Amicus Curiarum

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CRIMINAL LAW – BURGLARY STATUTE – DEFINITION OF DWELLING – A VACANT APARTMENT THAT IS BETWEEN TENANCIES IS A DWELLING WITHIN THE BURGLARY STATUTE

Facts: Following conviction of fourth degree burglary of a dwelling in district court, Patrick G. McKenzie, petitioner, appealed and was tried de novo before a jury in the Circuit Court for Montgomery County. The State presented evidence at trial that, on September 4, 2007, petitioner and two other men had broke and entered an unoccupied apartment located in a residential apartment complex in Montgomery County.

The apartment was between tenancies; a previous tenant had moved out of the apartment two weeks before the incident and a new tenant had signed a lease that was to begin the next day, September 5, 2007. The manager of the apartment complex discovered petitioner and the other men in the apartment while he was conducting a final check to make sure the apartment was ready for the new tenants. The manager testified that he found damage to the apartment, including cigarette burns on the carpet and a wall and stains on the ceiling, that had not been present when he had visited the apartment several days earlier. The jury convicted petitioner of fourth degree burglary of a dwelling.

The Court of Appeals granted a writ of certiorari to address petitioner's questions whether a vacant apartment, between tenancies, is a dwelling under the fourth degree burglary statute, Maryland Code (2002), § 6-205(a) of the Criminal Law Article ("CL") and whether there was sufficient evidence for the jury to have convicted petitioner.

Held: Affirmed. The Court held that the apartment, though it was unfurnished and between tenancies, was a dwelling under CL § 6-205(a), and there was sufficient evidence to convict petitioner of fourth degree burglary.

The Court initially noted that the General Assembly did not provide a statutory definition for the term "dwelling," opting instead to have the term "retain[] its judicially determined meaning except to the extent that its meaning is expressly or impliedly changed in this subtitle." CL § 6-201(e). The Court

also recognized that the judicially determined meaning of the term dwelling was subject to ongoing clarification by the court.

Upon review of the existing case law and various common law commentaries, the Court concluded that an apartment, a place of human habitation, does not lose its status as a dwelling during periodic vacancies between tenants. The Court analogized the apartment to, among other places of habitation, a vacation home that its owners may leave empty for periods of time. The Court reasoned that apartments are "designed and generally operated with the goal of continuous occupancy," and even if an apartment, as in the current case, was not occupied at a particular time, it is likely that renters will be moving into the apartment in the near future.

The Court therefore held that the apartment petitioner unlawfully entered qualified as a dwelling for purposes of the fourth degree burglary statute. The Court further held that the State had presented legally sufficient evidence to sustain petitioner's conviction of fourth degree burglary of a dwelling.

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Blanks v. State, No. 13, September Term 2008, filed November 12, 2008, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2008/13a08.pdf

CRIMINAL LAW - EVIDENCE – ATTORNEY-CLIENT PRIVILEGE – THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE PROSECUTOR DURING CROSS-EXAMINATION OF THE DEFENDANT TO INQUIRE ABOUT THE TIMING AND CONTENT OF HIS COMMUNICATIONS WITH DEFENSE COUNSEL

Facts: In May 2006, petitioner, Richard Lavonte Blanks, was tried before a jury and convicted of the first degree murder of Tyshika Askins. The State's theory of the case was that petitioner went to the victim's apartment and killed her during a quarrel about the location of petitioner's girlfriend. Petitioner testified that he was elsewhere when the victim was killed and had nothing to do with the crime.

Appellant was tried before a jury. The State established that the police found petitioner's DNA under the victim's fingernails and his fingerprint on an orange juice container in the victim's apartment, and that petitioner had met the victim through his girlfriend. The State also established that petitioner had told the police that he knew the victim was a friend of his girlfriend and he knew generally where the victim lived, but he denied ever having been to the victim's apartment.

Petitioner testified in his own defense. He testified that he and the victim were for sometime in a romantic relationship, and on the evening of the night the victim was killed, she had performed oral sex on him but they did not have sexual intercourse. He testified that she then poured him a glass of orange juice as he was leaving, and he took the glass with him. Petitioner explained that, when interviewed by the police, he denied knowing the victim and did not disclose the affair because he did not want his girlfriend to find out.

At the close of direct examination, defense counsel asked petitioner: "Had you revealed the affair to anyone at this point?" Petitioner replied: "Just my father." During cross-examination, over defense counsel objection, the State asked petitioner if and when he had discussed his testimony with his attorney. Specifically, the prosecutor inquired, "You and your attorney have talked about your testimony here previously, right?" and "Did your attorney go over with you what you were going to testify to?" The petitioner answered that he had only spoken briefly with his attorney about his testimony. The prosecutor also asked, over defense objection: "Okay. Let me ask you again. So basically today is the first time that you've gone into detail or said much about– what you've testified to today,

right?”

Following conviction of first-degree murder, petitioner appealed to the Court of Special Appeals. That court upheld the conviction, concluding that the prosecutor’s questions concerning petitioner’s communications with his attorney did not invade the attorney-client privilege and, even if they did, the cross-examination was harmless error. The Court of Appeals issued a writ of certiorari to address, inter alia, petitioner’s question whether the prosecutor’s questioning of petitioner invaded the attorney-client privilege, and the State’s question whether petitioner had failed to preserve that question for review.

Held: Reversed. Petitioner preserved his challenge to the prosecutor’s cross-examination by objections that made sufficiently clear to the trial court the defense’s specific concern that the prosecutor’s line of inquiry was encroaching upon the attorney-client privilege. The prosecutor’s questions in fact invaded the privilege by probing whether and when petitioner had discussed his testimony with his attorney. The trial court thus erred in permitting the cross-examination.

The error, moreover, was not harmless. The prosecutor’s impermissible cross-examination of petitioner sought to undermine his innocent explanation for the forensic and other evidence offered in the State’s case. Given that the defense case rested solely upon the jury’s believing petitioner’s version of events, the State could not satisfy its burden of establishing, beyond a reasonable doubt, that the error did not influence the jury’s verdict.

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Steven Anthony Powell v. State of Maryland, No. 33, September Term, 2008. Opinion filed on December 15, 2008 by Greene, J.

http://mdcourts.gov/opinions/coa/2008/33a08.pdf

CRIMINAL LAW – JURY SELECTION MARYLAND RULE 4-312,– GROUNDS FOR MISTRIAL

Facts: Steven Anthony Powell, petitioner, was charged with four counts of third-degree sexual offense. At his trial, Powell and the prosecutor selected a panel of twelve jurors and the court swore the jurors. Neither party requested alternate jurors and no alternate jurors were appointed. Soon thereafter, but before opening statements, one of the impanelled jurors, Juror 97, indicated to the court that he knew Powell and expressed concern that he could not be a fair and impartial juror. As a result of that revelation the court struck Juror 97 for cause. Powell and his attorney informed the court that Powell would not consent to a trial by jury consisting of only 11 jurors.

After a significant exchange between Powell's attorney and the prosecutor, the trial judge decided to replace Juror 97 with a member of the pool of potential jurors that remained in the courtroom and had not yet been dismissed. Powell's counsel explicitly refused to consent to this course of action and remarked that, "[t]his is going to be a mistrial." Despite Powell's lack of consent, he and the State proceeded to select a replacement juror pursuant to the court's instructions. Subsequently, the newly constituted jury convicted Powell. He appealed to the Court of Special Appeals on the ground that the trial court erred because it failed to declare a mistrial. The intermediate appellate court rejected Powell's assertion and concluded that the trial judge did not err and was not required, as a matter of law, to declare a mistrial.

Held: Reversed. We conclude that the trial judge erred in failing to declare a mistrial when a previously impanelled juror was dismissed for cause, no alternates were appointed, and the defendant did not consent to proceeding with only 11 jurors or to the selection of a replacement juror. Although, generally, a trial judge has discretion to remove a juror and replace that juror with an alternate, *State v. Cook*, 338 Md. 598, 607, 659 A.2d 1313, 1318 (1995), the trial judge does not have discretion to replace a juror when no alternate juror has been drawn. *Pollitt v. State*, 344 Md. 318, 326, 686 A.2d 629, 633 (1996); Maryland Rule 4-312 (b) (1).

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Ayinde Deleon v. State of Maryland, No. 17, September Term, 2008. Case decided on December 23,2008 by Adkins, J.

http://mdcourts.gov/opinions/coa/2008/17a08.pdf

CRIMINAL LAW – REVIEW – PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW

Facts: Petitioner Ayinde DeLeon was convicted of first-degree assault and conspiracy to commit first degree murder of a fellow prisoner in the Maryland Department of Corrections. At trial, the jury heard testimony that DeLeon and his prison comrades wore red, a color associated with the "Bloods" gang. Officer Davis, who responded to the scene, testified that when she discovered the victim in a pool of blood, he said that the "Bloods did it to me." On appeal, DeLeon asserts that "[e]vidence of gang membership and activity was not relevant to the facts of [DeLeon]'s case, was highly prejudicial, and was admitted without sufficient factual basis or nexus to the crimes as alleged." This prejudice, he argues, arises from the risk that jury members will be influenced to convict him because gangs invoke images of violent criminal activity.

Held: Affirmed. We agree with the State's contention that DeLeon failed to argue relevance or prejudice at trial about the evidence he now challenges and, accordingly, we will not consider those issues. DeLeon's remaining arguments for disallowing gang evidence are limited in scope, and do not reveal trial court error.

When Davis testified that the victim said that the "Bloods did it to me[,]" DeLeon objected that there was not a proper foundation for an excited utterance. On appeal, DeLeon argued that this was a "general" objection, hence preserving any ground against its inadmissibility. *Boyd v. State*, 399 Md. 457, 475-76, 924 A.2d 1112, 1122-23 (2007). However, an objection loses its status as a "general" one "'where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence[.]'" *Id*. at 476, 924 A.2d at 1123(citations omitted). DeLeon chose a more forceful approach than merely offering a general objection and instead advanced several reasons to support his objection to Davis' recounting of the victim's incriminating declaration. Thus, the objection was not a "general" objection under the rule stated in *Boyd* and, accordingly, DeLeon is limited to the grounds explicitly raised in the trial court.

There was sufficient foundation to admit the statement the "Bloods did it to me" as an excited utterance. Maryland Rule 5-803(b)(2) defines the excited utterance exception to the hearsay rule as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused

by the event or condition." We have held that "[t]he proponent of a statement purporting to fall within the excited utterance exception must establish the foundation for admissibility, namely personal knowledge and spontaneity." *Parker v. State*, 365 Md. 299, 313, 778 A.2d 1096, 1104 (2001). The State readily met this standard when Davis testified that the victim was screaming in pain after being stabbed in the eye.

Finally, DeLeon argues irrelevancy and prejudice arising from other gang evidence introduced by the State at trial. We agree with the State's conclusion that "[b]ecause DeLeon lodged no objection to this evidence at trial, any appellate complaint about the admission of the evidence has been waived." Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection. *Peisner v. State*, 236 Md. 137, 145-46, 202 A.2d 585, 590, *cert. denied*, 379 U.S. 1001, 85 S. Ct. 721 (1964). DeLeon made no objection when testimony was offered that he and his comrades wore red and that red was a color that identified gangs. Because this testimony was admitted without objection, it is unpreserved for our review.

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International Association of Firefighters, Local 1715, Cumberland Firefighters, et al., v. Mayor and City Council of Cumberland, et al., No. 88, September Term 2008. Opinion by Battaglia, J., filed December 22, 2008.

http://mdcourts.gov/opinions/coa/2008/88a08.pdf

ELECTION LAW – PETITIONS TO AMEND MUNICIPAL CHARTERS

Facts: Employees of the Cumberland Fire Department and representatives of the International Association of Fire Fighters, Local 1715 ("Firefighters") petitioned for an amendment to the Charter of the City of Cumberland, which would provide for binding arbitration of disputes between non-management employees of the Fire Department and the City of Cumberland. The Firefighters submitted 3,550 signatures to the City on July 25, 2008; 2,172 of the signatures were approved by the City on August 15, 2008. Realizing that the amount of signatures fell short of the 20% of qualified voters benchmark, the Firefighters submitted 472 additional signatures three days later. The City, however, refused to review them, contending that the additional 472 signatures constituted a second, separate petition, which, standing alone, also, in itself, contained an inadequate number of signatures. The Firefighters filed suit against the City, County Board of Elections and State Board of Elections, but the Circuit Court Judge ultimately issued a Memorandum and Order granting the City's Motion for Summary Judgment as well as the State Board of Elections' and County Board's Motion to Dismiss. The Judge first addressed the issue of whether the Firefighters were required to obtain the signatures of 20% of "active" voters, as they asserted, or 20% of the sum of "active" and "inactive" voters, as the City proffered, determining that only "active" voters needed to have been considered. He also reviewed the City's refusal to review supplemental signatures and concluded that signatures submitted "after the August 15 determination by the City that there were insufficient qualified voters on the July 25 petition is not retroactive to the earlier petition." (emphasis in original). The judge did not address whether the subject matter of the petition was appropriate for a charter amendment, although the resolution of this issue would have disposed of the entire controversy, if the subject matter were not appropriate.

Held: Reversed and remanded. The Court of Appeals first

noted that the statute is silent as to whether the number of signatures supporting a petition for referendum of a proposed piece of municipal legislation can be supplemented by another set, before the 60 day deadline for the approval of signatures has passed and then held that pursuant to tenets of statutory construction, the absence of prohibition or silence may be construed as permissive so that the supplemental signatures should have been reviewed. The Court concluded that the City correctly considered “active” and “inactive” voters when determining the number of signatures necessary to constitute 20% of the qualified voters. The Court also concluded that the case had to be remanded and that on remand another issue, seemingly dispositive of the entire case, had to be addressed, regarding whether the subject matter of the petition is appropriate for a charter amendment, because if a referendum could not be instituted, any petition would be in and of itself have been invalid.

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Jane Doe, et al., v. Montgomery County Board of Elections, No. 61, September Term 2008. Opinion by Battaglia, J., filed December 19, 2008.

http://mdcourts.gov/opinions/coa/2008/61a08.pdf

ELECTION LAW – PETITION FOR REFERENDUM

Facts: A Citizen's Group sought to use the referendum process to overturn a Bill, enacted by the Montgomery County Council and signed by the County Executive, which would add "gender identity" as a protected characteristic under the County's anti-discrimination laws. On March 6, 2008, the County Board sent a letter to the Montgomery County Executive and the President of the Montgomery County Council, among others, certifying the petition and stating that the "petition contained more than the requisite number of signatures to place the question on the 2008 General Election ballot" and "that the petition appears to meet the necessary requirements" regarding content under Section 6-201.

Eight days later, on March 14, 2008, twelve Montgomery County citizens, Jane Doe, et al., filed a complaint pursuant to Section 6-209, seeking judicial review and declaratory relief in the Circuit Court of Montgomery County. The complaint alleged, among other arguments, that the County Board "certified the Petition despite the Petition's failure to include, by the legal deadlines, the requisite number of valid signatures required for certification." The County Board of Elections moved for summary judgment, arguing that Jane Doe's complaint was time-barred, because it was not filed within the 10-day period prescribed by Section 6-210. Jane Doe filed a cross-motion for summary judgment contending that the petition should have been decertified because thousands of purported signatures were invalid and because the petition itself was defective. During the hearing on the summary judgment motions, counsel for the County Board revealed, for the first time, that "inactive" voters were not included in the total number of registered county voters from which the Board derived the 5% figure. Based on this new information, Jane Doe moved for leave to amend the complaint, which the circuit court granted.

Following the completion of oral argument on the motions for summary judgment, the Judge granted the County Board's motion for summary judgment, denied Jane Doe's cross-motion and in his Memorandum Decision and Declaratory Judgment Order, dismissed the complaint because he determined that the 6-209 cause of action for judicial review and declaratory relief accrued on February 20, so that the complaint was filed beyond the 10-day limitations period of Section 6-210; the judge also explored the various bases for invalidating the petition and held that the challenged signatures were valid, but insufficient. In addressing the sufficiency of the

challenged signatures, the court determined that "inactive" voters should have been included as registered voters, having declined to accept the County Board's argument that doing so "would artificially inflate the number of signatures required to successfully petition for referendum." The court also considered whether the signatures on the referendum petition were required to comply with the provisions of Section 6-203. On this issue the parties stipulated that 5,141 signatures included in the February 4 submission and 5,735 signatures of the February 19 submission failed to mirror the voter's identity on the statewide voter registration list. The court determined that the signature provisions of Section 6-203 were merely suggestive as opposed to required and validated 10,876 challenged signatures.

Held: The Court of Appeals granted certiorari and after hearing argument from Jane Doe and the County Board of Elections, issued a Per Curiam Order, reversing the judgment of the Circuit Court and remanding the case to that Court with directions to enter summary judgment in favor of Jane Doe. In the opinion filed thereafter, the Court determined that the applicable triggering date for the statutory period set forth in Section 6-210 was March 6, 2008, when the Petition was certified, because that was the only "final determination" by which Jane Doe was "aggrieved." The Court also held that Jane Doe's amended complaint "related back" to the filing of the original complaint. With respect to the challenged signatures, the Court held that they were not valid nor sufficient, because the percentage of registered voters included the combined total of "active" plus "inactive" voters, and also because they did not comply with the mandatory provisions of Section 6-203.

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COURT OF SPECIAL APPEALS

Hyundai Motor America v. Alley, No. 1495, Sept. Term, 2007, opinion filed November 25, 2008 by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2008/1495s07.pdf

ATTORNEY'S FEES - PREVAILING PARTY - SETTLEMENT AGREEMENTS

Facts: Plaintiff was awarded attorney's fees under the fee shifting provisions of the Maryland Automotive Warranty Enforcement Act ("AWEA") and the Maryland Consumer Protection Act ("CPA"), after the parties negotiated a settlement of the case which was subsequently read into the court record. Defendant argued that plaintiff was not a prevailing party under the meaning of the AWEA's and the CPA's fee-shifting provisions because a settlement must take the form of a consent decree, some other court-approved change, or it must be incorporated into an order of dismissal.

Held: Vacated and remanded to Circuit Court for Cecil County with respect to attorney's fees. In all other respects, judgment affirmed. A party is a prevailing party under AWEA and the CPA even when a settlement does not receive express judicial approval, if a settment agreement read into the court record is sufficiently indicative of prevailing party status and is not inconsistent with AWEA or the CPA. In Maryland, trial courts are required to follow the lodestar methodology for assessing the reasonableness of the attorney's fees sought and must explain how the lodestar factors justify the amount of attorney's fees.

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Melvin Conrad et ux v. Otis Gamble, Individually et al., No. 1908, September Term, 2007, decided December 30, 2008. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2008/1908s07.pdf

TESTAMENTARY GIFTS - *INTER VIVOS* GIFTS - CONFIDENTIAL RELATIONSHIP - *Moore v. Smith*, 321 Md. 347 (1990); *Upman v. Clarke*, 359 Md. 32, 42 (2000) (quoting *Green v. Michael*, 183 Md. 76, 84 (1944)).

The existence of a confidential relationship between the donor and donee is simply one suspicious circumstance to be considered in the case of testamentary as opposed to *inter vivos* gifts; it does not, of itself, give rise to a presumption of invalidity, and *the burden remains with the person challenging the gift to prove a substantially overbearing undue influence*. *Upman*, 359 Md. at 35.

Undue influence which will avoid a will must be unlawful on account of the manner and motive of its exertion, and must be exerted to such a degree as to amount to force or coercion, so that free agency of the testator is destroyed. It must appear that the power was actually exercised, and that its exercise produced the will. *Id.* The "elements characteristic of the presence of [undue influence]" are: (1) The benefactor and beneficiary are involved in a relationship of confidence and trust; (2) The will contains substantial benefit to the beneficiary; (3) The beneficiary caused or assisted in effecting execution of will; (4) There was an opportunity to exert influence; (5) The will contains an unnatural disposition; (6) The bequests constitute a change from a former will; and (7) The testator was highly susceptible to the undue influence. *Moore*, 321 Md. at 353-54.

Facts: The decedent's will, executed on July 10, 1995 and filed with the Register of Wills on July 11, 1995, appointed appellee to serve as the personal representative and bequeathed the decedent's home located in Suitland, Maryland, along with the adjoining unimproved lot and all tangible personal property within the home, to appellee, with the remainder of the decedent's estate bequeathed to her "goddaughter," Donna Bowser, her brothers-in-law, Nicholas Thomas and Francis Thomas and her sisters-in-law, Mary Belle Thomas and Margaret Crawford.

On April 27, 2005, the decedent executed a general power of attorney to appellant, Melvin Conrad and a specific power of attorney as to the decedent's bank account. On May 13, 2005, the decedent executed a deed conveying her real property, "in consideration of LOVE AND AFFECTION," to appellants as tenants by the entirety and, on August 1, 2005, the decedent executed a last will and testament (1) appointing appellant Delores Conrad as the executrix of the Will, (2) bequeathing the decedent's real property

located at 2023 Spaulding Avenue and the adjoining lots to "my loyal cousin," Melvin Conrad and (3) bequeathing the remainder of her estate to Melvin Conrad; appellee was not mentioned in any of these documents. The decedent died on December 8, 2005 at the age of eighty-eight.

On January 11, 2006, appellee was appointed Personal Representative of the decedent's estate by the Orphan's Court for Prince George's County and thereafter filed a complaint against appellants in the Circuit Court for Prince George's County, alleging fraud and undue influence over the decedent as to her 2005 deed and will.

Held: Affirmed. Trial judge properly found that confidential relationship existed between appellants and the decedent giving rise to a presumption that the decedent's *inter vivos* gift to appellants, *via* her May 2005 deed, was the product of undue influence and the burden to rebut this presumption consequently shifted to appellants; the court also properly concluded that appellee was not required to present "strong and conclusive proof" that the decedent was incompetent in order for the trial court to set aside the decedent's deed. In determining that appellants failed to meet the heavy burden of establishing, by clear and convincing evidence, that the decedent's *inter vivos* transfer of property was the free and uninfluenced act of the decedent, the circuit court properly applied the following elements characteristic of the presence of undue influence articulated in *Moore, supra*: (1) appellants had no relationship with the decedent prior to her March 2005 hospitalization at which time they immediately took charge, determining where the decedent would live, securing powers of attorney and exercising comprehensive control of the decedent's life and affairs; (2) the 2005 Will made appellants the sole beneficiaries of the decedent's estate, also providing that Delores Conrad will be the sole beneficiary if she survived her husband; (3) the 2005 Will was personally prepared by Delores Conrad and Melvin Conrad presented it to the decedent to execute; (4) in contrast to the execution of the 1995 Will which was drafted by counsel and filed with the Register of Wills, no attorney was retained or consulted in drafting the 2005 Will, nor was any effort made to provide the decedent an opportunity to speak with an attorney or to secure independent legal, financial or other advice prior to execution; (5) immediately after securing a general power of attorney, appellants transferred all of the decedent's assets to themselves, depositing $200,000 from the decedent's bank accounts into their daughter's account, thereafter transferring all of the decedent's real property to themselves; (6) notwithstanding that the beneficiaries named in the 1995 Will, "my godson, Otis Gamble," [the decedent's] "goddaughter," Donna Bowser (Sanders), her brothers-in-law and sisters-in-law, had a close relationship with the decedent and that the decedent's sister-in-law, Mary Thomas,

had tended to her during her hospitalization at the Prince George's Hospital, appellants, who had been in the decedent's life for less than five months, were made the beneficiaries of the entirety of the decedent's estate pursuant to the 2005 Will; (7) the decedent's medical records reflected a history of Alzheimer's disease, dementia, confusion, disorientation and inability to make safe decisions; she was also deemed unable to consent to medical treatment due to disorientation and cognitive impairment; her treating physician released her to a nursing home for a guardianship to be established.

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Betty A. Appiah et al. v. Bruce Edward Hall et al., No. 2730, September Term, 2007, decided December 31, 2008. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2008/2730s07.pdf

TORTS - RESTATEMENT (SECOND) OF TORTS § 414; *Wajer v. Baltimore Gas & Elec. Co.*, 157 Md. App. 228 (2004): One who entrusts work to an independent contractor, but *who retains the control of any part of the work*, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Md. Rule 8-602(e): (1) If the appellate court determines that the order from which the appeal is taken was not a final judgment *when the notice of appeal was filed* but that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602 (b), the *appellate court* may, as it finds appropriate, . . . "*(D) if a final judgment was entered by the lower court after the notice of appeal was filed, treat the notice of appeal as if filed on the same day as, but after, the entry of the judgment*.".

Facts: Appellee Maryland Port Administration (MPA) leased a small space at Seagirt Terminal to Marine Repair to be used for repairing containers and later entered into an agreement with appellee, Ports of Baltimore, Inc. (P&O), as independent contractor, to provide stevedoring and related services for MPA at the Seagirt Terminal, a marine port terminal in Baltimore, Maryland, and to act as terminal operator. When Mediterranean Shipping was notified that a refrigerated container of Bailey's Irish Creme had been off loaded at the Terminal and was available for pick up, the shipper hired a trucking firm, Den–El Transfer, Inc., to transport the container from the terminal to the wholesaler's warehouse. As he was rolling up the power cord from the shore power source, appellants' husband and son, a longshoreman-mechanic, employed by Marine Repair Services, Inc., who, in turn, was working for Mediterranean Shipping, was struck and fatally injured by the truck owned by the trucking firm and driven by Bruce Hall who was in the process of latching his truck onto the container. The husband and son of appellant, who was killed in the accident, filed a wrongful death and survivorship action against, *inter alia*, P&O Ports of Baltimore, Inc., the stevedoring and terminal operations company of the marine port, and the Maryland Port Administration, owner of the marine port. Appellees subsequently moved for summary judgment. The Circuit Court for Baltimore City granted the motion. Mother and widow appealed, contending that the circuit court erred in finding that MPA and P&O retained insufficient control to subject them to liability under Restatement (Second) of Torts § 414 and that,

because, from the summary judgment record, there were disputes of material fact, the circuit court erred in granting appellee's motion.

Held: Affirmed. Because the circuit court had discretion to enter final judgment pursuant to Md. Rule 2-602(b) when appellants' notice of appeal was filed, pursuant to Md. Rule 8-602(e), appellants' notice of appeal is treated as having been filed on the same day, but after, the entry of the judgment. In the case *sub judice*, when appellants, the Decedent's widow and mother, filed their appeals on January 16 and 24, 2008, respectively, the rights and liabilities of *all* parties had been adjudicated, notwithstanding co-defendants' attempt to vacate Order to Enforce Settlement Agreement.

The circuit court properly granted summary judgment in favor of the Maryland Port Administration and Ports of Baltimore, Inc. on the basis that MPA and P&O did not exercise control, under Restatement (Second) of Torts § 414, "in respect to the very thing from which the injury arose." *Wajer* at 245. Restatement (Second) of Torts § 414 does not contemplate the non-delegation of appellees' duty of care for operation of the marine port.

Only the grounds upon which the trial court relied in granting summary judgment is reviewed on appeal; accordingly, the issue of whether there was an "entrustment" under Restatement (Second) of Torts § 414 is not subject to review.

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ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective January 15, 2009:

PATRICK JOSEPH SMITH
*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective January 22, 2009:

RICHARD JOSEPH REINHARDT
*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective January 26, 2009:

ANTHONY IGNATIUS BUTLER, JR.
*

By an Order of the Court of Appeals of Maryland dated January 28, 2009, the following attorney has been disbarred by consent from the further practice of law in this State:

RICHARD ALLEN BRENNAN
*

JUDICIAL APPOINTMENTS

On December 23, 2008 the Governor announced the appointment of JOHN EDWARD NUNN, III to the District Court for Kent County. Judge Nunn was sworn in on January 16, 2009 and fills the vacancy created by the retirement of the Hon. Floyd L. Parks.

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On December 23, 2008 the Governor announced the appointment of CHRISTOPHER B. KEHOE to the Court of Special Appeals. Judge Kehoe was sworn in on January 21, 2009 and fills the vacancy created by the elevation of the Hon. Sally D. Adkins to the Court of Appeals.

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RULES ORDER

Rule 16-104: Judicial Leave

http://www.mdcourts.gov/coappeals/pdfs/rule16-104.pdf