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### COURT OF SPECIAL APPEALS

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ADMINISTRATIVE LAW – PHYSICIAN DISCIPLINARY MATTER – IMMORAL OR UNPROFESSIONAL CONDUCT IN THE PRACTICE OF MEDICINE

Facts: A male physician exploited his knowledge of three of his female patients and their families for his own personal gratification when he used his medical practice as a springboard, then as a cover, for his sexual adventures with the women, all to the detriment of his patients. He met two of these patients only through his medical practice and began intimate relationships with them during his medical consultations. He took advantage of his knowledge, attained through his treatment of the husband of one patient, that the husband would be out of town and that the patient might be susceptible to his advances. In addition, the physician recommended reverse tubal ligation surgery for two of the female patients and fertility testing for a third in order to gratify his desire that his sexual partners/patients conceive his children. The physician was not only treating or recommending treatment for marital problems, depression, fertility problems, and a suicide attempt for his sexual partners/patients; he also was treating some of their spouses and family members at the same time. In each episode, the physician had a vested personal interest in his patients' choice of treatment. Moreover, his recommendations for medical care in some instances appeared to be based solely on his own interests.

Following an administrative evidentiary hearing, an Administrative Law Judge (ALJ) of the Maryland Office of Administrative Hearings concluded that the physician had engaged in sexual relationships with three of his female patients during the time they were his patients. The ALJ recommended revocation of the physician's license to practice medicine in Maryland. The Maryland Board of Physician Quality Assurance ("the Board") adopted the ALJ's findings and imposed license revocation as the appropriate sanction for the misconduct revealed by the facts.

The physician sought judicial review of the Board's final order. After hearing oral argument, the Circuit Court for Talbot County affirmed the Board's decision. On direct appeal by the physician, the Court of Special Appeals affirmed.

Held: Affirmed. The physician's creation of these irreconcilable conflicts of interest compromised his professional relationships with these patients and their families. The physician's creation of these parallel relationships thus was

connected with his medical practice and was "immoral or unprofessional conduct in the practice of medicine." The Maryland Board of Physician Quality Assurance reasonably found that this conduct violated Maryland Code (1981, 2000 Repl. Vol., 2003 Supp.), § 14-404(a)(3) of the Health Occupations Article, and revoked his license to practice medicine.

Thomas E. Finucan, Jr. v. Maryland Board of Physician Quality Assurance, No. 71, Sept. Term, 2003, filed 5 April 2004. Opinion by Harrell, J.

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ATTORNEYS - MISCONDUCT – INTENTIONAL MISAPPROPRIATION – CRIMINAL CONDUCT – FAILURE TO FILE SALES TAX RETURNS OR TO PAY SALES TAXES

Facts: James Grafton Gore was convicted, in the Superior Court of the District of Columbia, of two counts of failure to pay sales taxes or file sales tax returns for a restaurant he owned and managed in D.C. Gore was sentenced to six months in jail on each count, to run concurrently, with all but 45 days suspended. He was also placed on three years of supervised probation and was ordered to pay restitution of $885,848.00 for back taxes, penalties, and interest.

Because Gore was admitted in Maryland to practice law, the Attorney Grievance Commission, acting through Bar Counsel, filed a petition for disciplinary or remedial action based on Gore's failures to fulfill his sales tax obligations. After a hearing before a judge of the Circuit Court for Anne Arundel County, the hearing judge found that Gore wilfully failed to file sales tax returns or pay sales taxes for a period of thirty months.

Held: Disbarred. Gore's misconduct essentially may be characterized as a business decision, in his capacity as the owner of a restaurant, that carrying on operation of his struggling business justified his failure to fulfill his obligations under the

District of Columbia sales tax laws. Gore committed intentional misappropriation, in violation of Maryland Rules of Professional Conduct Rule 8.4(c), by keeping the funds he owed to the government of the District of Columbia and using them to support the restaurant in which he had a financial interest. Intentional misappropriation is an act infected with deceit and dishonesty and, in the absence of compelling extenuating circumstances justifying a lesser sanction, will result in disbarment in Maryland. There were no such compelling extenuating circumstances in this case.

A separate and independent rationale for the Court of Appeals to impose the ultimate sanction of disbarment was the fact that Gore's willful failure to file returns or pay taxes amounted to criminal acts prejudicial to the administration of justice, which acts reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects, in violation of Maryland Rules 8.4(b) and 8.4(d). Gore gave District of Columbia taxation authorities a series of checks that he either knew or should have known were drawn on a bank account that contained insufficient funds. The bank dishonored each of these checks. This action compounded the crime of willful failure to pay and put his honesty, trustworthiness, and fitness as a lawyer in other respects (including his judgment) in doubt. The Court of Appeals concluded that, in order to protect the public, Gore must be disbarred.

Attorney Grievance Commission of Maryland v. James G. Gore, Miscellaneous Docket AG No. 7, September Term, 2003, filed 5 April 2004. Opinion by Harrell, J.

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ATTORNEYS - MISCONDUCT - MARYLAND RULES OF PROFESSIONAL CONDUCT - RULE 8.4 (MISCONDUCT)

Facts: The Attorney Grievance Commission of Maryland ("Bar Counsel"), filed a petition for disciplinary or remedial action against Thomas O'Toole, Esquire. The Petition alleged that O'Toole, who was admitted to the Bar of this Court on December 19,

1989, violated Maryland Rules of Professional Conduct ("MRPC") 1.15 (Safekeeping Property) and MRPC 8.4 (Misconduct), by failing to file various state and federal tax returns from 1998 to 2001 and by failing to pay various federal and state taxes for the same period. The petition was referred to Judge Thomas Waxter, Jr., of the Circuit Court for Baltimore City for an evidentiary hearing and to make findings of fact and conclusions of law.

Judge Waxter held that hearing and issued a memorandum, containing his findings of fact and conclusions of law. The court found that O'Toole, was incorporated as Thomas O'Toole P.C., and as such was required to file quarterly withholding tax forms (MW 506) and annual withholding tax consolidation forms (MW 508) with the Comptroller of the State of Maryland, indicating the amount of withholding tax that was to be withheld from any wages. Because O'Toole was the only employee of his Subchapter S professional corporation, the income charged to his corporation effectively was his personal income on which he was required to pay state and federal income taxes. The hearing judge found that O'Toole failed to file forms 506 for eight quarters, as well as the accompanying forms 508, which consolidated the quarterly forms on an annual basis. The court also found that, due to O'Toole's failure to file the required returns, the Comptroller of the State of Maryland filed a notice of lien for unpaid withholding taxes and issued writs of garnishment against O'Toole's bank accounts. After learning of the lien and writs of garnishment, O'Toole paid the Comptroller the sum of $7,354.98 which consisted of $4,840 in unpaid withholding taxes, as well as interest and penalties. The judge found that all returns were filed by September 2002, and all tax assessments, penalties and interests were paid as of December 2001.

The court found that O'Toole did not file state or federal income tax returns for the years, 1998, 1999, and 2000. The court also found that O'Toole was paying ahead on his income tax obligation by making estimated income tax payments for the years 1998, 1999 and 2000. In each of those years, he had paid more in estimated tax than was due on each return. Therefore, the hearing judge found that, although O'Toole missed his filing obligations, he did not fail to pay taxes.

Based on his findings of fact, Judge Waxter concluded, by clear and convincing evidence, that O'Toole's failure to file federal and state income tax returns for the calender years 1998, 1999 and 2000, constituted a violation of Rule 8.4(d) of the Maryland Rules of Professional Conduct. Judge Waxter also concluded that the failure to file Maryland withholding tax forms for Thomas O'Toole, P.C. for years 1998, 1999 and 2000, constituted

a violation of Rule 8.4(d) of the Maryland Rules of Professional Conduct.

Bar Counsel filed several exceptions to Judge Waxter's findings and conclusions. Bar Counsel excepted to the hearing judge's failure to find that O'Toole failed to pay taxes. Bar Counsel also disputed the Judge's finding that O'Toole had made tax payments since 2001. Finally, Bar Counsel argued that the judge should have found a violation of MRPC 8.4(b) in addition to violations of MRPC 8.4(d). O'Toole did not take any exceptions.

Held: Thirty-day suspension. The Court overruled Bar Counsel's exception regarding O'Toole's failure to pay taxes. The Court held that O'Toole's estimated tax payments fulfilled his tax payment obligations for the years in question. In addition, upholding the hearing judge's finding that O'Toole had made tax payments since 2001, the Court overruled Bar Counsel's second exception. The Court, however, sustained Bar Counsel's final exception, holding that, by failing to file state and federal income tax returns over a three-year period, O'Toole committed a criminal act that reflected adversely on his fitness as a lawyer in violation of MRPC 8.4(b). For this violation as well has his violations of MRPC 8.4(d), the Court suspended O'Toole from the practice of law for thirty days.

Attorney Grievance Commission v. Thomas O'Toole, Misc. Docket AG No. 3, September Term 2003, filed February 18, 2004. Opinion by Battaglia, J.

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CIVIL PROCEDURE - STATUTES OF LIMITATION - APPLICABILITY OF GENERAL THREE-YEAR STATUTE OF LIMITATIONS IN ACTIONS INITIATED BY A CHARTERED COUNTY GOVERNMENT BASED ON WRITTEN CONTRACT.

Facts: Baltimore County contracted with RTKL Associates, Inc. for architectural and civil engineering services on the construction of the Dundee-Saltpeter Nature Preserve, an education

center being constructed in northeastern Baltimore County. RTKL hired Andrews, Miller & Associates, Inc. (AMA) to help perform engineering services for the grading of the work site. In June, 1999, a Baltimore County survey crew discovered errors in the grading, resulting in additional, unanticipated expenses to the County. On August 14, 2001, Baltimore County sued RTKL and AMA for breach of contract and negligence.

RTKL filed a motion to dismiss on two separate grounds. First, RTKL claimed the County failed to file suit within the one-year statute of limitations of Article 25A, §1A of the Annotated Code of Maryland. Second, RTKL alleged the County failed to get the expert certification required under §3-2C-01, et. seq. of the Courts and Judicial Proceedings (CJP) Article. The trial court agreed that the one-year limitations period applied in a contract action involving a chartered county regardless of whether the county was the plaintiff or defendant. However, it rejected the certificate argument by concluding the requirement is only applicable in a complaint of negligence against certain individual professionals. The Court of Appeals subsequently granted *certiorari.*

Held: Reversed. The legislature intended for the one-year limitations period of Article 25A to apply in an action involving a chartered county as a party to a written contract only when the county is being sued as the defendant. Otherwise, the default three-year limitations period of CJP §5-101 necessarily applies. The common law sovereign privilege of *nullum tempus occurrit regi* ("Time does not run against the King") is inapplicable in this context because sovereign immunity, the logical underpinning of *nullum tempus*, has been abrogated in this type of contract action against chartered local governments. The trial court was correct, however, to conclude the expert certification requirement only applied in negligence claims against certain individual professionals.

Baltimore County v. RTKL Associates, Inc., No. 77, September Term, 2003, filed April 9, 2004. Opinion by Wilner, J.

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CRIMINAL LAW - EVIDENCE FROM PRIOR PROCEEDINGS - TESTIMONY OF ACCUSED - DEFENDANT'S INCULPATORY STATEMENT, MADE IN RESPONSE TO A QUESTION ASKED BY THE JUDGE AT A BAIL REVIEW HEARING, WAS ADMISSIBLE IN DEFENDANT'S SUBSEQUENT TRIAL WHERE THE QUESTION CANNOT BE SAID TO HAVE CONSTITUTED "INTERROGATION" AS IS MEANT BY *MIRANDA*.

CRIMINAL LAW - PRETRIAL PROCEEDINGS - REPRESENTATION BY ATTORNEYS - BAIL REVIEW HEARING WAS NOT A "CRITICAL STAGE" OF CRIMINAL PROCEEDINGS IN WHICH THE SIXTH AMENDMENT RIGHT TO COUNSEL WOULD ATTACH.

Facts: On January 9, 2001, Donald A. Fenner ("Fenner") was arrested for his involvement in a drug deal that was conducted under police surveillance. On January 10, 2001, the day after his arrest, and after his initial appearance before a District Court commissioner, Fenner was brought before a District Court Judge of the District Court of Maryland, sitting in Frederick County, for a bail review hearing. At this hearing, Fenner was read a statement concerning the charges that were pending against him and was told the date of his preliminary hearing. The presiding judge then asked Fenner, for the purposes of the bail review hearing, the following question: "Is there anything you'd like to tell me about yourself, sir?" Fenner, in his lengthy response to this innocuous question, made the following statement: "I'm not denying what happened."

Prior to trial, Fenner moved to suppress the statements he made at the bail review hearing. At the suppression hearing before the Circuit Court for Frederick County, Fenner argued that the statements should not be admitted because they were made pursuant to a custodial interrogation without the benefit of *Miranda* warnings and at a time when he was not represented by counsel. The suppression hearing judge denied Fenner's motion, holding that the portion of Fenner's statement in which he said, "I'm not denying what happened," would be admissible, but that the remainder of the statement would be excluded because it contained "other crimes" evidence.

At trial, Fenner's inculpatory statement was introduced and read to the jury via a stipulation. On March 21, 2002, Fenner was found guilty of both the charge of distribution of cocaine and the charge of conspiracy to distribute cocaine. Fenner thereafter filed an appeal to the Court of Special Appeals. In an unreported opinion, the Court of Special Appeals affirmed the trail court's rulings, *i.e.*, the ruling allowing Fenner's inculpatory statement

to be introduced into evidence. Fenner then filed a Petition for Writ of Certiorari to the Court of Appeals. The Court of Appeals granted the petition.

Held: Affirmed. The Court of Appeals held that the questioning of Fenner by a District Court judge at his bail review hearing was not "interrogation" as is meant by *Miranda*. The specific question, "Is there anything you'd like to tell me about yourself, sir?," was a routine, general question not designed to elicit any information about the specific criminal offense. Moreover, it was a proper question to ask in determining an appropriate amount of bail.

Furthermore, the Court held that Fenner's bail review hearing, at which he made an inculpatory statement, was not to be considered a "critical stage" of criminal proceedings and, as such, there existed no Sixth Amendment right to provided counsel during the bail review hearing, the only purpose of which was to ascertain the appropriateness and amount of bail pursuant to Md. Rule 4-216. While, under Md. Rule 4-213 (a)(2), the judicial officer presiding over an accused's initial appearance shall make the accused aware of his right to counsel and that counsel will be provided if he cannot afford private counsel, nothing in the Rule suggests that this right to provided counsel attaches at a bail review hearing.

Lastly, the Court held that the redacted version of Fenner's inculpatory statement, which was read to the jury via a stipulation, was not so vague or misleading as to have made it an abuse of discretion for the trial court to allow it into evidence.

Donald A. Fenner v. State of Maryland. No. 88, September Term, 2003, filed April 12, 2004. Opinion by Cathell, J.

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CRIMINAL LAW — PLEA BARGAINING — TRIAL COURT'S STATEMENT THAT DEFENDANT'S SENTENCE WOULD BE FIVE YEARS IF HE FAILED TO APPEAR FOR SENTENCING WAS NOT A VALID TERM OF PLEA AGREEMENT BECAUSE IT WAS A CONDITION IMPOSED AFTER COURT HAD ACCEPTED PLEA.

CRIMINAL LAW — PLEA BARGAINING — ONCE PLEA AGREEMENT CONTEMPLATING PARTICULAR SENTENCE WAS ACCEPTED BY COURT, COURT VIOLATED TERMS OF AGREEMENT WHEN IT IMPOSED DIFFERENT SENTENCE, AND DEFENDANT WAS ENTITLED TO SPECIFIC PERFORMANCE.

SENTENCING AND PUNISHMENT — HEARING — PRESENCE OF DEFENDANT — VOLUNTARY ABSENCE AND WAIVER — AFTER SENTENCING DEFENDANT *IN ABSENTIA*, COURT ERRED WHEN IT DENIED DEFENDANT A HEARING ON HIS MOTION TO CORRECT ILLEGAL SENTENCE, THEREBY DENYING HIM AN OPPORTUNITY TO EXPLAIN HIS ABSENCE FROM SENTENCING PROCEEDINGS.

SENTENCING AND PUNISHMENT — HEARING — PRESENCE OF DEFENDANT — VOLUNTARY ABSENCE AND WAIVER — BEFORE IMPOSING SENTENCE *IN ABSENTIA*, COURT MUST UNDERTAKE TWO-PART INQUIRY. FIRST, COURT MUST BE SATISFIED THAT DEFENDANT'S NON-APPEARANCE IS VOLUNTARY; SECOND, COURT MUST CONSIDER ALL RELEVANT CIRCUMSTANCES AND EXERCISE ITS DISCRETION IN DECIDING WHETHER TO PROCEED. SENTENCING *IN ABSENTIA* SHOULD OCCUR ONLY IN EXTRAORDINARY CIRCUMSTANCES.

Facts: Petitioner, Millard Tweedy, entered a plea of guilty in the Circuit Court for Baltimore City to the charge of possession of marijuana with intent to distribute. In accordance with Rule 4-242, petitioner's counsel examined petitioner on the record in open court, in order for the court to determine that the plea was knowing and voluntary. Counsel stated the terms of the plea agreement, which contemplated two alternative sentences, depending on whether petitioner cooperated with law enforcement. If petitioner failed to cooperate, his sentence would be five years incarceration with all but six months suspended, two years probation; if he cooperated, the sentence would be "complete parole or probation." The court accepted the plea, and found petitioner guilty "[b]ased on the plea agreement and the statements by [the prosecutor]." At the conclusion of the proceedings, the court added that, if petitioner failed to appear for sentencing, the court would sentence him to five years in prison.

Petitioner failed to appear at sentencing and later in the day, the court sentenced petitioner *in absentia* to five years. Petitioner's Motion to Correct Illegal Sentence was denied, without a hearing.

Petitioner noted an appeal to the Court of Special Appeals. In an unreported opinion, the intermediate appellate court affirmed. The Court of Appeals granted Tweedy's petition for writ of certiorari.

Held: Reversed and remanded for resentencing consistent with the plea agreement. The Court found that the trial judge accepted

the plea and approved the plea agreement before unilaterally imposing the condition that petitioner appear for sentencing. Rule 4-243(c)(3) provides that, once a plea agreement is accepted, the court must impose the agreed upon sentence. Additional terms of a plea agreement may not be added after the plea is accepted. The Court held that the trial court violated the terms of the plea agreement when it sentenced petitioner to five years' incarceration and that petitioner was entitled to specific performance of the plea agreement.

The Court also held that the trial court erred in denying petitioner a hearing on his Motion to Correct Illegal Sentence, thereby denying him an opportunity to explain his absence from the sentencing proceedings. A defendant may waive the right to be present at sentencing by, for example, voluntarily absenting himself from the proceedings. A trial court's finding of waiver merely permits the court to sentence a defendant *in absentia*, but, the court is required to consider all relevant circumstances and then exercise its discretion in deciding whether to proceed. A defendant's right to be present at every stage of trial, his right of allocution, and the importance of notice of the date from which the time limit on his appeal right begins to run, weigh heavily against sentencing *in absentia*. The Court made clear that sentencing *in absentia* should occur only in extraordinary circumstances.

Millard Tweedy v. State of Maryland, No. 35, September Term, 2003, filed April 6, 2004. Opinion by Raker, J.

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CRIMINAL LAW - SEARCH AND SEIZURE; LEGITIMATE EXPECTATION OF PRIVACY

Facts: Some time prior to December of 1998, Laney purchased a house located at 3612 Fels Lane in Ellicott City, Maryland. To finance the purchase, Laney acquired a loan, which was secured by 3612 Fels Lane and guaranteed by the Department of Veterans Affairs

("DVA"). Under the DVA loan guarantee, if the lender foreclosed on the loan, it could convey title to the property to the DVA. Laney failed to make payments according to the loan agreement, and, on December 13, 1999, the loan was foreclosed. On March 17, 2000, Commercial Federal Mortgage Corporation, the purchaser of 3612 Fels Lane at the foreclosure sale, conveyed title to 3612 Fels Lane to the DVA.

The DVA assigned Brad Criddle to "manage" the property, meaning that he would "attend to or look after" the foreclosed property. If Criddle were to find a property occupied, he would attempt to contact the person occupying the house to discuss the DVA's eventual possession of the property. Criddle, however, could not establish contact with anyone at 3612 Fels Lane until July 14, 2000, when he stopped by 3612 Fels Lane to encourage whomever was in the home to abandon the property. He encountered two men, one of whom was Joseph Winkle, who lived across the street. Winkle explained to Criddle that he was there to "rescue" some geese on the property for Laney, the former occupant of the house, who had been his neighbor for fifteen years and was currently in prison. Winkle explained further that, although he had obtained a key to the house from Laney's brother, he was afraid to enter the house because he believed there were "explosives and weapons" kept there.

Because one of Criddle's responsibilities as a property manager was to "make every effort to get in the house," he asked Winkle to let him inside the house to look around. Winkle agreed and opened the door. Inside the house, Criddle observed, in one room, a couple of olive green objects shaped like "two liter bottle[s]" and marked with "U.S. Army" in black writing and, in another room, "five or six grenades" in a trash can. When he went upstairs, he found "several guns, gun barrels, . . . camouflage[,] . . . . kni[v]es, . . . [and] numerous shell casings . . . ." Criddle went to the outside shed where he observed "something that looked like a small rocket . . . [and] other empty cartridge containers [and] shell casings . . . everywhere."

Criddle left the house, called the DVA for instructions on how to proceed, and was told to grant access to the property to local authorities. He called the Howard County Police Department, which sent Officer Keith Berry to the house. Criddle led Officer Berry into the unlocked house, where they looked around for five minutes. Other police officers arrived at the house and obtained written consent from the DVA to inspect the property. Thereafter, at the request of those officials, personnel of the fire department, Federal Bureau of Alcohol, Tobacco and Firearms, Federal Bureau of Investigation, and the U.S. Army's Explosive Ordnance Disposal Company arrived at the scene. The police and Army officials

thoroughly searched the house, spending several hours taking objects from the house and laying them on a tarp outside on the lawn. Numerous fuses, grenades, and various types of ammunition were seized and later disposed of by the authorities.

After all of the law enforcement and military personnel left the house on July 14, Criddle had the locks of the house changed to a DVA master key lock. Three days later, Criddle unlocked 3612 Fels Lane and allowed police officers and agents of the State Fire Marshall to search the house with a K-9 unit. As a result of that search, other items were seized. On July 21, Criddle again unlocked the house, this time to permit Army officials to look for a radio. He then hired a contractor to clean the property, making it possible for the DVA to market and eventually sell the house.

The State charged Laney with nine counts of possession of a destructive device, one count of reckless endangerment, and one count of possession of explosives without a license. Laney moved to suppress the evidence obtained from 3612 Fels Lane on the ground that it was seized in violation of his Fourth Amendment guarantee against unreasonable searches and seizures. The trial court denied Laney's motion to suppress, concluding that the searches of 3612 Fels Lane and the seizures of property during those searches were lawful. The judge then conducted a bench trial on an agreed statement of facts and found Laney guilty of unlawfully possessing an explosive device without a license and one count of unlawfully possessing a destructive device. The Court of Special Appeals affirmed. The Court of Appeals issued a writ of certiorari to determine whether the seizure of the items in the house located at 3612 Fels Lane constituted infringements of Laney's Fourth Amendment rights.

Held: Affirmed. Where title to a mortgaged property passes to the mortgagee as a result of foreclosure, sale, and ratification, the mortgagor no longer maintains a legitimate expectation of privacy in that property. Because Criddle, the agent of the title owner of the premises, had authority to possess and enter the house, Laney had no reasonable expectation of privacy in it. Therefore, Laney's Fourth Amendment rights were not violated when the authorities seized the evidence from the house.

Richmond C. Laney v. State of Maryland, No. 44, September Term, 2003, filed February 13, 2004. Opinion by Battaglia, J.

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COLLEGES - POWERS & LIABILITIES - SOVEREIGN IMMUNITY - THE "SUE OR BE SUED" LANGUAGE IN § 12-104 (B)(3) OF THE EDUCATION ARTICLE DOES NOT WAIVE SOVEREIGN IMMUNITY IN CONTRACT ACTIONS INVOLVING THE BOARD OF REGENTS WHERE NO APPROPRIATION OF FUNDS TO PAY AN ADVERSE JUDGMENT, OR ABILITY TO LEVY A TAX TO SATISFY AN ADVERSE JUDGMENT, WAS PRESENT.

STATES - SOVEREIGN IMMUNITY - SECTION 12-201 (A) OF THE STATE GOVERNMENT ARTICLE LIMITS THE WAIVER OF GOVERNMENTAL IMMUNITY TO THOSE CONTRACTS THAT ARE WRITTEN AND SIGNED BY AN OFFICIAL ACTING WITHIN HIS OR HER SCOPE OF AUTHORITY. THE DEFENSE OF SOVEREIGN IMMUNITY IS NOT NECESSARILY WAIVED FOR DECLARATORY OR INJUNCTIVE RELIEF IN ALL CONTRACT ACTIONS.

Facts: For the 2002-2003 academic year, the Board of Regents provisionally approved tuition rates based upon its budget in August of 2001. Following the General Assembly's enacting of the State Budget and in light of the University's actual budget appropriation, these rates were increased slightly in May of 2002.

During the Fall 2002 semester, Ms. Stern and the other students (the "students") received registration materials advertising courses for the Spring 2003 semester, with pricing, from their respective institutions and the students relied on these registration materials in their decisions to enroll in classes for the Spring 2003 semester. In November and December of 2002, after following the proper registration procedures, the students received bills from their respective institutions confirming the specific charges due for the spring courses for which the students' had registered. A majority of students promptly paid their bills and received $0 balance notices prior to the due dates.

As the State budget crises escalated in the fall of 2002, the possibility of budget cuts for several State agencies was apparent. In October and November of 2002, the presidents of the various University of Maryland System institutions and the Board of Regents met to discuss the possibility of budget cuts to the University System and approaches on how to deal with possible cuts. The Board of Regents later learned of $30.4 million in immediate budget cuts for fiscal year 2003 on November 20, 2002. After discussing the cuts with the presidents of each university institution, it was determined not to raise tuition at that time. On December 23, 2002, the Board of Regents learned that another $36.6 million in budget cuts for the fiscal year 2003 was probable. The Board then immediately called a special meeting to consider mid-year tuition increases for the Spring semester of 2003. A letter to students was then prepared to inform the students of the imminent tuition increase; the letter was mailed first to the University System

institutions on January 8, 2003 and then was promptly sent out by each institution to each respective student.

The text of the January 8th letter was signed by the Chancellor and the Board of Regents' Chairman and it discussed the various methods, other than tuition increases, by which the University System had already attempted to absorb previous budget cuts. The letter also stated that if further budget cuts occurred, it would be necessary for the Board of Regents to approve mid-year tuition increases for the Spring 2003 semester that would not exceed 5%.

On January 17, 2003, the budget for fiscal year 2004 was released to the public and it confirmed the additional $36.6 million budget cut for the University System and, in response to the official budgetary cuts, tuition increases of up to 5% for the Spring 2003 semester at nine of its institutions was instituted. The tuition increase recovered approximately $12.9 million of the total $60.7 million budget cuts.

Held: The Court of Appeals held that the Board of Regents, could avail itself of the defense of sovereign immunity in this case. The Court held that § 12-104 (b)(3) of the Education Article, which authorizes the Board of Regents to "[s]ue and be sued," does not waive sovereign immunity where the Legislature did not authorize a method of appropriating the funds, or levying a tax to obtain the funds, to pay an adverse judgment. The Court additionally held that the Board did not waive sovereign immunity pursuant to § 12-201 (a) of the State Government Article because the alleged contract was not signed by a duly authorized person. The Court did not address whether the alleged contracts between the students and their respective universities were "written contracts" for the purposes of § 12-201 (a). The Court of Appeals also held that sovereign immunity is not necessarily waived for all actions in which declaratory and/or injunctive relief is sought, because holding otherwise would improperly extend Maryland case law. As the Court of Appeals found that sovereign immunity precluded the students' suit against the Board of Regents and university officials, it did not reach the merits of the case.

Jodi Stern, et al. v. Board of Regents, University System of Maryland, et al. No. 85, September Term, 2003, filed April 12, 2004. Opinion by Cathell, J.

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REAL PROPERTY - EASEMENTS - IMPLIED EASEMENT CREATED BY REFERENCE IN DEEDS OF RESIDENTIAL SUBDIVISION LOTS TO A PLAT CONTAINING LANGUAGE OF RESERVATION.

Facts: Harbor Light Beach is a waterfront residential subdivision in Calvert County situated near Mill Creek and the Patuxent River. A plat for Section Two of the subdivision contained the following language on a waterfront lot: "Area Reserved for the Use of Lot Owners." In 1998, Appellee, Bruce Metzger, purchased a non-riparian lot in Section Two. He subsequently used the waterfront lot to access the waters of the Patuxent River. In 1999, a neighboring riparian lot owner, Arthur Kobrine, through his limited liability company, Kobrine, LLC, purchased the waterfront lot from the subdivision developer. Kobrine, LLC then placed "no trespassing" signs on the lot and installed a shoreline revetment to help prevent erosion.

Metzger sought declaratory and injunctive relief to prevent this obstruction. He claimed that title to the lot had been conveyed to him and the other Section Two lot owners by the developer through a recorded Declaration containing a purported "covenant to convey." Second, he claimed a use right based on an express or implied easement. The trial court agreed with Metzger that title had been conveyed by the developer in the recorded Declaration, and that an express and implied easement existed for all subdivision lot owners to access the waters of the Patuxent River from the lot. Kobrine, LLC was ordered to remove the revetment. The Court of Special Appeals agreed with the trial court as to the conveyance and the existence of an implied easement. The Court of Appeals subsequently granted *certiorari.*

Held: Vacated and remanded for a more limited judgment. There was nothing in the recorded Declaration that required the developer to convey the title of subdivision common areas to lot owners. Moreover, ambiguities in the recorded deeds, plats and Declaration of the subdivision preclude any finding of an easement in the waterfront lot by express grant or reservation. Yet, the recorded plat of Section Two establishes the intent of the developers to reserve a use right on behalf of some subdivision lot owners (only those in Section Two) in the waterfront lot. The language contained on the recorded plat could have no other purpose.

Kobrine, LLC v. Metzger, No. 59, September Term, 2003, filed April 8, 2004. Opinion by Wilner, J.

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TORTS – CONVERSION AND PUNITIVE DAMAGES; REVIEW OF THE SUFFICIENCY OF EVIDENCE SUPPORTING AN AWARD OF PUNITIVE DAMAGES

Facts: In March of 2000, Marcin Borzym visited Darcars several times to consider purchasing a 1999 BMW 323i, which he had seen advertised in a newspaper for $27,500. During these visits, he and Darcars negotiated a purchase price of $26,000 and was allowed to take the car for inspection by another dealer. Borzym returned to purchase the car during the evening of Friday, March 31. To complete the purchase, Borzym met with a finance manager of Darcars, Douglas Quander. Borzym handed $2,500 in cash to Quander as a down-payment. In addition, Quander had Borzym complete and sign several documents. Borzym, however, did not leave with the BMW that night, because he was unable to provide information about a State Farm automobile insurance policy that he believed would cover the BMW. When he returned, once again, to the dealer early Saturday morning, he provided the insurance information and left with the BMW. On Sunday, Borzym realized that he had not received any documents reflecting the BMW purchase, so he returned to Darcars, picked up copies of the paperwork, and left without incident.

On Monday morning, Darcars representatives began to question the accuracy of some of the information contained in the sales documents. That day, Robin Stein, a financial services manager from Darcars, and Quander contacted Borzym by phone to tell him that he needed to provide information of a different automobile insurance policy. Borzym responded to their requests by obtaining a new policy and informing Stein about that policy information on Tuesday morning. Later that afternoon, Stein called back several more times, however, complaining of further discrepancies in the paperwork and asking Borzym to return to Darcars as soon as he could so they could resolve the issue. Quander also called Tuesday afternoon in hopes of persuading Borzym to meet with him as soon as possible to address the discrepancies in the paperwork.

Borzym had no further contact with Darcars until the morning of Thursday, April 6, when he walked to the garage where he had parked the BMW and saw a truck from a repossession company towing the car from the garage. Borzym asked the driver why the BMW was being repossessed, and the driver told him that there was a "problem" with the "dealership" and that he should go there to resolve it. Inside the BMW when it was repossessed were, according to Borzym, his laptop computer, which he valued at approximately $1500, and his collection of music CDs, which he valued at $300.

Borzym called Darcars immediately and spoke to Stein, who told Borzym to come to the dealership to discuss the matter. Borzym

complied, going to Darcars later that evening to meet with its representatives. One of the Darcars representatives told Borzym that the car had been repossessed because Borzym "didn't pay anything." Borzym insisted that he had paid $2,500. He asked for the return of either the BMW with his belongings, the laptop and CDs, or the return of his deposit and his belongings. One of the Darcars representatives replied, "Forget about it. Get out of here. . . . [C]all your attorney." The representative told Borzym that the BMW had been taken to a different lot, and as for the laptop and CDs, he should "[j]ust forget about it, just get out of the office, [and] get lost."

Followed by Darcars staff, Borzym walked outside, where he met his father. When Borzym's father learned what had happened with the BMW and his son's belongings, he became upset and confronted Darcars staff. One of the personnel who had met with Borzym began "waving goodbye and making fun" of the Borzyms. The staff member then began "cursing out" the Borzyms, accusing them of being "thieves." Darcars did not return the $2,500 cash down-payment, nor did Borzym recover the laptop and CDs that had been taken during the repossession.

Borzym sued Darcars, alleging causes of action for breach of contract, conversion, punitive damages, and illegal repossession. Only Borzym's claim that Darcars converted Borzym's $2500 down-payment, laptop, and CDs went to the jury, which returned a $4,300 verdict in favor of Borzym and made a specific finding that Darcars had acted with actual malice, warranting punitive damages. After hearing testimony on the amount of punitive damages, the jury returned a punitive damage award of $100,000. The Circuit Court reduced that award to $25,000.

Darcars appealed, and the Court of Special Appeals affirmed. We granted Darcars' petition for a writ of certiorari to consider (1) whether the evidence was sufficient to support a finding of actual malice, (2) whether a court must consider the "clear and convincing" standard of proof in determining the sufficiency of the evidence supporting a jury finding of actual malice, and (3) whether the plaintiff seeking punitive damages must present evidence of the defendant's ability to pay the award.

Held: Affirmed. The evidence was sufficient to support the jury's finding of actual malice and to support an award of punitive damages, where the representatives of Darcars, the car dealer that had converted Borzym's property, had dismissed his inquiries about the property, cursed at him, and told him to "get lost" and "call your attorney." The Court held further that, in determining the legal sufficiency of evidence supporting actual malice, a trial

court must consider the "clear and convincing" standard of proof. Moreover, in seeking an award of punitive damages, Borzym had no obligation to present evidence of Darcars' financial condition or ability to pay the award. The award of punitive damages stands.

Darcars Motors of Silver Spring, Inc. v. Marcin Borzym, No. 33, September Term, 2003, filed February 9, 2004. Opinion by Battaglia, J.

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# COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - JUDICIAL REVIEW - RECORD

Facts: Hahn Transportation, Inc. and its workers' compensation insurer, Zurich American Insurance Company (collectively referred to as "Appellants"), filed a petition for judicial review with the Circuit Court for Frederick County from a decision of the Maryland Worker's Compensation Commission ("Commission"). Appellants notified the agency to transmit the record, according to Maryland Rule 7-206. Thereafter, pursuant to continuing jurisdiction under § 9-742 of the Workers' Compensation Act, the Commission held additional hearings. Neither the transcripts from those additional hearings nor the orders that resulted were transmitted to the circuit court.

At the beginning of the circuit court judicial review hearing, appellee, Thomas Gabeler, orally moved to dismiss because Appellants had failed to file the entire record with the court. Appellants countered that, under the rules, they did not have a duty to supplement the record. In the alternative, they requested that the court grant a continuance so that the record could be supplemented. After a short recess, the court granted the motion to dismiss.

Held: Reversed and remanded. The circuit court abused its discretion in dismissing the appeal. In this case, there was, at the very least, substantial compliance with Maryland Rule 7-206 when appellant notified the agency to transmit the record to the circuit court. The subsequent hearings and orders were "not additional issues" but rather extensions of the Commission's earlier decision; and on this basis alone, it would appear that there was no reason not to proceed on the issue of causation. The mistake, even assuming it was Appellants', in not ensuring that the circuit court had a complete record of the supplemental hearings before the judicial review hearing should not have deprived Appellants of the opportunity to litigate their claim. If there was a valid reason not to proceed on that day, a postponement was appropriate.

Hahn Transportation Inc., et al. v. Thomas Gabeler, No. 7, September Term, 2003, filed April 7, 2004. Opinion by Kenney, J.

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CRIMINAL LAW - WITNESS REFUSAL TO ANSWER QUESTIONS - DENIAL OF MISTRIAL MOTION - WITNESS EXAMINATION - REFUSAL BY COMPELLABLE WITNESS TO ANSWER QUESTION SEEKING RELEVANT FACT

Facts: Jesse Johnson and Larry Scot Somers, the appellant, were accused of together robbing the Northend Liquor Store in Hancock, Maryland, on February 18, 2002. In the Circuit Court for Washington County, Johnson pleaded guilty to robbery. Later, Somers was tried and convicted of robbery with a dangerous weapon; theft over $500; reckless endangerment; carrying a dangerous weapon openly with intent to injure; first degree assault; conspiracy to commit a robbery with a dangerous weapon; and conspiracy to commit felony theft.

At Somers's trial, the State called Johnson as its first witness. He did not invoke or attempt to invoke a testimonial privilege. On direct, Johnson testified that he robbed the liquor store, and that he did not commit the robbery alone. When asked who acted with him, Johnson said, "I'd rather not answer." When asked why, he said he felt "uncomfortable answering." The prosecutor again asked whom Johnson acted with, but he refused to answer. Johnson was then asked if that person was in the courtroom, and he again said, "I'd rather not answer." There was no objection during this questioning.

The trial judge excused the jury and held a bench conference. The judge elicited from Johnson that he had pleaded guilty in connection with the robbery and that his case was not on appeal. He advised Johnson that he had no right to refuse to answer the prosecutor's question, and that he could be held in contempt and sentenced to additional jail time if he continued to refuse to do so. At that point, defense counsel moved for a mistrial. The trial court denied the motion.

The jury was brought back into the courtroom and the prosecutor again asked Johnson, "With whom did you act?" He responded, "I still refuse to answer the question"; the prosecutor ended his examination, and defense counsel renewed his mistrial motion, which the court again denied. The trial continued and the State presented additional evidence to support its theory that Somers and Johnson together planned and carried out the robbery.

On appeal, Somers raised several challenges to his convictions, most notably that the trial court had committed reversible error in denying his mistrial motion.

Held: Judgment for conspiracy to commit felony theft vacated; sentence for carrying a dangerous weapon openly with intent to

injure vacated; judgments otherwise affirmed. This Court held that, because the State's theory was that Johnson and Somers engaged in a single conspiracy, albeit with more than one crime as its objective, Somers only was subject to a single count of conspiracy. The Court also held that the trial court erred by failing to merge Somers's sentence for carrying a dangerous weapon openly with intent to injure into his conviction for robbery with a dangerous weapon.

With respect to Somers's motion for a mistrial, the Court held that the trial court did not abuse its discretion by denying the motion. Johnson was a compellable witness: he did not have a Fifth Amendment right not to testify and, in any event, did testify, admitting that he committed the crime but not alone. The prosecutor did not engage in misconduct by calling Johnson to testify, questioning him, and re-posing the question after he refused to answer. The State was entitled to call Johnson in an effort to obtain his testimony on the critical fact of who the accomplice was. The prosecutor had no advance knowledge that Johnson would refuse to answer the question. After Johnson initially refused to answer, the prosecutor did not pose testimonial fact-laden questions in an effort to place facts he could not elicit from Johnson before the jury. The prosecutor did not try to build his case based on an adverse inference from Johnson's refusal to answer the accomplice question. His refusal was ambiguous, and did not necessarily give rise to an adverse inference against Somers. The refusal did not lend "critical weight" to the State's case. Finally, any possible prejudice from Johnson's repeated refusals to answer the accomplice identity question was susceptible to being cured by the trial court's curative instruction.

Somers v. State, No. 1816, September Term 2002, filed April 13, 2004. Opinion by Eyler, Deborah S., J.

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CUSTOM HOME PROTECTION ACT - REAL PROPERTY ARTICLE, SECTION 10-501,

ET SEQ.

Facts: On March 30, 2000, Jodie and Anthony Deyesu, the appellants, contracted with Dale and Jean M. Donhauser, d/b/a Wizard's Knoll Log Homes ("Wizard's Knoll"), the appellees, to complete assembly of a log cabin home they had purchased from Jim Barna Log Homes Unlimited, LLC. Under the contract, Wizard's Knoll agreed to perform the labor necessary to complete construction of the exterior of the home, and the Deyesus agreed to supply all materials. Prior to completion of the project, a dispute arose between the parties over the roofing subcontractor that Wizard's Knoll had hired to complete the installation of felt paper, shingles, and flashing on the roof. As a result, the Deyesus refused to pay the balance of the contract price due.

On July 17, 2000, Wizard's Knoll filed in the Circuit Court for Harford County a suit to establish and enforce a mechanic's lien, to recover the unpaid balance of the contract price. The Deyesus opposed the mechanic's lien claim, and counterclaimed for, *inter alia*, breach of contract and unfair and deceptive trade practices in violation of the Custom Home Protection Act ("CHPA"), Md. Code (1974, 2003 Repl. Vol.) sections 10-501 *et seq*., of the Real Property Article ("RP").

The case proceeded to trial on the merits of Wizard's Knoll's underlying breach of contract claim, and on the Deyesus' counterclaims. Following a bench trial, the circuit court issued a memorandum opinion and order granting judgment in favor of Wizard's Knoll on the breach of contract claim, and on all counterclaims. The Deyesus then noted a timely appeal.

Held: Judgment affirmed. The Court held that a contract to furnish labor only in the construction, erection, or completion of a custom home is not a "custom home contract," within the meaning of the CHPA. RP section 10-501(e) plainly requires that such a contract be for both "labor and material." Because the contract the Deyesus entered into with Wizard's Knoll did not include materials, the Court concluded it was not a "custom home contract" subject to the requirements of the CHPA.

Deyesu, et al. v. Donhauser, et al., No. 301, September Term 2002, filed April 2, 2004. Opinion by Eyler, Deborah S., J.

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ESTATES & TRUSTS – ADEMPTION BY SATISFACTION - TESTIMONY REGARDING DECEDENT'S INTENTIONS ADMISSIBLE

ESTATES & TRUSTS - ADEMPTION BY SATISFACTION - SPECIFIC BEQUEST PROPERLY DEEMED ADEEMED BY SATISFACTION WHERE EVIDENCE INDICATES DECEDENT'S INTENTION TO SO DO

Facts: Appellant, the YIVO Institute for Jewish Research, sought distribution of a specific bequest in the will of Jan Karski, decedent. In 1992, Karski, a member of the underground movement in Europe during World War II, pledged one hundred thousand dollars to YIVO to endow an annual award to living authors whose subject matter was Polish culture and science, by Poles of Jewish origin and Jewish Poles, from the Middle Ages to the present. In 1993, Karski executed a will bequeathing certain, specific stocks, then worth one hundred thousand dollars, to YIVO but did not specify their use. Beginning in 1995, Karski transferred a number of shares (none of which were left to YIVO in his will) and a small amount of cash to YIVO totaling exactly one hundred thousand dollars. Karski died in 2000, without changing his will. His personal representative refused to distribute the stocks bequested to YIVO, claiming the bequest was adeemed by satisfaction. The Circuit Court for Montgomery County, sitting as the Orphans' Court, agreed with Karski's personal representative and found the bequest had been adeemed by satisfaction.

Held: Affirmed. The Orphans' Court properly considered the testimony of the decedent's close friends regarding his intention, because the testimony was relevant to the matter and constituted a hearsay exception as provided by Maryland Rule 5-803(b)(3) (statements concerning the declarant's then-existing mental, emotional, or physical condition). The testimony of the decedent's close friend, size of remaining estate (had the bequest been distributed to YIVO), and size of the bequest to YIVO in comparison to other bequests by decedent, all evidence his intention that the bequest was for the specific purpose of fulfilling his pledge to YIVO, which was adeemed by satisfaction when the decedent made *inter vivos* transfers in the exact amount of the pledge. The *inter vivos* transfer of stocks and a small amount of cash to YIVO, in context of his stated intentions to friends, fulfills the same purpose as his bequest and was not different in kind from the bequest, fulfilling the requirements for ademption by satisfaction.

YIVO Institute for Jewish Research v. Karski, No. 966, September Term 2003, filed April 19, 2004. Opinion by Sharer, J.

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FAMILY LAW - CHILD SUPPORT - ABOVE GUIDELINES - CHILDREN'S SOCIAL SECURITY BENEFITS - SOCIAL SECURITY REGULATIONS

Facts: In an above guidelines child support case, the circuit court determined that the child support obligation would be based on the reasonable expenses of the parties' four minor children. In determining each party's income, the court added to appellee Terri E. Tucker's income the amount of Social Security benefits the four children received because of appellant Bruce Tucker's age. Mr. Tucker appealed, contending that the circuit court erred in adding the children's social security benefits to the income of Mrs. Tucker, the custodial parent. Instead, he maintained that the federal Social Security regulations required the circuit court to reduce the reasonable expenses of the children by the amount of the children's Social Security benefits before calculating each party's child support obligation.

Held: Vacated. The circuit court erred in including the children's Social Security benefits in Mrs. Tucker's income because benefits received by the children may not be included in the custodial parent's income for purposes of calculating the total child support obligation and each parent's percentage thereof. On remand, the court has the discretion as to what consideration is given to the children's Social Security benefits. Although this is an above guidelines child support case where the child support obligation is based on the children's reasonable expenses, the federal Social Security regulations do not require an automatic reduction of those expenses in the amount of the children's Social Security benefits.

Bruce Tucker v. Terri E. Tucker, No. 501, September Term, 2003, filed April 16, 2004. Opinion by Krauser, J.

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INSURANCE - UNINSURED/UNDERINSURED MOTORIST INSURANCE - INSURANCE ARTICLE SECTION 19-509(a) - DEFINITION OF "UNINSURED MOTOR VEHICLE."

Facts: This case arises from a three-car accident on July 30, 1995, on Route 50, in Talbot County. A car driven by Ok Cheon Ha and owned by Yoon Ko Myung ("the Myung vehicle") drove into the back of a car driven by Nancy Trempe and owned by Diana Crisfulli ("the Crisfulli vehicle"), propelling it into another car. Crisfulli and her son Nicholas were passengers in the Crisfulli vehicle. Trempe, Crisfulli, and Nicholas all suffered bodily injuries.

The Crisfulli vehicle was insured under a State Farm policy that included uninsured motorist ("UM") coverage, with limits of $25,000 per person and $50,000 per accident. Trempe was an insured driver under the UM coverage provision. Trempe made a claim against State Farm for UM benefits, but State Farm declined to pay on the ground that a $28,451 payment she had received from a claim against the insurance policy on the Myung vehicle exceeded the $25,000 per person limit for UM coverage on the State Farm policy. State Farm paid Crisfulli $7,929 in UM benefits, the difference between the $25,000 per person limit and the $17,071 she received under the Myung vehicle policy.

On February 28, 2001, in the Circuit Court for Talbot County, Trempe and Crisfulli filed suit against Ha, Myung, and State Farm. All claims were subsequently dismissed except for Trempe's breach of contract claim against State Farm, which alleged that State Farm was obligated under the policy to pay Trempe UM benefits. The parties entered into a stipulation about damages and, on that basis, jointly asked the court to enter judgment in favor of Trempe and against State Farm for $21,549. The court signed a proposed "Declaratory Judgment Order," which essentially amounted to a grant of partial summary judgment against State Farm on the issue of liability on the breach of contract claim. State Farm noted a timely appeal on the sole issue of whether the court erred in granting summary judgment on liability.

Held: Judgment reversed. The Court held that the circuit court's ruling in Trempe's favor on the issue of her entitlement to UM benefits under the State Farm policy was legally incorrect, because the Myung vehicle was not an "uninsured motor vehicle," within the meaning of Insurance Article section 19-509(a), and therefore the UM coverage under the State Farm policy did not apply to it. The Court explained that, when a tortfeasor's liability policy's single limit equals a UM policy's per accident limit, and when remaining available coverage under a tortfeasor's policy exceeds the per person limit in the UM policy, the tortfeasor's vehicle was not an "uninsured motor vehicle" under the statutory definition. Because Trempe had more insurance available to her under the tortfeasor's liability policy than under the State Farm

policy, the statutory definition was not satisfied. Thus, as a matter of law, she was not entitled to UM benefits.

State Farm Automobile Insurance Company v. Crisfulli, et al., No. 681, September Term 2003, filed April 19, 2004. Opinion by Eyler, Deborah S., J.

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REAL PROPERTY - TAX SALES - MARYLAND CODE, TAX-PROPERTY ARTICLE, TITLE 14; TAX SALES; VOID TAX SALES; REDEMPTION RATE; STATUTORY ATTORNEYS' FEES; EQUITABLE ESTOPPEL

Facts: Heartwood 88, Inc., appellant, purchased 1,385 properties at a tax sale conducted by Montgomery County, appellee. Appellant later discovered that the County sold 331 of the properties in error, because their owners had paid their delinquent property taxes prior to the tax sale. Accordingly, the County refunded the purchase monies to Heartwood for all 331 sales, along with interest at the rate of 8%, pursuant to the advertised terms of sale. Nevertheless, Heartwood claimed that it was entitled to interest at the 20% "redemption rate," which would have applied had the owners redeemed their properties after the tax sale. Heartwood filed a "Complaint For Declaratory Judgment And For Judgment That Tax Sales Were Void," seeking to have the court declare void the sale of the 331 properties, along with an order requiring the County to pay interest at 20% and statutory attorneys' fees of $400 per property. The County counterclaimed, seeking the return of the 8% interest that it previously paid to Heartwood.

The Circuit Court for Montgomery County ruled in favor of the County. It held that Heartwood was not entitled to the redemption rate or the 8% interest that the County had already paid, and ordered Heartwood to reimburse the County.

Held: Judgment affirmed in part and reversed in part.

The Court noted that, as a home rule county, Montgomery County is allowed to conduct tax sales of properties for which the owners

are delinquent in regard to their property taxes. Under the State's statutory scheme, for a period of time after a property has been sold at a tax sale, the delinquent taxpayer is allowed to redeem his or her property. According to § 14-820 of the Tax-Property Article ("T.P.")of the Maryland Code (1985, 2001 Repl. Vol.), the tax sale purchaser is then entitled to "the purchase price together with interest at the rate of 6% a year from the date of payment to the date of redemption (except as stated in subsection (b) of § 14-820 of the Tax Property Article of the Annotated Code of Maryland)." Under Subsection (b), Montgomery County is allowed to set its own rate of redemption. By Resolution No. 9-1591 (Dec. 1981), Montgomery County provided that the redemption rate would be the "sum of the interest rate as provided in Section 48, Article 81, Annotated Code of Maryland, 1980 Replacement Volume, as amended, on late payment of delinquent taxes, and the penalty rate on late payment of delinquent taxes as fixed by resolution of the County Council." By resolution, the County set the interest rate for delinquent property taxes at 8%, and the penalty rate at 12%.

Appellant relied on T.P. § 14-848, which provides that when "the court declares the sale void ... the collector shall repay the holder of the certificate of sale the amount paid to the collector ... with interest at the rate provided in the certificate of tax sale...." The Court stated that, because the delinquent taxes for the 331 properties in issue had actually been paid by the time of the tax sale, the sales were void at the time of sale. Therefore, because the court could not declare the sales of the 331 properties void, and Heartwood had no basis to foreclose the right of redemption, appellant did not qualify for the remedies under T.P. § 14-848. Similarly, T.P. § 14-848 provides for attorney's fees "on *redemption*," so Heartwood's claim for attorneys' fees failed.

Further, the Court noted that T.P. § 14-848 did not apply to Heartwood under these circumstances, because the terms of sale differentiated between interest rate and redemption rate. "Interest" and "penalties" are elements or components of the redemption rate. The notice of tax sale stated that any sales subsequently invalidated would yield a refund of the purchase price, plus interest of 8%.

But, based on principles of equitable estoppel, the Court determined that the County was not entitled to reimbursement of the interest payment of 8%. The Court held: "Because the County represented in its notice of sale that it would pay interest at 8% in regard to any invalid sales, the circuit court erred in concluding that appellant had to reimburse the County for the 8% interest that the County had previously paid to appellant."

Heartwood 88, Inc. v. Montgomery County, Maryland, et al., No. 02489, September Term, 2002, filed April 14, 2004. Opinion by Hollander, J.

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TORTS - MUNICIPAL CORPORATIONS - NEGLIGENCE - DUTY TO MAKE PUBLIC STREETS AND SIDEWALKS SAFE - NOTICE OF DANGEROUS CONDITION

Facts: On September 14, 2000, Buster Holland, the appellants' father, walking south on Caroline Street in Baltimore City, arrived at the northwest corner of that street's intersection with Fayette Street. At the time, the pedestrian crossing signal on the southwest corner of Caroline and Fayette Streets was approximately 90 degrees out of alignment, so that a pedestrian taking Mr. Holland's route would be unable to see it.

Mr. Holland stepped off the corner of the intersection, entered the crosswalk on Fayette Street, and started to walk across the street. Although he could not see the pedestrian crossing signal, he could see that the traffic light for Caroline Street was green, in his favor. As he reached the center of Fayette Street, the traffic light turned red. Noticing that the light had changed, Mr. Holland reversed course and attempted to return to the northwest corner. A westbound car stopped to let him pass. At the same time, another car traveling westbound in the same lane, accelerated around the car and into the intersection where Mr. Holland was walking. The driver of the car did not see Mr. Holland until it was too late; he skidded through the crosswalk and struck Mr. Holland, injuring him critically. On January 16, 2001, he died from his injuries.

On August 23, 2001, in the Circuit Court for Baltimore City, the appellants filed suit, individually and as the personal representatives of Mr. Holland's estate, against the City. They alleged that the City had breached its duty to use reasonable care

in maintaining the pedestrian crossing signal, and that, as a result, Mr. Holland was fatally injured. On November 1, 2002, the City filed a motion for summary judgment, arguing that there was no admissible evidence that it had actual or constructive notice of the misaligned pedestrian crossing signal. On December 27, 2002, following a hearing, the court granted the motion.

Held: Judgment affirmed. Before a municipal corporation may be liable for an injury to a person caused by the dangerous condition of a public street, the municipal corporation must have had either actual or constructive notice of the condition, so as to have given rise to a duty to repair.

The Court further held that a municipal corporation need not perform routine inspections of streets and safety control devices to detect dangerous conditions. It may rely on reports of citizens, including police officers and others on the city streets often by virtue of their work, to learn of dangerous conditions. A municipal corporation that relies upon citizens' reports of dangerous conditions of the streets may be found to be on constructive notice of such a condition, however, when the condition is such that one reasonably could infer from its mere existence that citizens would have reported it immediately, or that it must have existed for a sufficient length of time that it would have been reported prior to the injury's being sustained.

Smith, et al. v. City of Baltimore, No. 2588, September Term 2002, filed April 15, 2004. Opinion by Eyler, Deborah S., J.

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TORTS - NEGLIGENCE - CONTRIBUTORY NEGLIGENCE - LAST CLEAR CHANCE DOCTRINE.

Facts: Preston Carter, a commercial plumber, was injured while working on a large construction site when he knelt down beneath some scaffolding. According to Carter, when he first approached the scaffolding, he noticed a forklift about one hundred

feet away from him, but he then perceived the forklift move in behind him, coming as close as six to ten feet from him, and then stop in front of the scaffolding. The operator of the forklift maneuvered the machine to place a pan of mortar upon a cube of cinder blocks that sat on the scaffold. This action caused several of the blocks to fall, striking Carter in the head, neck, shoulder, and back. It was Carter's testimony that he would have been clearly visible to the forklift operator all the time that he knelt near the scaffold.

Carter sued the employer of the forklift operator for the injuries he sustained in the accident, and a jury awarded him damages. The employer moved for judgment notwithstanding the verdict ("JNOV") with the principal assertion that Carter and the forklift operator committed simultaneous negligence, so the last clear chance doctrine did not apply and Carter's contributory negligence stood as an absolute bar to recovery. The Circuit Court for Prince George's County granted the JNOV.

Held: Reversed. The evidence at trial showed that both the plumber and the forklift operator were negligent, but there was also evidence from which the jury could surmise that the forklift operator had the final opportunity to avoid the accident. That is, a jury could have concluded that, given the sequence of events detailed in testimony, as well as the forklift operator's superior knowledge of the impending danger, he had the superior ability to avert the accident. Because there was evidence supporting the jury's verdict, the trial court should not have disturbed it by granting JNOV. The jury's verdict is reinstated.

Carter v. Senate Masonry, Inc., No. 334, September Term, 2002, filed April 6, 2004. Opinion by Sonner, J.

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WORKERS' COMPENSATION - POSTHUMOUS CHILD - POSTHUMOUS CHILD MAY BE WHOLLY DEPENDENT UPON DECEASED WORKER FOR COMPENSATION BENEFIT PURPOSES

Facts: Elvis Rudis Hernandez moved to this country from El Salvador and began work as a laborer at Keystone Masonry Corporation. Less than three months after his arrival, he was killed, at work, when a wall collapsed on him. A claim for death benefits was filed on behalf of his three children, who remained in El Salvador; one of the children was born after his father's death. The Worker's Compensation Commission denied the claim for benefits. On appeal, a jury sitting in the Circuit Court for Prince George's County found all three children wholly dependent upon their father at the time of his death.

Held: Affirmed. Evidence presented at trial supported the claim that children, including one born after his father's death, were wholly dependent upon their father. Testimony by an expert witness that many El Salvadoran immigrants sent money to their families abroad using an informal courier system, coupled with testimony from courier that he had taken money to El Salvador from deceased worker for distribution to his children and testimony from deceased worker's parents that children's mothers received no other support, was adequate to support jury's finding that all three children were wholly dependent upon worker.

Section 9-101(c)(3) of the Labor and Employment article includes posthumous children in those children who may claim dependency upon a deceased worker. The mother of Hernandez's posthumous child, who was not married to Hernandez and could not claim benefits on her own behalf, used the funds provided by Hernandez for prenatal care and for her own food, on which the child she was carrying necessarily relied. Because the child's mother was wholly dependent upon Hernandez, he was also.

Case law provides that a worker need not provide housing for his children to be found wholly dependent.

Keystone Masonry Corporation v. Hernandez, No. 680, September Term 2003, filed April 19, 2004. Opinion by: Sharer, J.

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WORKERS' COMPENSATION - TEMPORARY RESTRAINING ORDER - PRELIMINARY INJUNCTION - MD. CODE ANN. LABOR & EMPL. § 9-741 "NO STAY" PROVISION - WORKER'S COMPENSATION; MD. RULE 7-205 - COMAR 14.09.01.24A(4) - LEGALITY OF STAY OF WORKER'S COMPENSATION COMMISSION'S ORDER UPON APPEAL - PLENARY EQUITY POWERS OF CIRCUIT COURT

Facts: Linda M. Hanks filed a claim for benefits in 1991 for an occupational disease contracted on the job. The claim was deemed compensable by the Worker's Compensation Commission and Gleneagles Inc, her employer, paid benefits for temporary total disability, temporary partial disability, and vocational rehabilitation services for various periods through 1992. Claiming worsening of her condition, Hanks filed issues, including a claim for permanent partial disability to the left and right upper extremities, arms, shoulders, and hands, in 1995. At the hearing in June 1997 concerning issues of medical treatment, medical expenses, and causal relationship of hand/arm injuries as to her shoulders, the Commission granted all of Hanks' requests. In 1998, Hanks filed issues relating to causal relationship of a neck condition which Gleneagles contested, and after impleading the Subsequent Injury Fund in 2000, a hearing was finally held in 2003, at which the Commission entered an award of compensation for Hanks.

Gleneagles filed a request for an immediate temporary restraining order and for a stay and/or preliminary injunction at the same time as their Petition for Judicial Review. The circuit court granted temporary injunctive relief, but after a full evidentiary hearing, dissolved the injunction on the grounds that it was without jurisdiction to grant a stay of an award of compensation, pursuant to Md. Code Ann. Lab. & Empl. § 9-741, and Maryland Rule 7-205.

Gleneagles argued that Md. Rule 7-205 permits a stay of an order or action of an administrative agency, and that the circuit court's plenary equity power to issue injunctions is the proper vehicle to achieve a stay. Hanks countered that the "no stay" provision of Md. Code Ann., Lab. & Empl. 9-741 is absolute.

Held: Affirmed. Maryland Rule 7-205 does not permit a stay of the immediate payment of an award of the Commission and the application of the circuit court's plenary equity power to issue injunctions in not an appropriate vehicle to achieve a stay of an award of the Commission upon appeal. The clear policy behind the enactment of Lab. & Empl. 9-741 by the General Assembly is that an opposing party's request for judicial review should not deny employees immediate benefits. Payment of compensation and payment of attorneys fees are disparate concepts within worker's compensation and are governed by separate rules (with COMAR

14.09.01.24a(4) governing only delayed payment of attorneys fees and Lab. & Empl. 9-741 addressing payment of compensation).

Gleneagles, Inc., et al. v. Hanks, No. 1502, September Term 2003, filed April 19, 2004 Opinion by Sharer, J.

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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 April 1, 2004:

DONALD J. MAY
*

By an Order of the Court of Appeals of Maryland dated April 2, 2004, the following attorney has been disbarred by consent, from the further practice of law in this State:

PETER J. SOMMER
*

By an Opinion and Order of the Court of Appeals of Maryland dated April 5, 2004, the following attorney has been disbarred from the further practice of law in this State:

JAMES GRAFTON GORE, JR.
*

By an Opinion and Order of the Court of Appeals of Maryland dated April 9, 2004, the following attorney has been disbarred from the further practice of law in this State:

RONALD ALLEN BROWN
*

By an Opinion and Order of the Court of Appeals of Maryland dated April 9, 2004, the following attorney has been disbarred from the further practice of law in this State:

RAY I. VELASQUEZ
*

By an Opinion and Order of the Court of Appeals of Maryland dated March 9, 2004, the following attorney has been suspended for ninety days effective April 9, 2004 from the further practice of law in this State:

STEVEN JOHN POTTER
*