam. Law (1984, 2006 Repl. Vol. & Supp. 2009), or occupational license, see Fam. Law § 10-119.3, or deduct support payments from the earnings of an obligor who has failed to make child support payments. Md. Code Ann. Fam. Law (1984, 2006 Repl. Vol. & Supp. 2009) §§ 10-119, 10-119.3, 10-120-10-138.

The Court acknowledged that it has held, under the facts and circumstances of other cases and statutes, that statutes exempting certain property from execution were found inapplicable where the underlying debt was for spousal support arrearages. In *United States v. Williams*, 279 Md. 673, 370 A.2d 1134 (1977), the Court held that a statute exempting a certain amount of a debtor's wages from execution on a judgment to be inapplicable when the underlying obligation is for intra-familial support. That rationale is based on the rationale that the purpose of the wage exemption is to protect a family from being deprived of all support by attachment proceedings brought by an outsider. In *Safe Deposit & Trust Co. of Balt. v. Robertson*, 192 Md. 653, 65 A.2d 292 (1949), the Court permitted the attachment of income from a spendthrift trust to satisfy alimony arrearages, notwithstanding that a typical creditor would not be permitted to

reach the funds. In *Safe Deposit*, the Court stated explicitly that its decision rested on public policy grounds. In *Blum v. Blum*, 295 Md. 135, 453 A.2d 824 (1983), the Court extended the holding of *Williams* to hold that the wage exemption statute did not apply to an obligation to pay contractual spousal support. Finally, in *Pope v. Pope*, 283 Md. 531, 390 A.2d 1128 (1978), the Court held that a statute that exempted unemployment benefits from execution was inapplicable where the underlying obligation was for alimony based on the public policy rationale the Court established in *Williams*.

Mr. Rosemann argued that these cases establish that statutes exempting specific property from legal process have been construed judicially to be inapplicable against a claim for child support or alimony. The Court disagreed. It determined that the cases establish that statutes exempting wages and unemployment benefits from execution on a judgment have been construed to be inapplicable as against a claim for familial support. Although some portion of the family's support should be protected from creditors, no part of the wages that provide support should be protected from the family itself. The personal injury exemption, by contrast, is intended to make the injured person whole. Personal injury awards are not meant to support directly the injured party's family. Furthermore, the Court determined that its holding in *Safe Deposit* was inapplicable because the trust funds were intended to provide income to the beneficiary, not to make the person whole when injured in tort.

The Court next noted that the Legislature has amended § 11-504 many times, but did not create an exception to the personal injury monies exemption with regard to execution on a judgment for child support arrearages. The Court may not create judicially an exemption to the statute that the Legislature has not seen fit to impose.

COURT OF SPECIAL APPEALS

Ali v. CIT Technology Financing, No. 1313, Sept. Term, 2008, filed October 5, 2009. Opinion by Eyler, James R., J.

<http://mdcourts.gov/opinions/cosa/2009/1313s08.pdf>

APPEAL AND ERROR = BANKRUPTCY - STATE INSOLVENCY PROCEEDINGS

Facts: Ahmed M. Ali, appellant, appealed from a judgment entered by the Circuit Court for Prince George's County in favor of CIT Technology Financing Services, Inc., appellee, in the amount of \$190,725.85 in damages and \$21,977.95 in prejudgment interest. Appellant contended that the trial court should have dismissed the suit because it was barred by the applicable statute of limitations; the trial court erred when it calculated the amount of damages; and the trial court erred when it calculated pre-judgment interest. The Court of special Appeals vacated the judgment, affirmed as to liability, and remanded the case to the circuit court for a new trial on damages.

In June, 1997, appellee's predecessor/lessor entered into an equipment lease with appellant. The lease required appellant to pay \$3,275.60 per month for 60 months. The total amount of rental payments due under the lease was \$196,536.

In May, 1999, appellant defaulted. Appellee sent a letter dated August 10, 2000 demanding that appellant pay \$158,760.86 by August 20, 2000. The amount claimed by appellee was for the accelerated rental payments and the value of the unreturned equipment. Appellant failed to pay all or any portion of that amount by August 20, 2000.

On June 11, 2001, appellant filed a chapter 11 petition in bankruptcy in the United States Bankruptcy Court for the District of Maryland. Appellee could not pursue its claim outside of the bankruptcy proceeding because of the automatic stay provision in 11 U.S.C. § 362. In 2002, Appellee filed a general unsecured claim in the bankruptcy proceeding in the amount of \$158,760.86. In July, 2003, appellee moved to lift the stay. In September 2003, the bankruptcy court granted the motion and lifted the stay.

Appellant continued to possess the equipment without making any monthly payments to appellee. Also in September 2003, appellee filed a claim in the bankruptcy proceeding for

administrative expenses in the amount of \$85,165.70, which included the cost of appellant's post-petition use of the equipment.

In August 2004, the parties entered into a stipulation and proposed consent order that allowed appellee a general unsecured claim in the amount of \$190,725.86, allowed appellee an administrative claim in the amount of \$53,200, and authorized appellant to execute all documents necessary to consummate the transactions referred to in the stipulation. The bankruptcy court executed the consent order.

The transactions referred to in the stipulation related to the administrative claim. These transactions included a payment schedule, a confessed judgment note, a transfer of the equipment's title to appellant, and a grant of a security interest in the equipment to appellee. Appellant paid appellee approximately \$26,200 under the note. However, appellant failed to pay the remainder of the money due under the note. In accordance with a confession of judgment provision in the note, appellee obtained a confessed judgment for \$30,400 against appellant in a separate action.

Appellee did not recover any portion of the unsecured claim from the bankruptcy proceeding. On July 12, 2006, the bankruptcy court dismissed appellant's bankruptcy case without discharge of debts.

In January, 2007, appellee sued appellant for breach of the lease. In March, 2008, appellee filed an amended complaint, in which it added a count seeking to enforce the stipulation and consent order. On April 16, 2008, the circuit court heard the case nonjury.

In an order dated May 27, 2008 and docketed May 30, 2008, the circuit court found that appellant, in May 1999, had defaulted under the lease. The court held that the three year period of limitations contained in Md Code (2006 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article was tolled during the pendency of the bankruptcy proceeding, by operation of §5-202 of the same Article. The court entered judgment.

Section 5-202 provides:

If a debtor files a petition in insolvency which is later dismissed, the time between the filing and the dismissal is not included in determining

whether a claim against a debtor is barred by the statute of limitations."

Held: The Court of Special Appeals, after an extensive review of the history of state insolvency laws and federal bankruptcy laws, and after noting that the tolling statute had been repealed and reenacted, held that it applied to bankruptcy proceedings.

Appellant also contended that the trial court erred when it based its judgment "solely on the stipulation in the Bankruptcy Court" because the stipulation and consent order was vacated by operation of 11 U.S.C. § 349(b). That section provides that a dismissal of a bankruptcy petition vacates certain orders and transfers. The Court of Special Appeals held that the dismissal vacated the stipulation and consent order and reinstated the lease as the basis for liability. Because the Court could not tell if the trial court based the amount of its award on the stipulation and the Court could not tell how the court computed the amount of damages, it remanded the case for further proceedings with respect to damages.

Bayly Crossing v. Consumer Protection Division, No. 1328, Sept. Term, 2008, filed October 5, 2009. Opinion by Eyler, James R., J.

<http://mdcourts.gov/opinions/cosa/2009/1328s08.pdf>

CONSUMER PROTECTION - FAILING TO REGISTER UNDER THE HOME BUILDER REGISTRATION ACT

Facts: This appeal arose from a civil administrative action by the Consumer Protection Division of the Maryland Office of the Attorney General ("CPD") against appellants Julia B. Passyn, Theodore B. Passyn, Theodore B. Passyn, III ("the Passyns"), and Bayly Crossing, LLC. CPD charged appellants with failing to register under the Home Builder Registration Act ("HBRA"), Maryland Code (2004 Repl Vol., 2007 Supp.), §§ 4.5-101 to 4.5-701 of the Business Regulation Article, unfair and deceptive trade practices under the Consumer Protection Act ("CPA"), Maryland Code (2005 Repl. Vol., 2008 Supp.), §§ 13-101 to 13-501 of the Commercial Law Article, and failure to comply with a settlement agreement pursuant to CPA § 13-403(c)(1). The CPD, acting in its quasi-judicial role, delegated the matter to the Office of Administrative Hearings ("OAH"), see Maryland Code (2004 Repl. Vol., 2008 Supp.), § 10-205(a), (b) of the State Government Article ("SG"), for proposed findings of fact and conclusions of law, and ultimately issued a Final Order ruling against appellants on all charges. Appellants filed a petition for judicial review pursuant to SG § 10-222(a) in the Circuit Court for Baltimore City, which affirmed the Agency's decision .

The Passyns purchased membership interests in Bayly Crossing, LLC from Talbot Bank on November 19, 2002, with each Passyn acquiring a one-third interest. At the time of the purchase, Bayly Crossing, LLC owned thirty lots in the "Bayly Crossing" subdivision located in Dorchester County, which consisted of nine finished lots and twenty-one unfinished lots. Bayly Crossing, LLC was not registered as a home builder with the Home Builders Registration Unit ("HBRU") prior to the Passyns' acquisition of the company, nor did any of the Passyns apply to register Bayly Crossing, LLC as a home builder following their purchase.

Over the 827 day period from October 11, 2002 to January 14, 2005, Bayly Crossing, LLC contracted with ten consumers to sell them homes in the Bayly Crossing subdivision. The form contract used by Bayly Crossing, LLC contained language indicating that Bayly Crossing LLC agreed to sell and construct homes.

In 2002, the CPD initiated an investigation of T.B. Passyn & Sons, Inc.'s home building practices, which led to litigation in the Circuit Court for Talbot County and a related administrative action. The dispute was settled with a Final Order by Consent ("Consent Order"), executed on July 17, 2003 by Theodore B. Passyn, III, President, on behalf of T.B. Passyn & Sons, Inc., the Passyns individually, Jeston Harner, Jr and Steven M. Sakamoto-Wengel, Assistant Attorneys General, and William Leibovici, "Assistant Attorney General and Chief [of the CPD]." Under the terms of the Consent Order, the HBRU agreed to renew T.B. Passyn & Sons registration as home builder, which they had requested, provided they complied with certain conditions.

On July 12, 2005, the CPD filed a Statement of Charges against the Passyns and Bayly Crossing, LLC, alleging violations of HBRA §§ 4.5-301 and 4.5-501 for failing to register as home builders, CPA §13-303 for engaging in unfair and deceptive trade practices defined in CPA §§ 13-301(1) and 13-301(3), and CPA § 13-402(c)(1) for failing to comply with the Consent Order.

The CPD found the violations set forth above and imposed penalties. Appellants filed a petition for judicial review in the Circuit Court for Baltimore City, which affirmed the administrative decision.

Held: The Court of Special Appeals dismissed Bayly Crossing LLC's appeal because its charter had been forfeited. With respect to the individual appellants, the Court held that Bayly Crossing LLC was required to register as a home builder; that appellants' failure to disclose the nonregistered status was a misrepresentation under the CPA; that the violation of the consent order was a violation of the CPA; affirmed other violations of the CPA; held that appellants were jointly and severally liable; and that the penalties were not arbitrary or capricious.

Thomas B. Harris v. State - No. 581, September Term, 2008, filed November 30, 2009. Opinion by Zarnoch, J.

<http://mdcourts.gov/opinions/cosa/2009/581s08.pdf>

CRIMINAL LAW - CONDUCT OF TRIAL - COMMUNICATIONS BETWEEN COURT AND JURY

Facts: Appellant was convicted by a jury in the Circuit Court for Baltimore County of second-degree depraved heart murder on March 5, 2008. On May 5, 2008, the court sentenced Harris to fifteen years' incarceration. At appellant's trial, after voir dire was completed and the jury was empaneled and sworn, a juror told the judge that his grandmother was in the hospital and doctors did not expect her to live much longer. He told the judge that he would like to be available to leave if his grandmother died or to see her if it "looked like it was the end coming." The judge did not excuse the juror, but provided the juror with his chambers' phone number so that the juror could be contacted by his family if necessary.

Shortly after the evidentiary portion of the trial concluded and before the jury began deliberating, the jury was excused for lunch and the judge's secretary received a phone call from the juror's father that the grandmother had died. The secretary called the juror to the phone. After he got off the phone, the secretary asked the juror, "Are you all right to continue?" The juror responded, "Yes." This conversation took place before the alternate jurors were discharged. The judge found out about this conversation at some point, but did not inform counsel for the State or the defendant. A short time after the jurors began deliberating, the juror whose grandmother died sent a note to the court requesting to be excused for family preparations and to be replaced with an alternate juror. The noted stated, "If you can exchange me for an alternate jury member without disrupting anything, that will be great. If it is a big deal, please discuss with me." The judge then informed counsel of the earlier conversation between the juror and the secretary. The secretary then described on the record her conversation with the juror. Defense counsel moved for a mistrial because the defendant was not informed of the communication earlier and would have requested that the juror be replaced with an alternate. The judge denied the motion and sent a note back to the juror that the court would not excuse him from jury duty. The jury continued deliberating and convicted appellant of second-degree depraved heart murder later that day.

Held: The Court of Special Appeals reversed the appellant's conviction and remanded to the circuit court for a new trial. Maryland Rule 4-326(d) provides that "[t]he court shall notify the defendant and the State's Attorney of the receipt of any communication from the jury pertaining to the action as promptly as practicable and in any event before responding to the communication." The Court held that for the purposes of this rule, a judge's secretary is included within the meaning of "court" and, therefore, the communication between the juror and the secretary was a communication between the court and the jury. The Court further held that the communication about whether the juror was "all right to continue" "pertain[ed] to the action" within the meaning of the rule. The purpose of Rule 4-326(d) is to provide an opportunity for the parties' input in designing an appropriate response to jurors' questions in order to assure fairness and avoid error. Although the juror indicated that he could continue, since his grandmother had died, the court should have informed the parties while the alternate jurors were still available to provide the parties an opportunity to provide input whether the juror should be replaced. The Court further held that when an *ex parte* communication occurs between the court and a juror, prejudice is presumed and the State bears the burden of demonstrating that the communication was harmless. Here, the record does not demonstrate that the error was harmless because it is unclear whether the alternate jurors had already been discharged at the time the judge found out about the communication and thus whether the juror could have been replaced had the communication been promptly disclosed. Moreover, it could not be determined from the record whether the juror whose grandmother died or other jurors deliberated properly or may have rushed to reach a verdict. Therefore, the Court held that the trial court erred when it failed to declare a mistrial and reversed the appellant's conviction. The Court then determined that the evidence was sufficient to sustain the appellant's conviction and, therefore, remanded to the circuit court for a new trial.

Spry v. Gooner, No. 2677, Sept. Term, 2008, filed January 5, 2010.
Opinion by Eyler, James R., J.

<http://mdcourts.gov/opinions/cosa/2010/2677s08.pdf>

ESTATES - EXCEPTIONS TO ACCOUNT

Facts: William F. Spry and Robert Allen Spry, appellants, appealed from an order entered by the Orphans' Court for Cecil County, dismissing appellants' exceptions to a first administration account in the estate of William L. Spry, decedent (hereinafter decedent or settlor), on the ground that appellants lacked standing. The basis of the order was that appellants were not "interested persons" within the meaning of Maryland Code, (2001 Repl.Vol., 2008 Supp.), § 1-101(i) of the Estates & Trusts Article ("ET"). Ralph Gooner, Thomas S. Crouse, and Harold Hartzel, personal representatives of the estate, and Christine Spry, surviving spouse of the decedent, were appellees.

On appeal, appellants contended that the court erred in dismissing the exceptions based on lack of standing. The Court of Special Appeals agreed, and on the facts of the case, concluded that appellants had standing to file exceptions. Thus, the Court reversed and remanded the case to the orphans' court for further proceedings.

Held: The Court noted that standing to file exceptions is governed by common law. Under common law, the Court concluded that appellants had a beneficial interest in the revocable trust. The Court of Appeals' decision in Carrier v. Crestar Bank, 316 Md. 700 (1989), extended standing to the beneficiary of a testamentary trust, and it did not expressly limit its holding to testamentary trusts. The Court of Special Appeals saw no practical distinction between a testamentary trust and an inter vivos trust on the facts before it. Significantly, all of the estate assets, after proper expenses and other deductions, were to be distributed to the revocable trust.

Deborah L. Pfeifer v. Phoenix Insurance Co., No. 1851, September term, 2008, filed January 4, 2010. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2010/1851s08.pdf>

INSURANCE - UNDERINSURED MOTORIST ACTION - CONTRACT ACTION AGAINST
UM CARRIER - STATUTE OF LIMITATIONS

Facts: Deborah Pfeifer ("Ms. Pfeifer") was involved in an automobile accident while operating a vehicle owned by her employer. The employer had a contract for automobile liability insurance with Phoenix Insurance Co. ("Phoenix"). On October 27, 2003, Ms. Pfeifer's attorney sent a letter to Phoenix advising it of ongoing settlement negotiations with the tortfeasor's insurance company. In October 2004, the tortfeasor's insurance company offered its policy limits to Ms. Pfeifer, who then advised Phoenix of the offer and received Phoenix's written permission to accept the offer. On July 10, 2006, Ms. Pfeifer filed suit against Phoenix for breach of contract arising from the failure to pay underinsured motorist benefits. On July 23, 2008, Ms. Pfeifer's lawyer took the de bene esse deposition of Phoenix's expert medical witness, Dr. Rosenthal. On July 25, 2008, Ms. Pfeifer filed a motion to exclude Dr. Rosenthal from testifying at trial, citing discovery violations. On July 28, 2008, trial commenced and the court ruled that Dr. Rosenthal could testify provided that he produce certain information which had been requested during the discovery phase by Ms. Pfeifer's lawyer. The trial ended on July 31, 2008, and the jury returned a verdict in favor of Ms. Pfeifer in the amount of \$100,000, which was reduced to zero because of the money already received from the tortfeasor's insurer. Ms. Pfeifer appealed the sufficiency of the jury verdict and Phoenix cross-appealed asserting that Ms. Pfeifer's claim is barred by the statute of limitations.

Held: The Court of Special Appeals affirmed the trial court's judgment. The record shows that the circuit court did not abuse its discretion in fashioning a remedy to ensure that Ms. Pfeifer could introduce evidence pertaining to the expert witness's potential bias. Ms. Pfeifer was given the opportunity to take the expert's deposition and explore his bias prior to the introduction at trial of the videotaped deposition. She also used information gleaned from the court-ordered deposition during her case-in-chief and in closing argument to cast a negative light on the expert's testimony.

The Court of Special Appeals denied Phoenix's cross-claim. When Ms. Pfeifer filed suit on July 10, 2006, she based her claim on the underlying contract between her and Phoenix. Thus, the

action against Phoenix is a contract action, and the cause of action would accrue upon breach of the contract, either by anticipatory repudiation or actual breach in performance. Breach of contract in an underinsured motorist context occurs when the carrier denies coverage.

In *Kurtz v. Erie Insurance Exchange*, 157 Md. App. 143 (2004), the Court held that Section 19-509(g) of the Insurance Article of the Maryland Code allows insurers to require complete exhaustion of available benefits before paying underinsured benefits. Here, the day fixed by the contract for rendition of performance could not have been before Ms. Pfeifer, with Phoenix's permission, accepted (or declined) the tortfeasor's offer exhausting the tortfeasor's policy limits.

Therefore, the statute of limitations in an underinsured motorist contract action does not begin to run until, at the earliest, the date on which exhaustion of the tortfeasor's coverage occurs. A breach of contract, triggering the statute of limitations, can only occur after the underinsured motorist carrier denies further coverage. The holding is not meant to address denials of coverage that occur prior to exhaustion.

In re Lavar D., Britny C. & Ronald B., Nos. 604, 605 & 634, Sept. Term, 2008, filed December 30, 2009. Opinion by Eyler, James R., J.

<http://mdcourts.gov/opinions/cosa/2009/604s08.pdf>

JUVENILE DELINQUENCY-SUFFICIENCY OF EVIDENCE-EVIDENCE

Facts: Lavar D., Britny C., & Ronald B, appellants, were found involved with respect to the delinquent acts of assault in the first and second degree, conspiracy to commit assault in the first degree, disorderly conduct, and reckless endangerment, arising out of an altercation between appellants and the victims, Sarah Kreager and Troy Ennis, on a Mass Transit Administration bus on the afternoon of December 4, 2007. Appellants contended the court shifted the burden of proving self defense to appellants. The statement by the juvenile court, on which appellants relied, was made while delivering its decision.

Appellants contended the court erred in prohibiting cross-examination of one of the victims about a pending charge for distribution of cocaine on the ground that it was relevant to the victim's credibility because of an inconsistent statement made by the victim in a victim impact statement.

Appellants contended the evidence was legally insufficient to sustain the court's findings as to certain offenses.

One of the appellants contended the court erred in failing to suppress the appellant's statement to police officers on the ground that it was induced.

Appellants contended the court erred in prohibiting them from cross-examining the male victim about past domestic abuse of the female victim.

Appellants contended the court erred in admitting into evidence statements by co-appellants in violation of the Confrontation Clause.

Appellants contended the court erred in prohibiting them from using a document to refresh the male victim's recollection as to whether he had given certain information to a police officer.

Held: The Court of Special Appeals explained that the statement was intended to refer to the duty to produce evidence but

held that it was a harmless misstatement, in any event, because appellants, at trial, denied involvement in attacks on the victims.

The Court of Special Appeals held that the court did not err because, generally, evidence of an arrest is inadmissible, and appellants' proffer was insufficient to establish that the victim's arrest had any bearing on her credibility.

The Court of Special Appeals held that the evidence was sufficient to sustain the conclusion that appellants engaged in a conspiracy and was also sufficient to sustain the conclusion that each appellant participated in the altercation.

The Court of Special Appeals held the court did not err because the officer told appellant to tell the truth but made no promises.

The Court of Special Appeals held that the court did not err in ruling that the evidence was not relevant.

The Court of Special Appeals held that the court did not err because the statements were admitted in redacted form and, thus, did not implicate co-appellants. The Court noted that there was evidence that at least 40 persons were on the bus when the altercation began, and not all of the juveniles were parties to these or similar proceedings.

The Court of Special Appeals held that the court did not commit reversible error because some of the information was otherwise inadmissible and the remainder was in evidence through another source.

Classics Chicago v. Comptroller of the Treasury, No. 2047, Sept. Term, 2008, filed January 4, 2010. Opinion by Eyler, James R., J.

<http://mdcourts.gov/opinions/cosa/2010/2047s08.pdf>

TAXATION - STATE INCOME TAX - COMMERCE CLAUSE

Facts: The Classics Chicago, Inc. ("Classics") and The Talbots, Inc. ("Talbots"), appellants, appealed from a judgment entered by the Circuit Court for Baltimore City, affirming a Maryland Tax Court decision, which had affirmed income tax assessments against appellants by the Comptroller of the Treasury, appellee. The assessments were for the years 1993-2003 ("the Taxable Period").

The principal issue before the Court of Special Appeals was whether Classics, a wholly owned subsidiary of Talbots, and which has no physical presence in this State, can be constitutionally required to pay State income taxes on its income, when Talbots maintains a physical presence in this State. Resolution of that issue turned on whether there was a substantial nexus between Classics and this State so that imposition of income tax did not violate the Commerce Clause of the United States Constitution or principles of due process. For the most part, the parties' arguments addressed their differing interpretation of the nature and extent of the holding in Comptroller of the Treasury v. SYL, Inc., 375 Md. 78, *cert denied*, 540 U.S. 984 and 540 U.S. 1090 (2003), in which the Court of Appeals concluded that the nonresident subsidiary involved in that case was subject to State income tax.

A secondary issue was whether the assessment against Talbots, arising out of the same underlying transactions relevant to the assessment against Classics, was unlawful. The assessment against Talbots was in the alternative and effective only if the assessment against Classics were not upheld on appeal.

Held: affirmed the assessment against Classics; thus, there was no need to address the assessment against Talbots. The Court explained that the basis of a nexus sufficient to justify taxation was the economic reality of the fact that the parent's business in the taxing state was what produced the income of the subsidiary.

Brass Metal Products, Inc. v. E-J Enterprises, Inc. et al., No. 1580, September Term 2008, filed November 30, 2009. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2009/1580s08.pdf>

TORTS - CONTRACT - CONVERSION CLAIMS - INTELLECTUAL PROPERTY - CUSTOM AND USAGE - TORTIOUS INTERFERENCE WITH CONTRACT - CIVIL CONSPIRACY - INJURIOUS FALSEHOOD - INTENTIONAL MISREPRESENTATION - NON-DISCLOSURE - CONFIDENTIAL RELATIONSHIPS - CONSTRUCTIVE FRAUD - TRADE SECRETS.

Facts: E-J Enterprises, a wholesale metal distributor, entered into an agreement with Brass Metal, a manufacturer and distributor of aluminum railing products, to provide "just-in-time" inventory services, which entailed purchasing aluminum railings directly from aluminum extrusion mills, storing these railings, and selling them to Brass Metal as needed. The railings were designed by Brass Metal's owner and President, James Burger, but Mr. Burger did not patent his railing designs.

In April 2006, E-J Enterprises sold railings that were being held for Brass Metal to another company, Parthenon Installations ("Parthenon"). Thomas Martin, a Brass Metal salesman, owned a majority interest in Parthenon. In July 2006, when Mr. Burger discovered that Parthenon had established a manufacturing facility that was a "duplicate" of his facility, Mr. Burger fired Mr. Martin. Mr. Burger then requested that E-J Enterprises stop selling railings based on Mr. Burger's design to Parthenon. E-J Enterprises declined Mr. Burger's request.

Brass Metal filed a complaint in the Circuit Court for Howard County against E-J Enterprises, Mr. Johnson, Parthenon, Mr. Martin, and Anastasios Pantoulis, part-owner of Parthenon, asserting claims for, among other things, conversion, tortious interference with contract, interference with economic relations, injurious falsehood, civil conspiracy, false representations, non-disclosure or concealment, and constructive fraud. Brass Metal did not assert a claim for breach of contract against E-J Enterprises. Prior to trial, Brass Metal settled with Parthenon, Mr. Martin, and Mr. Pantoulis, and they were dismissed from the case. Trial proceeded against E-J Enterprises and Mr. Johnson.

On August 22, 2008, after six days of trial, at the close of Brass Metal's case, the circuit court granted appellees' motion for judgment.

Held: Judgment affirmed. To establish a claim for conversion, the plaintiff must first demonstrate that he or she had a property interest in property that was allegedly converted. Where E-J Enterprises ordered and paid for aluminum railings to store for Brass Metal until Brass Metal requested delivery, E-J Enterprises owned the railings until it sold them to Brass Metal. When E-J Enterprises sold the railings to another company, it may have violated the business agreement between the parties, but its actions did not constitute conversion. The claim that E-J Enterprises converted Brass Metal's interest in the designs of the aluminum railings asserts intangible property rights. Conversion claims for intangible property rights are limited to situations where the intangible property rights are merged into a document that has been transferred. Where no such showing was made, the conversion claim failed.

Brass Metal alleged that, based on custom and usage, E-J Enterprises converted the unpatented design of its railings. Brass Metal cites no case holding that custom and usage in an industry can create property rights that give rise to a conversion claim. Even if custom and usage could create property rights, Brass Metal failed to present sufficient evidence to establish that there was a uniform, definite, and well-established custom in the aluminum extrusion industry that a person who creates a die possesses a property right in the shapes created from the die.

Brass Metal failed to produce sufficient evidence to create a jury question regarding whether a confidential relationship existed between the parties, such that E-J Enterprises had a duty to disclose its business dealings with Brass Metal's competitor. Where two businesses are engaged in an "arms-length" transaction to further their own separate business objectives, a confidential relationship does not exist. E-J Enterprises did not exercise the type of dominion and influence over Brass Metal that would establish a confidential relationship.

E. Daris Warsham v. James Muscatello, Inc., No. 1041, September Term, 2008. Opinion filed on December 30, 2009 by Hollander.

<http://mdcourts.gov/opinions/cosa/2009/1041s08.pdf>

TORTS - CONTRACT - NEGLIGENCE - SLIP AND FALL - ICE - ASSUMPTION OF THE RISK - VOLUNTARINESS- EMERGENCY - EXIGENCY RESCUE DOCTRINE.

Facts: The plaintiff fell while salting an icy parking lot at work, in an attempt to prevent others who might arrive at work from falling on the ice. He brought a negligence suit against his employer's landlord to recover for injuries he sustained in the fall. The Circuit Court for Montgomery County granted the landlord's motion for summary judgment, ruling that suit was barred by the doctrines of assumption of the risk and contributory negligence.

Held: Affirmed. The trial court did not err in granting summary judgment to the landlord because the plaintiff voluntarily assumed the risk of his injuries. The circumstances were not so exigent as to compel the plaintiff's conduct in order to protect the lives of others. He also had other alternatives available to him to prevent injury to others.

Mayor and City Council of Baltimore v. Zvi Guttman, No. 2122, September term, 2008, filed January 4, 2010. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2010/2122s08.pdf>

TORTS - CONTRACT - MUNICIPAL LIABILITY - REQUIREMENTS: -OFFICIAL POLICY OR CUSTOM - LACK OF KNOWLEDGE OF PROTECTED SPEECH

TORTS - CONTRACT - IMMUNITY - LEGISLATIVE IMMUNITY - SUBSTANTIVELY LEGISLATIVE ACTION

Facts: On December 12, 2001, the appellant Mayor and City Council of Baltimore ("City") awarded a contract to the auto-body repair company of Deborah Mullins ("Ms. Mullins") which entitled the company to bid on auto body repairs required by Baltimore City. At the time Ms. Mullins applied for the contract, her husband, Jimmy Mullins, worked in Baltimore City's central garage as a body man. On March 30, 2001, the director of the Board of Ethics of Baltimore City advised Ms. Mullins that she could bid on the contract as long as her husband recused himself from any participation in the consideration, award, or implementation of the contract. On January 14, 2004, and February 19, 2004, Ms. Mullins appeared on Fox 45 newscasts and criticized Baltimore City repair practices. On March 29, 2004, the City Purchasing Agent, Edward Gallagher, wrote Ms. Mullins a letter stating that the Board of Estimates had terminated her contract with the City on March 24. About eight months after her contract with the City was terminated, Ms. Mullins filed for bankruptcy. The trial court entered judgment in favor of the City on Ms. Mullins' claim that the appellants breached her contract by firing her. The jury found in favor of Ms. Mullins on count three, a 42 U.S.C. § 1983 claim alleging a retaliatory termination of the contract in violation of the First Amendment. The court entered judgment in favor of the appellee in the amount of \$120,000 on October 8, 2008. The City timely appealed the jury's verdict, and Ms. Mullins cross-appealed asserting that the trial court erred in granting summary judgment to Mr. Gallagher and that its denial of attorney fees was an abuse of discretion.

Held: The Court of Special Appeals reversed the trial court's judgment in favor of Ms. Mullins on count three. Municipal corporations can be sued under § 1983 but can not be found liable based on a theory of respondeat superior. Only where the decision is part of official government policy or custom can a municipality be liable under § 1983. Even a single decision can constitute municipal "policy." The municipality must officially sanction or order the decision in order for it to

be liable, and can not do so unless it is cognizant of the protected activity.

Here, Ms. Mullins attempted to impute retaliatory animus to the Board of Estimates through circumstantial evidence, *i.e.*, an email and memo authored by the Chief Solicitor for Baltimore City. She presented evidence that the Director of Public Works, one of five members of the Board of Estimates, had knowledge of the newscast. However, the email and memo do not mention the protected speech, and Ms. Mullins did not present any evidence to show that the other four members of the Board had knowledge of the protected speech. Thus, her claim against the City must fail as a matter of law and the case was remanded for entry of judgment in favor of the City.

The Court of Special Appeals reversed the trial court's ruling that Mr. Gallagher was entitled to legislative immunity. Local legislators are absolutely immune from suit under § 1983 for their legislative activities. However, Mr. Gallagher merely submitted a request for action to the Board seeking to terminate Ms. Mullins' contract under the contract's termination for convenience clause. He proposed that the Board, which is part of the executive branch of city government, terminate one contract in a move that was unrelated to the overall budgetary process. The Board's act of voting on Mr. Gallagher's request, though procedurally legislative, did not effectuate a substantively legislative result because it did not involve a policy-making decision of general scope. Thus, the judgment in favor of Mr. Gallagher was vacated and remanded for further proceedings.

JUDICIAL APPOINTMENTS

On December 2, 2009, the Governor announced the appointment of S. ANN BROBST to the Circuit Court for Baltimore County. Judge Brobst was sworn in on December 16, 2009 and fills the vacancy created by the retirement of the Hon. John O. Henegan.

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On December 2, 2009, the Governor announced the appointment of JOHN J. NAGLE III to the Circuit Court for Baltimore City. Judge Nagle was sworn in on January 5, 2010 and fills the vacancy created by the retirement of the Hon. Lawrence R. Daniels.

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RULES ORDERS AND REPORTS

Amendments to Rule 16-104 (Judicial Leave) was filed on
January 12, 2010:

<http://www.mdcourts.gov/rules/rodocs/ro16-104.pdf>