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Annual Review: Annual Review of Maryland Law: The Court of Appeals of Maryland, 1995-96 Opinions

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Annual Review: Annual Review of Maryland Law: The Court of Appeals of Maryland, 1995-96 Opinions

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ANNUAL REVIEW OF MARYLAND LAW:
COURT OF APPEALS OF MARYLAND, 1995-96
OPINIONS

The *University of Baltimore Law Review* proudly introduces the *Annual Review of Maryland Law*. The *Review* is designed to help practitioners by keeping them abreast of recent decisions of the Court of Appeals of Maryland. The *Review* consists of short synopses of every case published by the Court of Appeals of Maryland during the previous year. Although this issue only covers opinions published between September 15, 1995 and May 17, 1996, beginning with Volume 27 the *Review* will cover the entire year.

Organized by categories based on the Maryland Lawyer's Index on Published Opinions, each piece contains a short discussion of the facts and analysis of the law(s) affected by the holding. An index is included to facilitate the practitioner's search for changes in Maryland case law.

Accompanying the *Review* is statistical data (Tables II through V) gathered to further aid Maryland practitioners in analyzing current trends of the court. This data, however, should not be interpreted as having any predictive value on the outcome of future cases. These tables follow the methodology used by the *Harvard Law Review* and the *Revista Jurídica de la Universidad de Puerto Rico*. See 100 HARV. L. REV. 305-06 (1986); 65 REV. JUR. U.P.R. 703-21 (1996).

We are delighted to present our first *Review* and welcome constructive comments.

THE EDITORS

TABLE I
INDEX TO CASES REVIEWED AND SUBJECT MATTERS COVERED

Case Name	Page	Subject Classified Under	Additional Subjects Impacted
Curtis G. Testerman Co. v. Buck	10	Bus	—
Montgomery County v. Revere National Corp.	11	Bus	Stat, Code, & Reg
Pavel Enterprises, Inc. v. A.S. Johnson Co.	14	Bus	—
Hartford Fire Insurance Co. v. Maryland National Bank	16	Bus	—
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Enterprise Leasing Co. v. Allstate Ins. Co.	21	Bus	Const / Stat, Code, & Reg
Sullins v. Allstate Insurance Co.	23	Bus	Evid
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Urban Site Venture II Ltd. v. Levering Associates Ltd. Partnership	31	Civ Pro	Prop
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In re Keehan	108	Prof Res	—
Attorney Grievance Commission v. Glenn	110	Prof Res	—
Attorney Grievance Commission v. Breschi	112	Prof Res	—
Attorney Grievance Commission v. Willcher	114	Prof Res	—
Attorney Grievance Commission v. Kenney	115	Prof Res	—
Attorney Grievance Commission v. James	116	Prof Res	—

Bus = Business Law; *Civ Pro* = Civil Procedure; *Crim* = Criminal Law; *Const* = Constitutional Law; *Evid* = Evidence Law; *Fam* = Family Law; *Prof Res* = Professional Responsibility; *Prop* = Property Law; *Law, Code, & Reg* = State Law, Code & Regulations; *Tort* = Tort Law.

TABLE I (continued)

INDEX TO CASES REVIEWED AND SUBJECT MATTERS COVERED

Case Name	Page	Subject Classified Under	Additional Subjects Impacted
Poe v. State	39	Crim	---
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Harley v. State	44	Crim	Const
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Burrell v. State	48	Crim	---
Gary v. State	30	Crim	Stat, Code, & Reg
State v. Purcell	51	Crim	---
Whittlesey v. State	53	Crim	Const
Grandison v. State	59	Crim	Evid / Const
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Motor Vehicle Administration v. Karwacki	63	Crim	Evid / Stat, Code, & Reg
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Jennings v. State	69	Crim	Stat, Code, & Reg
State v. Brown	71	Crim	---
Shand v. State	72	Crim	---
Boyd v. State	74	Crim	---
Gadson v. State	76	Crim	Const
Mangum v. State	77	Crim	---
Baltimore Sun Co. v. State	79	Const	Civ Pro
State v. Jones	80	Const	Crim
Bishop v. State	82	Const	Crim
Department of Public Safety v. Berg	83	Const	Stat, Code, & Reg

"Bus" = Business Law; "Civ Pro" = Civil Procedure; "Crim" = Criminal Law; "Const" = Constitutional Law; "Evid" = Evidence Law; "Fam" = Family Law; "Prof Res" = Professional Responsibility; "Prop" = Property Law; "Law, Code, & Reg" = State Law, Code & Regulations; "Tort" = Tort Law.

TABLE I (continued)

INDEX TO CASES REVIEWED AND SUBJECT MATTERS COVERED

Case Name	Page	Subject Classified Under	Additional Subjects Impacted
Armstead v. State	85	Evid	Crim / Const / Stat, Code, & Reg
Araiza v. Roskowsinski-Droneburg	87	Evid	---
Sears, Roebuck & Co. v. Ralph	89	Evid	Tort / Civ Pro
Goldstein v. State	92	Evid	Crim
Jackson v. State	93	Evid	Crim
Stewart v. State	95	Evid	Crim
Department of Public Safety and Correctional Services v. Cole	98	Evid	Const
Franch v. Ankney	99	Evid	Tort
Klingenberg v. Klingenberg	101	Fam	Civ Pro
Coburn v. Coburn	102	Fam	Civ Pro / Stat, Code, & Reg
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Wallander v. Barnes	128	Prop	---

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TABLE I (continued)

INDEX TO CASES REVIEWED AND SUBJECT MATTERS COVERED

Case Name	Page	Subject Classified Under	Additional Subjects Impacted
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Comptroller of Treasury v. Disclosure, Inc.	131	Stat, Code, & Reg	---
Roberts v. Lakin	132	Stat, Code, & Reg	---
Board of Trustees of the Maryland State Retirement and Pension Systems v. Hughes	134	Stat, Code, & Reg	---
Insurance Commissioner v. Equitable Life Assurance Society	135	Stat, Code, & Reg	Civ Pro / Const
Carrion v. Linzey	137	Stat, Code, & Reg	Civ Pro / Tort
Blondell v. Baltimore City Police Department	139	Stat, Code, & Reg	---
Hess Construction Co. v. Board of Education of Prince George's County	141	Stat, Code, & Reg	Bus / Civ Pro
Stevens v. Rite-Aid Corp.	142	Stat, Code, & Reg	Tort
Haupt v. State	144	Stat, Code, & Reg	Civ Pro
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Montgomery Ward v. Wilson	147	Tort	Civ Pro
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Morris v. Osmose Wood Preserving	151	Tort	Civ Pro / Bus / Stat, Code, & Reg

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TABLE II
INDIVIDUAL OUTPUT OF JUDGES

Judge	N	OC	S	CO	CV	DO	DV	DCO	DCV
Robert C. Murphy	70	12	56	0	0	1	1	0	0
John C. Eldridge	79	10	64	0	0	1	4	0	0
Lawrence F. Rodowsky	79	12	64	0	1	0	2	0	0
Howard S. Chasanow	79	14	51	2	1	1	0	0	0
Robert L. Karwacki	78	9	67	0	1	1	0	0	0
Robert M. Bell	80	7	60	0	2	7	3	1	0
Irma S. Raker	80	12	59	2	0	3	4	0	0
John F. McAuliffe (Specially Assigned)	8	2	6	0	0	0	0	0	0
Marvin H. Smith (Specially Assigned)	1	0	1	0	0	0	0	0	0
Robert F. Fischer (Specially Assigned)	2	0	0	0	0	1	1	0	0
Theodore G. Bloom (Specially Assigned)	1	0	0	0	0	1	0	0	0
Total	--	78*	--	4	--	16	--	1	--

This table shows the individual output of each judge. "N" = number of cases a judge participated in; "OC" = number of opinions of the court written by the judge; "S" = number of times a judge signed to the opinion of the court; "CO" = number of concurring opinions written by the judge; "CV" = number of times a judge signed to the concurring opinion of a colleague; "DO" = number of dissenting opinions written by the judge; "DV" = number of times a judge signed to the dissenting opinion of a colleague; "DCO" = number of concurring/dissenting opinions written by the judge; "DCV" = number of times a judge signed to the concurring/dissenting opinion of a colleague.

*Number does not include two per curiam opinions.

TABLE III
INDIVIDUAL OUTPUT OF JUDGES BY SUBJECT MATTER

Judge	Bus	Civ Pro	Crim	Const	Evid	Fam	Prof Res	Prop	Torts	Law, Code, & Reg
Robert C. Murphy	3	1	1	2	0	2	0	1	1	1
John C. Eldridge	1	2	1	1	0	0	0	0	2	3
Lawrence F. Rodowsky	1	1	1	0	2	1	1	3	1	1
Howard S. Chasanow	2	1	4	0	3	1	1	1	0	1
Robert L. Karwacki	1	1	3	0	0	0	1	1	0	2
Robert M. Bell	0	0	4	0	0	0	0	2	0	1
Irma S. Raker	1	0	4	0	3	1	2	0	0	1
John F. McAuliffe (Specially Assigned)	1	0	0	1	0	0	0	0	0	0

This table shows the number of opinions of the court written by each judge per area of the law. "Bus" = Business Law; "Civ Pro" = Civil Procedure; "Crim" = Criminal Law; "Const" = Constitutional Law; "Evid" = Evidence Law; "Fam" = Family Law; "Prof Res" = Professional Responsibility; "Prop" = Property Law; "Law, Code, & Reg" = State Law, Code & Regulations.

TABLE IV
VOTING ALIGNMENTS

Judge		RM	JE	LR	HC	RK	RB	IR	IM	MS	TB	RF
Robert C. Murphy	N	—	12	12	12	12	12	12	—	—	—	—
	S	—	11	12	11	12	11	11	—	—	—	—
	C	—	0	0	1	0	0	0	—	—	—	—
	D	—	1	0	0	0	1	1	—	—	—	—
	CD	—	0	0	0	0	0	0	—	—	—	—
	%P	—	92	100	92	100	92	92	—	—	—	—
John C. Eldridge	N	8	—	10	10	10	10	10	1	—	—	—
	S	8	—	10	9	10	8	9	1	—	—	—
	C	0	—	0	1	0	1	1	0	—	—	—
	D	0	—	0	0	0	1	0	0	—	—	—
	CD	0	—	0	0	0	0	0	0	—	—	—
	%P	100	—	100	90	100	80	90	100	—	—	—
Lawrence F. Rodowsky	N	12	12	—	12	12	12	12	—	—	—	—
	S	12	12	—	11	12	11	12	—	—	—	—
	C	0	0	—	1	0	1	0	—	—	—	—
	D	0	0	—	0	0	0	0	—	—	—	—
	CD	0	0	—	0	0	0	0	—	—	—	—
	%P	100	100	—	92	100	92	100	—	—	—	—
Howard S. Chasnow	N	12	13	13	—	14	14	14	1	1	—	1
	S	11	12	10	—	12	10	11	1	1	—	0
	C	0	0	1	—	1	0	1	0	0	—	0
	D	1	1	2	—	1	4	2	0	0	—	1
	CD	0	0	0	—	0	0	0	0	0	—	0
	%P	92	92	77	—	86	71	79	100	100	—	0
Robert L. Karwacki	N	8	9	9	8	—	9	9	1	1	1	—
	S	8	9	9	8	—	8	8	1	1	1	—
	C	0	0	0	0	—	0	0	0	0	0	—
	D	0	0	0	0	—	1	1	0	0	1	—
	CD	0	0	0	0	—	0	0	0	0	0	—
	%P	100	100	100	100	—	89	89	100	100	0	—
Robert M. Bell	N	6	7	7	7	5	—	7	2	—	—	1
	S	5	6	7	7	5	—	5	2	—	—	0
	C	0	0	0	0	0	—	0	0	—	—	0
	D	1	1	0	0	0	—	2	0	—	—	1
	CD	0	0	0	0	0	—	0	0	—	—	0
	%P	83	86	100	100	100	—	71	100	—	—	0
Irma S. Raker	N	10	12	12	12	12	12	—	1	—	—	—
	S	10	11	12	12	12	8	—	1	—	—	—
	C	0	0	0	0	0	0	—	0	—	—	—
	D	0	1	0	0	0	3	—	0	—	—	—
	CD	0	0	0	0	0	1	—	0	—	—	—
	%P	100	92	100	100	100	67	—	100	—	—	—
John F. McAuliffe	N	—	2	2	2	2	2	2	—	—	—	—
	S	—	2	2	1	2	2	1	—	—	—	—
	C	—	0	0	0	0	0	0	—	—	—	—
	D	—	0	0	1	0	0	1	—	—	—	—
	CD	—	0	0	0	0	0	0	—	—	—	—
	%P	—	100	100	50	100	100	50	—	—	—	—

This table shows the position assumed by each judge with respect to the opinion of the court written by his or her colleagues. "O" = number of opinions of the court written by each judge; "N" = number of times a judge participated in the decisions in which his or her colleague wrote the opinion of the court; "S" = number of times a judge signed to the opinion of the court; "C" = number of times the judge concurred with the opinion of the court; "D" = number of times a judge dissented with the opinion of the court; "CD" = number of times a judge concurred and dissented with the opinion of the court; "%P" = percentage of agreement between the judges (%P=(S/N)*100). Judges specially assigned were Theodore G. Bloom (TB), Marvin H. Smith (MS), Robert F. Fischer (RF), and John F. McAuliffe (JM).

TABLE V
NET AGREEMENT BETWEEN JUDGES

Judge		RM	JE	LR	HC	RK	RB	IR	JM	MS	TB	RF
Robert C. Murphy	S	--	64	65	64	64	56	62	1	1	0	0
	CD	--	0	1	0	0	0	1	0	0	0	0
	T	--	64	66	64	64	56	63	1	1	0	0
	N	--	69	69	69	68	70	70	1	1	1	2
	%P	--	93	96	93	94	80	90	100	100	0	0
John C. Eklridge	S	64	--	70	71	70	65	68	7	0	0	0
	CD	0	--	0	0	0	3	3	0	0	0	0
	T	64	--	70	71	70	68	71	7	0	0	0
	N	69	--	78	78	77	79	79	8	0	1	2
	%P	93	--	90	91	91	86	90	88	0	0	0
Lawrence F. Rodowsky	S	65	70	--	71	74	64	69	8	1	0	0
	CD	1	0	--	0	2	0	2	0	0	0	0
	T	66	70	--	71	76	64	71	8	1	0	0
	N	69	78	--	78	77	79	79	8	1	1	1
	%P	96	90	--	91	99	81	90	100	100	0	0
Howard S. Chasnow	S	64	71	71	--	71	65	68	7	1	0	0
	CD	0	0	0	--	0	2	1	0	0	0	0
	T	64	71	71	--	71	67	69	7	1	0	0
	N	69	78	78	--	77	79	79	8	1	0	2
	%P	93	91	91	--	92	85	87	88	100	0	0
Robert L. Karwacki	S	64	70	74	71	--	63	69	7	1	0	0
	CD	0	0	2	0	--	0	2	0	0	0	0
	T	64	70	76	71	--	63	71	0	1	0	0
	N	68	77	77	77	--	78	78	7	1	1	1
	%P	94	91	99	92	--	81	91	100	100	0	0
Robert M. Bell	S	56	65	64	65	63	--	63	7	0	0	1
	CD	0	3	0	2	0	--	2	0	0	1	0
	T	56	68	64	67	63	--	65	7	0	1	1
	N	70	79	79	79	78	--	80	8	1	1	2
	%P	80	86	81	85	81	--	81	88	0	100	50
Irma S. Raker	S	62	68	69	68	69	63	--	6	1	0	0
	CD	1	3	2	1	2	2	--	0	0	1	0
	T	63	71	71	69	71	65	--	6	1	1	0
	N	70	79	79	79	78	80	--	8	1	1	2
	%P	90	90	90	87	91	81	--	75	100	100	0
John F. McAuliffe (Specially Assigned)	S	1	7	8	7	7	7	2	--	0	0	0
	CD	0	0	0	0	0	0	1	--	0	0	0
	T	1	7	8	7	7	7	0	--	0	0	0
	N	1	8	8	8	7	8	8	--	0	0	0
	%P	100	88	100	88	100	88	50	--	0	0	0

This table shows the number of times that one judge voted with another in full opinion decisions. "N" = number of decisions in which both judges participated and thus the number of opportunities for agreement; "S" = number of times the two judges signed the opinion of the court; "CD" = number of times the two judges signed the same concurring or dissenting opinion; "T" = the total number of times the two judges signed the same opinion (T=S+CD); "%P" = percentage of agreement between the judges (%P=(T/N)*100). Judges specially assigned were Theodore G. Bloom (TB), Marvin H. Smith (MS), Robert F. Fischer (RF), and John F. McAuliffe (JM).

This tabulation follows the methodology used by the *Harvard Law Review*. See 100 HARV. L. REV. 305-06 (1986).

I. BUSINESS & INSURANCE LAW

A. One who is neither a party to an arbitration agreement nor a signatory of the agreement can not be bound by an arbitration award. An arbitrator does not have the authority to award attorney fees when the contract between the parties does not provide for recovery of attorney fees, regardless of whether a statutory claim provides that a court can award attorney fees. Curtis G. Testerman Co. v. Buck¹

1. Facts

Curtis G. Testerman and Curtis G. Testerman Company (Company) appealed from a judgment entered by the Circuit Court of Maryland for Cecil County affirming an arbitration award in favor of Walter and Gabrielle Buck (the Bucks). The underlying dispute arose out of a construction contract between the Bucks and the Company. The contract was signed by the Bucks, as owners of the property involved, and by the Company as the contractor. Testerman signed the contract on behalf of the Company in his capacity as President.² The Bucks brought an action to compel arbitration pursuant to the arbitration clause of the contract, after the Company allegedly failed to complete the construction on time.³

2. Analysis

Two issues were raised on appeal. The first issue was whether one who is neither a party to an arbitration agreement nor a signatory of

1. 340 Md. 569, 667 A.2d 649 (1995).

2. The contract in question was executed in the name of "Curtis G. Testerman, Inc." instead of the actual name of the corporation, "Curtis G. Testerman Company," and signed by Testerman as "President." See *id.* at 575; 667 A.2d at 652. The Bucks argued that because of the mistake, Testerman entered into the contract on behalf of an unincorporated entity and was therefore personally liable. See *id.* at 575-76, 667 A.2d at 652. The trial court found, and the Court of Appeals of Maryland agreed, that the use of "Inc." instead of "Company" was a misnomer and that the Bucks knew that they were dealing with an incorporated entity. See *id.* The court of appeals stated "[w]e cannot allow the Bucks to use a simple misnomer in the corporate name to hold Testerman personally liable." *Id.* The court then concluded that Testerman had signed the agreement as an agent on behalf of a disclosed principal and therefore could not be held personally liable. See *id.* at 576-77, 667 A.2d at 653.

3. The arbitration clause provided:

"All claims or disputes between the Contractor and the Owner arising out or relating to the Contract, or the breach thereof, shall be decided by arbitration The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Id. at 573, 667 A.2d at 651 (quoting section 10.8 of the construction contract).

the agreement can be bound by an arbitration award.⁴ The Court of Appeals of Maryland answered this question in the negative because Testerman did not sign the contract in his individual capacity and therefore, as a non-party and a non-signatory to the contract, he did not agree to arbitrate.⁵ The trial court erred in compelling Testerman to submit to arbitration of his personal liability.⁶

The second issue raised on appeal was whether an arbitrator has the authority to award attorney fees when the contract between the parties does not provide for recovery of attorney fees.⁷ One of the claims involved the Maryland Consumer Protection Act which provides that a "court" can award attorney fees.⁸ The court of appeals held that an arbitrator does not have authority to award attorney fees in such a situation, regardless of whether a statutory claim provides that a "court" can award attorney fees.⁹

John B. Beckman

*B. A judicial order incorporating a settlement agreement is a final judgment when it has the effect of terminating the litigation in the trial court. Settlement agreement ending dispute over zoning regulations does not exceed the authority of Montgomery County, but instead is an exercise of executive discretion. Montgomery County v. Revere National Corp.*¹⁰

1. Facts

In 1968, Montgomery County (County) changed its zoning regulations regarding the placement, height, and size of billboards within the County. The regulations provided that any existing billboards not conforming to the new requirements be removed within two years of the effective date of the regulations or four years from the date the billboards were erected, whichever occurred later. Claiming Rollins

4. *See id.* at 574, 667 A.2d at 651; *see also supra* note 3.

5. *See id.* at 578-79, 667 A.2d at 653-54.

6. *See id.* The trial judge ordered Testerman to participate in the arbitration with the Bucks and the Company. *See id.* It should be noted that Testerman could have waived his right to have his liability litigated in a judicial forum, but he did not. *See id.* at 583, 667 A.2d at 656.

7. *See id.* at 574, 667 A.2d at 651.

8. *See id.*

9. *See id.* at 589-90, 667 A.2d at 659. The court of appeals concluded that an arbitrator is not a court within the meaning of the statute, making it an error for the trial court to confirm the award of attorney fees by the arbitrator. *See id.*

10. 341 Md. 366, 671 A.2d 1 (1996).

Outdoor Advertising, Inc. (Rollins) did not comply with the new requirement, the County ordered Rollins to remove them.

In 1974, Rollins subsequently filed suit against the county¹¹ challenging the validity of the regulations.¹² In 1986, while the litigation was still pending the County again changed its zoning regulations, this time to prohibit all billboards within the County. In 1990, Rollins's successor-in-interest, Reagan Outdoor Advertising, Inc. (Reagan) entered into an agreement with the County ending the sixteen years of litigation. The agreement, signed by the County, the County attorney, and Reagan officials and incorporated into a judgment of the Circuit Court of Maryland for Montgomery County, provided for the dismissal of all pending litigation and allowed Reagan to maintain and replace certain billboards for a period of ten years.

In 1992, Revere National Corporation, Inc. (Revere), the successor-in-interest to Reagan, sought the County's permission to construct a replacement billboard in accordance with the settlement agreement. The County denied the request stating that the settlement agreement was *void ab initio* because it conflicted with current zoning restrictions banning all billboards. Revere filed suit to enforce the settlement agreement and the County moved to have the agreement voided, contending that the County had no power to make an agreement which conflicted with zoning regulations. The circuit court granted the County's motion to vacate the settlement agreement.

Revere appealed and the Court of Special Appeals of Maryland reversed in an unreported opinion. The court of special appeals held that the settlement agreement incorporated into the judgment of the circuit court constituted a final judgment terminating the litigation. The court further held that the County had not shown any valid basis to set aside the 1990 judgment incorporating the settlement agreement. The County appealed to the Court of Appeals of Maryland.

2. Analysis

On appeal to the Court of Appeals of Maryland, Montgomery County argued that the court of special appeals erred in holding that the 1990 order was a final judgment.¹³ Revere argued that the 1990 order was a final judgment and that the judgment could not be revised absent fraud, mistake, or irregularity.¹⁴ The court of appeals agreed

11. Rollins filed suit against Montgomery County, the Montgomery County Executive, and the Montgomery County Council. *See id.* at 370, 671 A.2d at 2-3. All the defendants will be referred to collectively as "Montgomery County" or "the County." *See id.*

12. *See id.* Rollins sought both injunctive and declaratory relief. *See id.*

13. *See id.* at 376, 671 A.2d at 5.

14. An order that is not a final judgment is subject to revision.

with Revere and held that the 1990 order constituted a final appealable judgment.¹⁵ The court reasoned that an order which was entered on the docket pursuant to Maryland Rule 2-601¹⁶ and had the effect of terminating the litigation in the trial court constituted a final judgment.¹⁷

Montgomery County also contended that, even if the 1990 order was a final judgment, it was subject to collateral attack because the County exceeded its legal authority when it entered into the settlement agreement.¹⁸

The court of appeals expressly declined to decide whether such a collateral attack can be made, concluding that the substance of the settlement agreement was not *ultra vires*¹⁹ because the County's authority to make zoning regulations is not legislative authority.²⁰ Therefore, the County did not cede legislative authority over zoning matters that was specifically granted by state law and county charter.²¹ Zoning enactments are not legislation within the meaning of Article XI-A of the Maryland Constitution or the Montgomery County Charter.²² Instead the County Council, sitting as a District Council, is an administrative agency.²³

Furthermore, the court of appeals concluded that when the executive branch of a county, in carrying out the laws and functions of government, enters into a contract, it is exercising its executive discretion.²⁴ Therefore, a requirement that the county adhere to that discretion and be bound to that contract does not constitute an unlawful interference with future executive discretion.²⁵ Thus, the settlement agreement was a valid exercise of executive discretion which ended a dispute between the County and Revere, and the County shall be bound by its agreement.²⁶

John B. Beckman

15. See *Revere*, 341 Md. at 379, 671 A.2d at 7.

16. Rule 2-601 is the rule by which the trial courts enter an order disposing of the case.

17. See *Revere*, 341 Md. at 379, 671 A.2d at 7.

18. See *id.* at 379-80, 671 A.2d at 7.

19. See *id.* at 382-83, 671 A.2d at 9.

20. See *id.* at 386-87, 671 A.2d at 11.

21. See *id.* at 387, 671 A.2d at 10.

22. See *id.* at 383-84, 620 A.2d at 9-10.

23. See *id.* at 384, 620 A.2d at 10. The Montgomery County Council, pursuant to the Regional District Act, MD. ANN. CODE art. 28, § 8-101 (Supp. 1995), adopts zoning "ordinances" which are not subject to the approval or veto of the County Executive. See *Revere*, 341 Md. at 383, 671 A.2d at 9.

24. See *Revere*, 341 Md. at 390, 620 A.2d at 12.

25. See *id.*

26. See *id.* Under Maryland law, counties and municipalities are normally bound by their contracts to the same extent as private entities. See *id.* at 384-85, 671 A.2d at 10; *Fraternal Order of Police v. Baltimore County*, 340 Md. 157, 665 A.2d 1029 (1995).

C. *The doctrine of detrimental reliance applies to the setting of construction bidding. Pavel Enterprises, Inc. v. A.S. Johnson Co.*²⁷

1. Facts

The National Institute of Health (NIH) solicited bids for a renovation project on one of the buildings on its Bethesda, Maryland campus. A large part of the mechanical work involved heating, ventilation and air conditioning (HVAC). Appellant Pavel Enterprises, Inc. (Pavel), a general contractor, submitted a bid for the NIH project. In preparation for its bid, Pavel solicited sub-bids from subcontractors for the HVAC component of the job. Among the subcontractors submitting sub-bids was the appellee, A.S. Johnson Co. (Johnson), which submitted a bid of \$898,000 for the HVAC work.

Based on Johnson's sub-bid, Pavel prepared and submitted a bid of \$1,585,000 for the entire project to the NIH on August 5, 1993. Pavel's bid was accepted by NIH later that month. Pavel met with Johnson on August 26, 1993 to discuss Johnson's proposed role in the work. After the meeting, Pavel sent a letter by facsimile to all the mechanical subcontractors who had bid on the project and asked them to resubmit their bids minus the amount calculated for electric controls because Pavel was going to supply the electric controls. On August 30, 1993, Pavel informed NIH that Johnson was to be the mechanical subcontractor on the project. On September 1, 1993, Pavel formally accepted Johnson's bid.

Upon receipt of the Pavel's acceptance on September 1, 1993, Johnson informed Pavel that their bid contained an error that caused its price to be too low. Johnson claimed that they had discovered the error but did not inform Pavel because they believed that Pavel was not awarded the NIH contract. Johnson sought to withdraw its bid and Pavel refused to allow Johnson to withdraw.

On September 28, 1993, NIH formally awarded the construction contract to Pavel. In order to complete the project, Pavel hired a substitute HVAC subcontractor who agreed to perform the work for \$930,000. Pavel instituted this action to recover the \$32,000 difference between Johnson's bid and the cost of the substitute subcontractor. The trial court found for Johnson because they determined that a contractual relationship was never formed between the parties. Pavel appealed to the Court of Special Appeals of Maryland, and before the intermediate appellate court considered the case, the Court of Appeals of Maryland issued a writ of certiorari on its own motion.

27. 342 Md. 143, 674 A.2d 521 (1996).

2. Analysis

Judge Karwacki, writing for the court, outlined the mechanics of the construction bidding process and the legal system's attempts to regulate it.²⁸ Among the legal difficulties in the construction bidding process is the problem of determining at what precise points on the bidding timeline the various parties become bound to each other.²⁹

Under the facts of this case, the court of appeals analyzed (1) whether a traditional bilateral contract had been formed at the time Johnson withdrew its bid, and (2) whether there was sufficient evidence to establish Pavel's detrimental reliance on the bid. The court answered both questions in the negative and affirmed the decision of the trial court.³⁰

On the first issue, the court of appeals agreed with the trial court that Johnson's sub-bid was an offer to contract, finding it sufficiently clear and definite.³¹ The next inquiry focused on whether Pavel made a timely acceptance and thus created a traditional bilateral contract.³² The trial court found that there was "no meeting of the minds" and the court of appeals - finding nothing clearly erroneous - agreed.³³ The trial judge reached this conclusion primarily because of the August 26 letter to all potential mechanical subcontractors indicated that Pavel and Johnson did not have a definite meeting of the minds on a certain price for a certain quantity of goods.³⁴

Alternatively, the court of appeals held that the evidence permitted the trial judge to find that Johnson revoked its offer before Pavel's final acceptance.³⁵ The court determined that Pavel's acceptance of the offer was subject to a condition precedent, that is, Pavel's receipt of the award from NIH.³⁶ Prior to the occurrence of the condition precedent, Johnson was free to withdraw its offer.³⁷ Therefore, the trial judge's finding that a withdrawal preceded a valid acceptance was supported by sufficient evidence and not clearly erroneous.³⁸

The court of appeals addressed Pavel's alternate theory, holding that Pavel had not proven detrimental reliance.³⁹ However, the court of appeals expressly stated that the doctrine of detrimental reliance is

28. *See id.* at 151-62, 674 A.2d at 525-30.

29. *See id.* at 152, 674 A.2d at 526.

30. *See id.* at 169, 674 A.2d at 534.

31. *See id.* at 161, 674 A.2d at 530.

32. *See id.* at 162-63, 674 A.2d at 530-31.

33. *Id.*

34. *See id.* at 162-63, 674 A.2d at 531.

35. *See id.* at 163, 674 A.2d at 531.

36. *See id.*

37. *See id.*; *see also* 2 WILLISTON ON CONTRACTS § 6:14 (1990).

38. *See Pavel*, 342 Md. at 163-64, 674 A.2d at 531.

39. *See id.* at 167-68, 674 A.2d at 533-34.

applicable to the setting of construction bidding.⁴⁰ The court adopted Section 90(1) of the Second Restatement of Contracts, which they "recast" as a four part test.⁴¹

Detrimental reliance arises when there exists (1) a clear and definite promise; (2) where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee; (3) which does induce actual and reasonable action or forbearance by the promisee; and (4) causes a detriment which can only be avoided by the enforcement of the promise.⁴²

The court analyzed each element of the doctrine of detrimental reliance and held that the trial judge was not clearly erroneous in finding that recovery by Pavel was not justified under the theory of detrimental reliance.⁴³

John B. Beckman

*D. Under Maryland common law, a drawer can bring an action to recover their losses against a depository bank for checks that the depository bank accepted with missing endorsements or in violation of restrictive agreements. Hartford Fire Insurance Co. v. Maryland National Bank*⁴⁴

1. Facts

In 1982, Eugene Carbaugh, head of the accounts payable department of the Prince George's County Board of Education (the Board), began an elaborate scheme to steal money from the Board. Carbaugh submitted fictitious bills to the Board, and after the checks were issued to pay for the bills, Carbaugh deposited the checks into bank accounts opened in his name at Maryland National Bank (MNB). By the time Carbaugh's scheme was discovered in 1993, he had stolen approximately \$1.1 million.

The Board recovered most of its losses from its insurance carrier, Hartford Fire Insurance Co. (Hartford). As subrogee and assignee of the Board's claims, Hartford brought an action in the United States District Court for the District of Maryland against MNB seeking to

40. *See id.*

41. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979).

42. *Pavel*, 342 Md. at 166, 674 A.2d at 532.

43. *See id.* at 166-69, 674 A.2d at 533-34.

44. 341 Md. 408, 671 A.2d 22 (1996).

hold MNB liable for the Board's loss. The district court found that MNB failed to follow commercially reasonable banking practices because MNB accepted checks with missing endorsements and in violation of restrictive endorsements. This case came to the Court of Appeals of Maryland by method of certification from the United States District Court for the District of Maryland.

2. Analysis

The United States District Court for the District of Maryland called upon the Court of Appeals of Maryland to decide whether a drawer can bring suit against a depository bank when it accepts a check with no indorsement for deposit into an account other than that of the named payee or when the depository bank accepts a check in violation of a restrictive indorsement.⁴⁵

The Court of Appeals of Maryland concluded that, under Maryland common law,⁴⁶ Hartford, as assignee of the Board, can bring an action to recover the Board's (the drawer's) losses against MNB (the depository bank) for those checks accepted with missing endorsements or in violation of restrictive agreements.⁴⁷

In reaching this conclusion the Court of Appeals of Maryland expressly rejected *Stone & Webster Engineering Corp. v. First National Bank & Trust*⁴⁸ and *Underpinning Foundation Constructors Inc. v. Chase Manhattan Bank*,⁴⁹ two leading cases from Massachusetts and New York.⁵⁰ These cases stand for the proposition that a drawer cannot sue the depository bank directly, but instead must sue the drawee bank, who can then sue the depository bank.⁵¹ The reasoning behind this is as follows: the drawee bank pays the depository bank with its own funds and subsequently debits the drawer's account.⁵² Therefore, the funds that the depository bank receives are not drawer's funds - but

45. *See id.* at 411, 671 A.2d at 23.

46. Titles 3 and 4 of the Commercial Law Article of the Annotated Code of Maryland govern the rights and duties of drawers and depository banks. Titles 3 and 4 are essentially equivalent to Articles 3 and 4 of the Uniform Commercial Code. "Where the Commercial Law Article does not expressly resolve an issue," however, "the principles of law and equity . . . shall supplement its provisions." *Hartford Fire Insurance*, 341 Md. at 413, 671 A.2d at 24. In this case Titles 3 and 4 do not directly define or limit the drawer's right of action; consequently, the court looked to Maryland common law. *See id.* at 413, 671 A.2d at 24.

47. *See id.*

48. 184 N.E.2d 358 (Mass. 1962).

49. 386 N.E.2d 1319 (N.Y. 1979).

50. *See Hartford Fire Ins.*, 341 Md. at 418-23, 427-28, 671 A.2d at 27-29, 31-32.

51. *See id.*

52. *See id.*

the drawee's.⁵³ Under this analysis, the only party that can sue the depository bank directly is the drawee bank.⁵⁴ The Court of Appeals of Maryland rejected this concept calling it a "legal fiction."⁵⁵

John B. Beckman

*E. A junior mechanic's lien is extinguished upon foreclosure of a senior mortgage to the same extent as any other junior lien would be extinguished upon foreclosure of a senior mortgage. IA Construction Corp. v. Carney*⁵⁶

1. Facts

Birchwood Manor, Inc. (BMI) assembled a tract of land in Harford County, Maryland for development through various conveyances. One of the conveyances to BMI was from the respondent Robert E. Carney, Jr. The deed, dated June 28, 1989, stated that the consideration was \$135,000. Carney, acting as the mortgagee, took back a \$35,000 mortgage on the property that he had conveyed.

The petitioner, IA Construction Corporation (IA) entered into construction contracts with BMI for work for which BMI failed to pay. On May 24, 1993, IA petitioned to establish a mechanic's lien on the mortgaged property in the amount of \$27,269.⁵⁷

On June 22, 1993, Carney instituted foreclosure on the mortgage and notified IA. Carney purchased the property for \$26,000 at the mortgage foreclosure sale. IA then filed an action in the Circuit Court of Maryland for Harford County to enforce the mechanic's lien. The circuit court granted Carney's motion for summary judgment concluding that a valid foreclosure had taken place which defeated the mechanic's lien claim for work performed prior to the foreclosure proceeding. The Court of Special Appeals of Maryland affirmed and subsequently the Court of Appeals of Maryland granted IA's petition for certiorari.

2. Analysis

The Court of Appeals of Maryland affirmed the intermediate appellate court's decision, holding that a valid foreclosure had taken

53. *See id.*

54. *See id.*

55. *Id.* at 427-28, 671 A.2d at 31-32.

56. 341 Md. 703, 672 A.2d 650 (1996).

57. The mechanic's lien was ordered pursuant to Section 9-106(b)(3) of the Real Property Article of the Annotated Code of Maryland, which is part of the mechanic's lien law, MD. CODE ANN., REAL PROP. §§ 9-101 to -114 (1996).

place which defeated the mechanic's lien claim for work performed prior to the foreclosure proceeding.⁵⁸ The court based its decision on Section 9-108 of the Real Property Article of the Annotated Code of Maryland.⁵⁹ The court concluded that section 9-108 makes it clear that ordinary rules and priorities in judicial sales apply when a mortgage is foreclosed that is senior to a mechanic's lien.⁶⁰ Therefore, upon a mortgage foreclosure sale, all liens and encumbrances on such property must be satisfied in accordance with their priority.⁶¹ The junior mechanic's lien is extinguished upon foreclosure of a senior mortgage to same extent as junior lien would be extinguished upon foreclosure of senior mortgage.⁶² Section 9-108 also defeats an attempt by a junior lien (that was not satisfied out of the proceeds of the foreclosure) to encumber the land after legal title has been conveyed to the mortgage foreclosure purchaser.⁶³

Although IA, as the contractor, has a contract claim against BMI that survived the mortgage foreclosure, the mechanic's lien claim of IA is a remedy that is limited to a lien on the specific land and when the lien no longer exists, a claim for that lien no longer exists.⁶⁴

John B. Beckman

F. A cause of action exists in Maryland for wrongful discharge for sex discrimination against an employer with less than fifteen employees. When there is direct evidence of discrimination, a jury instruction that where the same person hires and fires the employee there is an inference that the discharge was not due to the employee's sex is not applicable. Molesworth v. Brandon⁶⁵

1. Facts

Dr. Linda Molesworth, a recent graduate from veterinary school, began working for Dr. Randall Brandon (Brandon) whose veterinary practice concentrated on thoroughbred horses. There were two other male members of the practice and Molesworth was the first female full-time veterinarian employed by Brandon. Molesworth's primary duty

58. See *Carney*, 341 Md. at 716, 672 A.2d at 657.

59. See *id.* at 714, 672 A.2d at 656.

60. See *id.*

61. See *id.* at 714-15, 672 A.2d at 656.

62. See *id.*

63. See *id.*

64. See *id.* at 715, 672 A.2d at 656.

65. 341 Md. 621, 672 A.2d 608 (1996).

was working at the Laurel racetrack administering shots to horses.

During Molesworth's employment, which was from July 1, 1988 to July 13, 1990, she was given two pay increases and numerous favorable evaluations. There were, however, several complaints from trainers at the racetrack stating that they did not want a female veterinarian at the racetrack. On July 13, 1990, just two weeks after her second pay increase, Molesworth met with Brandon and Palmer, who had a contract to acquire 48% of the stock in the incorporated practice, and Brandon informed her that her contract would not be renewed because of complaints from trainers. Molesworth asked if she was being fired because she was a woman. Molesworth testified that Palmer replied "Yes, that's part of it."⁶⁶ According to Molesworth, Brandon nodded in agreement. Palmer and Brandon both testified that they answered "no" to Molesworth's question.

Molesworth filed a wrongful discharge suit in the Circuit Court of Maryland for Anne Arundel County. The jury awarded Molesworth \$39,198 in damages.⁶⁷

2. Analysis

The issues before the Court of Appeals of Maryland were: (1) whether a common law cause of action for wrongful discharge of a female employee based on sex discrimination lies against an employer with less than fifteen employees; and (2) whether the court must instruct a jury that where the same person hires and fires the employee there is an inference that the discharge was not due to the employee's sex.⁶⁸

First, the court of appeals held that there is a cause of action for wrongful discharge for sex discrimination against an employer with less than fifteen employees.⁶⁹ Maryland recognizes a cause of action for an employer's wrongful discharge of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy.⁷⁰ A plaintiff must allege a particular statute with some specificity to show the conduct was violative of public policy.⁷¹ The court concluded that section 14 of the Fair Employment Practices Act, Maryland Code, Article 49B (the Act) provides a sufficiently clear mandate of public policy against sex discrimination to support Molesworth's claim for wrongful discharge even though the Act exempts employers with less than fifteen employees.⁷² The existence of this exception does not

66. *Id.* at 626, 672 A.2d at 610.

67. *See id.* at 627, 672 A.2d at 611.

68. *See id.* at 624, 672 A.2d at 609-10.

69. *See id.* at 637, 672 A.2d at 616.

70. *See id.* at 629, 672 A.2d at 612.

71. *See id.*

72. *See id.* at 637, 672 A.2d at 616.

change the Act's declaration that sex discrimination is against public policy.⁷³

Second, the court of appeals held that a jury instruction stating that when the same person hires and fires the employee there is an inference that the discharge was not due to the employee's sex is not applicable in a case, such as this one, with direct evidence of discrimination.⁷⁴ The court of appeals held that in this case there was direct evidence of discrimination, that is, testimony of Molesworth that the defendant admitted the discharge was because of her gender.⁷⁵ Thus, the inference was not applicable.⁷⁶ Therefore, the trial court properly denied the defendant's requested instruction.⁷⁷

John B. Beckman

*G. Lessor of motor vehicle must provide primary liability insurance up to the statutory minimum to cover operation of a rental vehicle, regardless of whether the driver is authorized by the rental agreement to operate rental vehicle. Enterprise Leasing Co. v. Allstate Ins. Co.*⁷⁸

1. Facts

On August 8, 1991, Grace Sonde leased an automobile from Enterprise Leasing Company (Enterprise), a self-insured entity that is in the business of leasing automobiles to the public. Under the terms the rental agreement, the car could not be driven by anyone under the age of twenty-one without the owner's written permission or by anyone other than the renter without written consent of the owner. Sonde specifically declined to request permission for anyone else to drive the vehicle. Three days later, however, Sonde allowed her seventeen year-old son, David Sonde (David), to operate the Enterprise rental vehicle. David was subsequently involved in an accident while driving the Enterprise vehicle, in which Stephany Witt, a passenger in the other car, was injured.

At the time of the accident, Allstate Insurance Co. (Allstate) had an automobile insurance policy in effect that provided liability coverage

73. *See id.*

74. *See id.* at 638, 672 A.2d at 616.

75. *See id.* at 638-39, 672 A.2d at 616-17. Although the jury instruction is not applicable, the defendant is not precluded from making the "same actor" argument to the jury. *See id.* at 645-46, 672 A.2d at 620.

76. *See id.*

77. *See id.* at 646, 672 A.2d at 620-21.

78. 341 Md. 541, 671 A.2d 509 (1996).

for both Grace and David Sonde. After Witt filed suit against Grace and David Sonde, the Sondes submitted the claim to Allstate to provide coverage and to defend the suit. Allstate in turn submitted the claim to Enterprise, contending that Enterprise was required to provide primary insurance coverage up to the statutory minimum coverage required by Maryland law. After Enterprise denied responsibility for primary coverage, Allstate sought a declaratory judgment in the Circuit Court for Anne Arundel County that Enterprise was obligated to provide primary coverage for the claim, which was granted in Allstate's favor. Prior to consideration by the Court of Special Appeals of Maryland, the State's highest court granted a writ of certiorari on its own motion and affirmed.

2. Analysis

The sole issue presented to the Court of Appeals of Maryland was whether the lessor of a rental vehicle is relieved of financial responsibility for third party claims resulting from the negligent operation of its rental vehicle, when the operation of the vehicle was in violation of the express terms of the rental agreement.⁷⁹ In reaching an answer to this question, the court focused on language contained in Section 18-102(b) of the Maryland Transportation Article of the Annotated Code of Maryland, which requires security to be provided for rental vehicles to cover the "owner of the vehicle and each person driving or using the vehicle with the permission of the owner or lessee . . . [n]otwithstanding any provision of the rental agreement to the contrary."⁸⁰ The court then concluded that the plain language of section 18-102(b) indicates "that no term or condition of a private rental agreement may interfere with the coverage required"⁸¹ under this section, and therefore, "Enterprise could not 'contract away its statutorily-imposed risk by inserting in its rental agreement restrictive clauses that narrow the statutory requirements.'"⁸²

Further, section 18-106, which provides for the enforcement of provisions in rental contracts such as the one in the instant case,⁸³ does not effect the lessor's obligation under section 18-102(b) to provide the required security.⁸⁴ To hold otherwise would be inconsistent with the

79. *See id.* at 543, 671 A.2d at 510.

80. MD. CODE ANN., TRANSP. § 18-102(b) (1992 & Supp. 1995) (emphasis added).

81. *Enterprise Leasing*, 341 Md. at 547, 671 A.2d at 513.

82. *Id.* at 549, 671 A.2d at 513 (quoting *Consolidated Enters., Inc. v. Schwindt*, 833 P.2d 706, 710 (Ariz. 1992)).

83. Section 18-106 provides, in pertinent part, "[i]f a person rents a motor vehicle under an agreement not to permit another person to drive the vehicle the person may not permit any other person to drive the rented motor vehicle." TRANSP. § 18-106(a).

84. *See Enterprise Leasing*, 341 Md. at 547-48, 671 A.2d at 513.

“[n]otwithstanding any provision of the rental agreement to the contrary” language of section 18-102(b).⁸⁵ Thus, the court held that section 18-102(b) requires the lessor to cover damages to third parties under its required security where any operator, whether authorized or unauthorized to operate the vehicle under the terms of the rental agreement, drives or uses a rental vehicle.⁸⁶

Joseph R. Salko

*H. Conflicting interpretations of insurance policy language in judicial opinions is not determinative of, but is a factor to be considered, in determining the existence of ambiguity. Sullins v. Allstate Insurance Co.*⁸⁷

1. Facts

In 1990, the Allstate Insurance Company (Allstate) issued a Deluxe Homeowners Policy to Reverend D. Paul Sullins and Patricia H. Sullins (Sullinses). An endorsement to the policy, added later that year, provided liability coverage to the Sullinses' rental properties, including the property located at 30 South Fulton Avenue in Baltimore, Maryland. The policy contained the following exclusion, the interpretation of which would later result in the litigation of this case: “We do not cover bodily injury or property damage which results in any manner from the discharge, dispersal, release, or escape of: a) vapors, fumes, acids, toxic chemicals, toxic liquids or toxic gasses; b) waste materials or other irritants, contaminants or pollutants.”⁸⁸

In 1993, suit was filed in the Circuit Court for Baltimore City by a tenant residing in the 30 South Fulton Avenue property against the Sullinses. The complaint alleged, *inter alia*, that the Sullinses were negligent in allowing lead paint to chip and flake from the interior of the premises, resulting in injuries to an infant child who ingested the lead paint. Allstate responded by filing suit in the United States District Court for the District of Maryland, alleging that the facts as set forth in the plaintiff's complaint fell within the express exclusion in the policy, and thus had no duty to defend the Sullinses. The district court then certified the following question to the Court of Appeals of Maryland: Whether an insurance company has a duty to defend and/or indemnify its insured in an action alleging injury from exposure to

85. *Id.*

86. *See id.* at 548, 671 A.2d at 513.

87. 340 Md. 503, 667 A.2d 617 (1995).

88. *Id.* at 506-07, 667 A.2d at 618.

lead paint where the insurance policy contains an exclusion such as the one contained in the Allstate policy. The court of appeals held that Allstate had a duty to defend.

2. Analysis

In answering the certified question, the court of appeals examined the language of the Allstate policy, in addition to other jurisdictions' treatment of this issue. Starting with the general premise that an insurer has a duty to defend its insured if there is a potentiality that a claim may be covered by the policy,⁸⁹ the court looked to the terms of the pollution exclusion in the Allstate policy to determine whether there existed an ambiguity, such that a reasonable person would interpret the exclusion to apply to lead paint.⁹⁰ Utilizing Webster's Dictionary,⁹¹ the court found that several of the terms in the exclusion, including "contaminants," "pollutants" and "chemicals," were susceptible of two interpretations by a reasonably prudent person.⁹² Since no extrinsic evidence was proffered by Allstate to clarify the intentions of the parties involved, the court concluded that the policy must be construed against Allstate as the drafter.⁹³ Thus, the pollution exclusion clause did not remove Allstate's duty to defend the Sullinses in the underlying lead paint poisoning action.⁹⁴

The court then discussed other jurisdictions' treatment of the issue to determine what effect conflicting interpretations of policy language in judicial opinions had in deciding whether ambiguity exists. The court rejected the reasoning of the Pennsylvania Superior Court in *Cohen v. Erie Indemnity Co.*,⁹⁵ which held that where several appellate courts, construing the same policy language, denied coverage and several others granted coverage, the conflict in judicial opinion "itself creates the inescapable conclusion that the provision in issue is susceptible to more

89. *See id.* at 509, 667 A.2d at 619-20. See also *Aetna v. Cochran*, 337 Md. 98, 651 A.2d 859 (1995) and *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975) for a discussion of an insurer's duty to defend in Maryland.

90. *See Sullins*, 340 Md. at 509-10, 667 A.2d at 620.

91. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981).

92. *See Sullins*, 340 Md. at 509-13, 667 A.2d at 620-22.

93. *See id.* at 509-10, 667 A.2d at 620. The court noted that Maryland does not follow the rule of many jurisdictions that an insurance policy is to be construed most strongly against the insurer. *See id.* at 508, 667 A.2d at 619. Rather, where terms of a policy are ambiguous, extrinsic and parol evidence may be considered to ascertain the intentions of the parties. *See id.* However, if no extrinsic or parol evidence is introduced, or if the ambiguity remains after such evidence is examined, the policy will be construed against the insurer as the drafter of the document. *See id.* at 508-09, 667 A.2d at 619.

94. *See id.* at 518, 667 A.2d at 624.

95. 432 A.2d 596 (Pa. Super. Ct. 1981).

than one interpretation.’⁹⁶ Rather, the court followed language from the Court of Appeals of New York decision in *Breed v. Insurance Co. of North America*,⁹⁷ which noted that “[s]urely we would be abdicating our judicial role were we to decide such cases by the purely mechanical process of searching the nation’s courts to ascertain if there are conflicting decisions.’⁹⁸ Thus, the court concluded that conflicting interpretations of policy language in judicial opinions is not conclusive in determining the existence of ambiguity, but is a factor to be considered in the analysis.⁹⁹

Joseph R. Salko

I. A subsequent fall on ice while going to a physical therapist’s office for treatment of a compensable injury suffered three years earlier is not a direct and natural result of the original injury.
*Mackin & Associates v. Harris*¹⁰⁰

1. Facts

Dean Harris, a workers’ compensation claimant, suffered a compensable injury in 1989 while employed with Mackin & Associates (Mackin). Harris subsequently terminated his employment with Mackin and became self-employed. In 1993, while self-employed, Harris was injured when he slipped on a patch of ice and fell. Harris sought additional benefits for the subsequent slip and fall accident because, he said, the fall occurred while he was on his way to a physical therapy appointment to receive treatment for the earlier compensable injury. Harris contended that the second accident was a consequence of the first and should therefore be compensable as well.

After a claim to the Workers’ Compensation Commission was denied, Harris appealed to the Circuit Court for Montgomery County, and the circuit court entered summary judgment in favor of Mackin. Harris then appealed to the Court of Special Appeals of Maryland, and that court reversed. The Court of Appeals of Maryland granted Mackin’s petition for certiorari to determine whether the injury he sustained in the second accident “naturally result[ed] from an accidental injury that arises out of and in the course of employment,”¹⁰¹ such

96. *Id.* at 599.

97. 385 N.E.2d 1280 (N.Y. 1978).

98. *Id.* at 1283 (quoting *Hastigan v. Casualty Corp. of Am.*, 124 N.E. 789 (N.Y. 1919)).

99. *See Sullins*, 340 Md. at 518, 667 A.2d at 624.

100. 342 Md. 1, 672 A.2d 1110 (1996).

101. *Id.* at 3, 672 A.2d at 1111.

that it would be compensable under the Maryland Workers' Compensation Act (the Act).

2. Analysis

Harris argued on appeal that the 1993 accident naturally resulted from the 1989 accident because but for the 1989 accident he would not have been required to go to the therapist in 1993, and but for the requirement of that visit he would not have fallen on the ice at that time and place.¹⁰² Initially, the court acknowledged that a subsequent injury caused by an earlier work-related accident may be compensable even though the subsequent injury occurred when the claimant was not pursuing the employer's business.¹⁰³ Moreover, the court stated, complications flowing directly from treatment of a compensable injury are covered under the Act even if the complications result from negligent medical treatment.¹⁰⁴ The court refused, however, to extend the concept of causation to "embrace every subsequent accident that may occur while going to and coming from a doctor or other health care provider or obtaining or taking medication for an original compensable injury."¹⁰⁵

In holding that a subsequent fall on ice while going to a therapist's office for treatment of a compensable injury suffered three years earlier is not a direct and natural result of the original injury,¹⁰⁶ the court specifically rejected the "but for" test as solely determinative of causation.¹⁰⁷ The court noted that this expanded concept of causation would produce an unusual result.¹⁰⁸ That is, under the workers' compensation laws a claimant would be denied coverage for an ordinary accident that occurred while the claimant was going to or coming from actual employment.¹⁰⁹ To permit recovery in the instant case would enable a claimant to be compensated if the same accident occurred while the claimant was going to or coming from a doctor visit for treatment of injuries suffered in an earlier compensable accident.¹¹⁰ Rather than expanding the concept of causation in this manner, the court reiterated the long settled rule of causation that a "claimant

102. *See id.*

103. *See id.* at 4, 672 A.2d at 1111 (citing *Great Atl. & Pac. Tea Co. v. Hill*, 201 Md. 630, 95 A.2d 84 (1953)).

104. *See id.* at 5, 672 A.2d at 1112 (citing *Nazario v. Washington Adventist Hosp.*, 45 Md. App. 243, 412 A.2d 1271 (1980)).

105. *See id.* at 7, 672 A.2d at 1113.

106. *See id.* at 8, 672 A.2d at 1113.

107. *Id.* The "but for" test asks: but for the first injury and the need for treatment for it, would the second accident have occurred? *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

must establish 'a direct causal connection' between the original accidental injury and the subsequent injury or condition."¹¹¹

Joseph R. Salko

*J. Officers of close corporations who make conscious and deliberate decisions not to purchase workers' compensation insurance for themselves cannot claim the status of covered employees for the purpose of collecting benefits from the Uninsured Employers' Fund. Uninsured Employers' Fund v. Lutter*¹¹²

1. Facts

In 1991, William Lutter was injured in a work-related accident while working for Lutter Construction, Inc., a Maryland close corporation¹¹³ wholly owned by Lutter and his wife. Lutter served as president of the corporation, and his wife was vice-president. When Lutter was injured in 1991, Lutter was the corporation's only employee. Significantly, the corporation did not have workers' compensation insurance at the time of Lutter's injury. Approximately six months prior to the accident, Lutter discovered that his insurance with Aetna included liability coverage but not workers' compensation coverage. However, Lutter decided not to purchase workers' compensation coverage for the corporation upon the advice of his insurance agent who suggested that it was not necessary as long as he was the corporation's only employee and had health insurance.

After spending nearly two months in the hospital following a serious job related injury, Lutter filed a claim with the Workers' Compensation Commission (the Commission), seeking benefits from his close corporation pursuant to the Maryland Workers' Compensation Act (the Act).¹¹⁴ Because the corporation did not have workers' compensation insurance, Lutter sought benefits from the Uninsured Em-

111. *Id.* at 10-11, 672 A.2d at 1114.

112. 342 Md. 334, 676 A.2d 51 (1996).

113. "A close corporation is one in which the stock is subject to certain transfer restrictions, and which has elected close corporation status by a unanimous vote of its stockholders." *Id.* at 341 n.3, 676 A.2d at 54 n.3 (citing William G. Hall, Jr., *The New Maryland Close Corporation Law*, 27 MD. L. REV. 341, 341-42 (1967)). Close corporations are typically characterized by a "limited number of stockholders who actively participate in the business," stockholders who have a close personal relationship, and no established market for the corporate stock. *Id.* (citing William G. Hall, Jr., *The New Maryland Close Corporation Law*, 27 MD. L. REV. 341, 341-42 (1967)).

114. MD. CODE ANN., LAB. & EMPL. §§ 9-101 to -1108 (1991 & Supp. 1996).

ployers' Fund,¹¹⁵ which was established by the State to provide workers' compensation benefits for injured workers whose employers fail to purchase workers' compensation insurance for them. The Commission denied Lutter's claim for benefits on the ground that Lutter was not a "covered employee" within the meaning of the Act. After the Circuit Court for Prince George's County affirmed the ruling of the Commission, Lutter appealed to the Court of Special Appeals of Maryland which reversed the circuit court, finding that Lutter was a "covered employee" under the Act and therefore entitled to benefits from the Uninsured Employers' Fund. The Court of Appeals of Maryland granted certiorari to determine whether "officers of Maryland close corporations, who decide not to purchase workers' compensation insurance for themselves but fail to notify the State of their decision and are subsequently injured working for the corporation, may collect workers' compensation benefits from the state-operated Uninsured Employers' Fund."¹¹⁶ The court of appeals reversed the intermediate appellate court.¹¹⁷

2. Analysis

In determining whether Lutter was eligible to collect benefits from the Uninsured Employers' Fund, the court examined section 9-206 of the Act. Section 9-206(a) provides that "an officer of a corporation . . . is a covered employee if the officer . . . provides a service for the corporation . . . for monetary compensation."¹¹⁸ Because Lutter was performing construction work for the corporation at the time of his injury, it would appear that he would be a covered employee within the meaning of section 9-206(a).¹¹⁹ However, the Act also provides that an officer of a close corporation may elect to be exempt from coverage,¹²⁰ which becomes effective when the corporation submits a written notice of the election to the Commission and the insurer of the corporation.¹²¹ Thus, the court determined that the real question was whether Lutter effectively exempted himself from coverage under section 9-206(b) by deciding, in his capacity as corporate president, not to purchase workers' compensation insurance for himself.¹²²

115. *Id.* § 9-1002.

116. *Lutter*, 342 Md. at 336-37, 676 A.2d at 52 (holding that Lutter did not qualify for benefits under the Act).

117. In a lengthy dissent, acknowledging the law as written would produce an unsatisfactory result, Judge Karwacki criticizes the majority for ignoring the express language of the statute and leaving the law regarding workers' compensation confused and vague. *Id.* at 350-61, 676 A.2d at 58-64 (Karwacki, J., dissenting).

118. LAB. & EMPL. § 9-206(a).

119. *See Lutter*, 342 Md. at 341, 676 A.2d at 54.

120. *See* LAB. & EMPL. § 9-206(b)(1).

121. *See id.* § 9-206(c)(2).

122. *See Lutter*, 342 Md. at 341, 676 A.2d at 54.

In determining that Lutter elected to be exempt from Maryland's workers' compensation system by working as an employee of his close corporation without workers' compensation insurance,¹²³ the court found that the requirement in section 9-206(c) that the Commission be notified in writing of a corporate officer's election to be exempt exists for the benefit of the state not for the benefit of the corporate officer.¹²⁴ Because the notice provision exists solely for the benefit of the state, the state has the right to waive the notice requirement,¹²⁵ and thus, Lutter's failure to notify the Commission of his decision not to obtain workers' compensation insurance did not provide him with coverage.¹²⁶ The court reasoned that Lutter, as president of the corporation, could not use his own failure to notify the Commission as the basis for his eligibility for benefits.¹²⁷ Therefore, the court held that Lutter elected to be exempt from workers' compensation coverage by making a conscious and deliberate decision not to purchase workers' compensation insurance and thus could not claim the status of a covered employee for the purposes of collecting benefits from the Uninsured Employer's Fund.¹²⁸ In so holding, the court avoided the absurd result of enabling officers of close corporations to obtain free workers' compensation coverage from the Uninsured Employer's Fund by not buying insurance for themselves and not notifying the Commission of their decision.

Joseph R. Salko

II. CIVIL PROCEDURE

*A. A lessor is required to order a transcript for purpose of an appeal to circuit court when the amount in controversy is more than \$2500 based on the value of tenant's right to possession. Cottman v. Princess Anne Villas*¹²⁹

1. Facts

Beginning in October of 1987, Princess Anne Villas (lessor) and Tyzanna Cottman entered into a series of yearly lease agreements.¹³⁰

123. *See id.* at 343-44, 676 A.2d at 55-56.

124. *See id.* at 342-43, 676 A.2d at 55.

125. *See id.* at 343, 676 A.2d at 55 (citing *Blaustein v. Aiello*, 229 Md. 131, 138, 182 A.2d 353, 357 (1962)).

126. *See id.* at 343, 676 A.2d at 55.

127. *See id.* at 345, 676 A.2d at 56. The court noted that Lutter, by "occupying the dual roles of employer/employee . . . was 'required to discharge the responsibilities of each or suffer the consequence of failing either one.'" *Id.* (citing *Molony v. Shalom Et Benedictus*, 46 Md. App. 96, 103, 415 A.2d 648, 651 (1980)).

128. *See id.* at 345-46, 676 A.2d at 56.

129. 340 Md. 295, 666 A.2d 1233 (1995).

130. The rent was paid partially by a federal subsidy and partially by Cottman. *See id.* at 297, 666 A.2d at 1234.

Because Cottman was delinquent on several rent payments, Princess Anne Villas notified Cottman that it would not renew the lease. Cottman held over and Princess Anne Villas filed a complaint in the district court seeking possession for breach of lease. The district court found for Cottman. Princess Anne Villas appealed to the circuit court. Cottman moved to dismiss for failure to transmit the record required by Maryland Rule 7-109, when the amount in controversy exceeds \$2500. The circuit court denied Cottman's motion to dismiss finding the amount in controversy to be \$167.

2. Analysis

Disagreeing with the circuit court's determination of the amount in controversy, the Court of Appeals of Maryland stated that the correct way to calculate the amount in controversy in an action for possession was to determine the value of the tenants right to possession.¹³¹ This is done by determining "whether the fair market rent 'over [Cottman's] remaining life span, or at least over a period of years' was greater than \$2500."¹³² The court found the aggregate amount to exceed \$2500, therefore it reversed the circuit court judgment because the appeal to the circuit court should have been on the record, and the failure of Princess Anne Villas to transmit the record was sufficient grounds to dismiss the appeal.¹³³

Christopher J. Marchand

B. When the appellate court remands a tort case for a new trial on punitive damages, the question whether a claim for punitive damages should be submitted to a jury depends on the evidence adduced at the new trial and not upon the evidence from the prior trial. Middle States Holding Co. Inc. v. Thomas¹³⁴

1. Facts

In April 1990, Everett Thomas and the predecessor of Middle States Holding Company, Inc. (Middle States) entered into a contract

131. *See id.* at 298, 666 A.2d at 1234 (citing *Purvis v. Forrest Street Apartments*, 286 Md. 398, 408 A.2d 388 (1979)).

132. *Id.* at 299, 666 A.2d at 1235 (quoting *Carroll v. Housing Opportunities Comm'n* 306 Md. 515, 527, 510 A.2d 540, 546 (1986)). This method is used to determine the value of possession because a tenant in federally subsidized housing has a continuing right to possession for an indefinite time period. *See Carroll*, 306 Md. at 525, 510 A.2d at 545. "A tenant in federally subsidized housing can only be evicted for 'material noncompliance' with the lease or other good cause." *Cottman*, 340 Md. at 298, 666 A.2d at 1234. Therefore, Cottman had a right to possession until good cause for eviction could be established. *See id.* at 299, 666 A.2d at 1235.

133. *See id.* at 299, 666 A.2d at 1235.

134. 340 Md. 699, 668 A.2d 5 (1995).

for the raising of hogs on a farm leased by Thomas. In December 1990, difficulties arose between the parties, and Thomas instituted a suit against Middle States. Seeking compensatory and punitive damages Thomas brought counts alleging trespass, breach of contract, and conversion. Thomas also brought a count under the federal Racketeer Influenced and Corrupt Organizations Act¹³⁵ which was dismissed. The court, upon a motion filed by Middle States, dismissed the trespass count and Thomas's request for punitive damages. The jury awarded Thomas \$9411.60 on the contract count and \$12,853.00 on the conversion count. On appeal, the Court of Special Appeals of Maryland held that the trial court erred in dismissing the claim for punitive damages with respect to the trespass and conversion counts because the complaint sufficiently alleged "actual malice."¹³⁶ The court of special appeals held that "[i]n the event that a new trial is held on Count II (trespass) or Count III (conversion), the issue of punitive damages must be submitted to the jury."¹³⁷ Middle States appealed to the Court of Appeals of Maryland arguing that the court of special appeals could not require the issue of punitive damages to be submitted to the jury upon new trial because the evidence at the new trial may not be sufficient to submit the issue to the jury.

2. Analysis

The Court of Appeals of Maryland agreed with Middle States that the determination of whether the issue of punitive damages will be submitted to a jury is determined by the evidence adduced at the new trial.¹³⁸ The court stated "[s]imply because an appellate court believes that the evidence at the prior trial was sufficient to generate a jury issue on punitive damages does not mean the evidence at the trial to be held in the future will be sufficient."¹³⁹ Therefore, the court of special appeals cannot require the issue of punitive damages to be submitted to the jury in the event a new trial is ordered.¹⁴⁰

Christopher J. Marchand

C. A defendant in an encroachment case who seeks to avoid injunctive relief through the doctrine of comparative hardship must prove innocent mistake by a preponderance of the evidence. Urban Site Venture II Ltd. v. Levering Associates Ltd. Partnership¹⁴¹

135. 18 U.S.C. §§ 1961-1968 (1994).

136. Maryland law does not permit punitive damages in claims for breach of contract. *See id.* at 702, 668 A.2d at 7 (citing *Alexander v. Evander*, 336 Md. 635, 645 n.8, 650 A.2d 260, 265 n.8 (1994)).

137. *Id.* at 702-03, 668 A.2d at 7.

138. *See id.* at 703, 668 A.2d at 7 (citing *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 472, 601 A.2d 633, 659 (1992)).

139. *Id.* at 704, 668 A.2d at 8.

140. *See id.*

141. 340 Md. 223, 665 A.2d 1062 (1995).

1. Facts

Urban Site Venture II Limited Partnership and LaSalle Partners (Urban Site) planned and began construction on a parking garage adjacent to property owned by Levering Associates Limited Partnership (Levering). Urban Site had already built three stories of the garage when Levering filed suit alleging an encroachment. Levering sought an injunction ordering removal of the encroachment and damages. At trial, the garage was found to encroach a total of 1.3 square feet on Levering's property. The trial court, using a preponderance of the evidence standard, found the encroachment to be the result of an innocent mistake. Levering was awarded damages of \$302 and the injunction was denied. Levering appealed to the Court of Special Appeals of Maryland which reversed the circuit court's ruling and granted the injunction. The court of special appeals found that Urban Site failed to provide compelling evidence necessary to establish innocent mistake under the doctrine of comparative hardship. Upon appeal, the Court of Appeals of Maryland reversed the judgment of the court of special appeals and affirmed the trial court's decision.

2. Analysis

The doctrine of comparative hardship blocks a permanent injunction if the court determines the benefit of the injunction is minimal compared to the inconvenience and damage to the defendant.¹⁴² To prevail, the party seeking to avoid the issuance of a permanent injunction bears the burden of proving that its mistake was innocent.¹⁴³ First the court must find that the defendant's mistake was innocent.¹⁴⁴ In determining the innocence of the mistake, the Court of Special Appeals of Maryland used a heightened level of scrutiny due to "the sanctity of private property."¹⁴⁵ The Court of Appeals of Maryland rejected the heightened standard used by the court of special appeals because a preponderance of evidence standard has been consistently applied by the court in previous cases involving

142. *See id.* at 231, 665 A.2d at 1065 (citing *Eastern v. Dundalk Holding Co.*, 199 Md. 303, 305, 86 A.2d 404 (1952) (citing *Hasselbring v. Koepke*, 248 N.W. 869, 873 (1933))).

143. *See id.* at 228, 665 A.2d at 1064 (citing *Griffin v. Red Run Lodge*, 610 F.2d 1198 (4th Cir. 1979)).

144. *See id.* at 232, 665 A.2d at 1066. An innocent mistake is one made in good faith. *See id.* at 234, 665 A.2d at 1067. In this case, the court found that Urban Site was acting in good faith because it relied on an expert's survey and stopped work to recheck the survey as soon as it was made aware of Levering's objections. *See id.*

145. *Id.* at 229, 665 A.2d at 1064-65.

private property ownership.¹⁴⁶ Therefore, a defendant in an encroachment case who seeks to avoid injunctive relief through the doctrine of comparative hardship must prove innocent mistake by a preponderance of the evidence.¹⁴⁷

Christopher J. Marchand

*D. A motion for new trial on grounds that the transcript is unavailable for appellate review can only be granted when the lost portion is relevant to appellate issues and can not be reconstructed through diligent efforts. Bradley v. Hazard Technology Co.*¹⁴⁸

1. Facts

On April 19, 1993, Hazard Technology Company (Hazard) filed suit against Bradley, a terminated employee, to recover money it had paid Bradley prior to termination. The district court entered a judgment against Hazard. A timely notice of appeal was filed, however, because of a faulty audio tape a full transcript of the district court trial was not available.¹⁴⁹ Before Hazard filed an appeal memorandum as required by Maryland Rule 7-113(d)(2), it moved to have the case remanded for new trial on the grounds that since a full transcript was not available it could not "adequately prepare for or prosecute its appeal."¹⁵⁰ The court granted the motion for a new trial. Bradley filed a petition for certiorari arguing that the circuit court erred by granting a new trial without first requiring Hazard to submit a memorandum explaining the basis for appeal, and then determining whether a sufficient record could be reconstructed.

2. Analysis

Maryland Rule 7-113(d)(3) requires the appealing party to file an appeal memorandum to present specific allegations of error, pose

146. *See id.* at 229, 665 A.2d at 1065.

147. *See id.*

148. 340 Md. 202, 665 A.2d 1050 (1995).

149. In civil cases, appeals from district court are on the record if the amount in controversy exceeds \$2500. *See id.* at 204 n.1, 665 A.2d at 1052 n.1 (citing MD. CODE ANN., CTS. & JUD. PROC. § 12-401(f) (Supp. 1995)). Maryland Rules require the recording of the entire trial on the merits excluding opening statements and closing arguments. *See id.* at 204 n.2, 665 A.2d at 1052 n.2 (citing MD. R. 1224(d)(2)(a)).

150. *Id.* at 205, 665 A.2d at 1052.

any questions for appellate review, and provide an argument in support of its position.¹⁵¹ The Court of Appeals of Maryland held that the circuit court erred when it granted Hazard's motion for a new trial on the basis that a full transcript was not available.¹⁵² The court stated that it had consistently held that the unavailability of a complete transcript is not in itself sufficient to warrant a new trial.¹⁵³ The appellant has the burden to assert error and prove that the omissions from the record "are not merely inconsequential, but are in some manner relevant on appeal."¹⁵⁴ The appellant must, if possible, reconstruct the record for review.¹⁵⁵ A new trial may be warranted, however, "[i]f an appellant can demonstrate to the circuit court that error may have occurred at trial, and that a record sufficient to allow for a fair consideration [of the issues] cannot be reconstructed."¹⁵⁶

Christopher J. Marchand

E. The Batson rule applies to the exclusion of white jurors based on race. A defendant's objection to the discharge of the first jury pool is not waived by the acceptance, by defendant's counsel, of a jury chosen from a second jury pool. Gilchrist v. State¹⁵⁷

1. Facts

During jury selection at the trial of Gary Gilchrist, defense counsel exercised seven peremptory challenges all of which were directed at white members of the venire. After the seventh peremptory challenge, the State objected "arguing that the defense was attempting to remove all white prospective jurors in violation of the principles set forth in *Batson v. Kentucky*."¹⁵⁸ The court proceeded to ask the defendant to give reason for striking all seven jurors. In the ensuing exchange, the court told Gilchrist: "[W]hen you have stricken seven jurors, potential jurors, . . . and they are all white and they all have different profiles, you're going to have to come up with a satisfactory

151. *See id.* at 206, 665 A.2d at 1053.

152. *See id.* at 207, 665 A.2d at 1053.

153. *See id.* at 208, 665 A.2d at 1053 (citations omitted).

154. *Id.* at 208, 665 A.2d at 1054 (quoting *Smith v. State*, 291 Md. 125, 136, 433 A.2d 1143, 1149 (1981)).

155. *See id.* at 211-12, 665 A.2d at 1055.

156. *Id.* at 213, 665 A.2d at 1055. The court stated that "only in 'rare cases' is a retrial justified because of a missing or incomplete transcript." *Id.*

157. 340 Md. 606, 667 A.2d 876 (1995).

158. *Id.* at 612, 667 A.2d at 878-79.

explanation that persuades me that your reason for striking him was not racial”¹⁵⁹ The court found that the explanation given by defendant for striking four of the seven potential jurors was unsatisfactory.¹⁶⁰ The court excused the jury pool and defense counsel objected. The selection process proceeded to a second jury pool, and defense counsel found the second jury to be acceptable. Gilchrist was subsequently convicted on all charges. On appeal, Gilchrist argued that *Batson* was inapplicable to peremptory challenges against white jurors, and that even if *Batson* applied, the trial court erred in its determination that “the prosecution had made a *prima facie* showing of discrimination.”¹⁶¹ The State argued that the defense counsel objection was not preserved because defense counsel waived the objection to the first jury by accepting the second jury. Gilchrist appealed to the Court of Special Appeals of Maryland, which affirmed Gilchrist’s conviction.¹⁶² The court of appeals granted certiorari and affirmed.

2. Analysis¹⁶³

First, the court addressed the State’s waiver argument as a threshold issue. The court stated that it had consistently held that an objection to the exclusion of a juror is waived if the objecting counsel finds the jury to be acceptable at the conclusion of the selection process.¹⁶⁴ The court, however, distinguished the situation in this case from earlier cases. The court noted that previous cases

159. *Id.* at 615, 667 A.2d at 880.

160. Among reasons found unsatisfactory by the court were the clothing and manner of a juror, the education level attained by a juror and his studious appearance, the address of a juror, and the inability of the defense counsel to recall the reason he struck a specific juror. *See id.* at 615-16, 667 A.2d at 880.

161. *Id.* at 616, 667 A.2d at 881.

162. 97 Md. App. 55, 627 A.2d 44 (1993).

163. Judge Chasanow, joined by Judge Bell, wrote separately “to clarify that a *prima facie* case of discrimination under *Batson* merely shifts the burden to the striking party to offer a race and gender-neutral reason for the challenge; it does not create a rebuttable presumption that, in effect, shifts the ultimate burden of proof.” *Id.* at 606, 667 A.2d at 892 (Chasanow, J., concurring). According to Judge Chasanow, the majority made the same mistake the eighth circuit made in *Purkett v. Elem*, 25 F.3d 679 (8th Cir. 1994), *overruled by* 115 S. Ct. 1769 (1995). The Supreme Court overruled *Purkett* because the eighth circuit collapsed steps two and three of the *Batson* analysis. *See Gilchrist*, 340 Md. at 631-34, 667 A.2d at 888-89 (Chasanow, J., concurring) (discussing *Purkett*, 115 S. Ct. at 1769). Judge Chasanow also wrote that the issue of waiver was moot because the defendant was entitled to, and did assemble, a properly selected jury. *See id.* at 630, 667 A.2d at 887 (Chasanow, J., concurring).

164. *See id.* at 617, 667 A.2d at 881 (citations omitted).

did not involve two separate jury pools, an objectionable first seated jury from the first pool, and a subsequently acceptable jury selected entirely from the second pool.¹⁶⁵ In previous cases, the objection was waived because the included or excluded juror was from the same jury pool as the jury that actually heard the case. The court held that the objection to the dismissal of the first panel of jurors is not waived even though the objecting counsel found the second jury panel acceptable.¹⁶⁶

Next the court addressed whether *Batson* is applicable to the exclusion of white jurors.¹⁶⁷ The court stated that “[t]he majority of courts throughout the country which have considered *Batson*’s applicability to excluded white jurors have determined that the same reasoning underlying the court’s decision in *Batson* applies with equal force to race-based peremptory challenges exercised against white prospective jurors.”¹⁶⁸ The court held that, under both Article 24 of the Maryland Declaration of Rights and the Equal Protection clause of the Fourteenth Amendment, peremptory challenges cannot be exercised against white persons solely because of their race.¹⁶⁹

Gilchrist’s last claim was that the process by which the *Batson* challenge was utilized by the trial court was flawed.¹⁷⁰ Gilchrist argued that the prosecution never made a *prima facie* showing that the peremptory challenge was exercised in a racially discriminatory manner.¹⁷¹ In *Batson*, the Supreme Court articulated a three-step process to assess whether peremptory challenges were being exercised in a racially discriminatory manner.¹⁷² First, the complaining party must make a *prima facie* showing that the other party has exercised its peremptory challenges on a discriminatory basis.¹⁷³ Second, once a *prima facie* case is established, the burden shifts to the other party

165. *See id.* at 618, 667 A.2d at 881.

166. *See id.* at 618, 667 A.2d at 882. The court’s rationale was that when a jury is found to be acceptable after an objection has been made to include or exclude a prospective juror from the same pool that the final jury was selected, “[t]he parties’ final position, [finding the jury acceptable], is directly inconsistent with his or her earlier complaint.” *Id.* However, the same inconsistency is not present when the objection is aimed at an entirely different pool of jurors than that which the objecting counsel found acceptable. *See id.*

167. *See id.* at 621, 667 A.2d at 883.

168. *Id.* (citations omitted).

169. *See id.* at 624-25, 667 A.2d at 885. The court made clear that “[b]lack are not the only cognizable [racial] group to which *Batson* applies” *Id.*

170. *See id.* at 625, 667 A.2d at 885.

171. *See id.*

172. *See id.* (discussing *Batson v. Kentucky*, 476 U.S. 79, 93-97 (1986) and citing *Purkett v. Elem*, 115 S. Ct. 1769, 1770-71 (1995); *Whittlesey v. State*, 340 Md. 30, 46, 665 A.2d 223, 231 (1995)).

173. *See id.*

to offer race-neutral explanations for excluding the jurors.¹⁷⁴ “Finally, the trial court must ‘determine [] whether the opponent of the strike has carried his burden of proving purposeful discrimination.’”¹⁷⁵ The trial judge is accorded great deference in the determination of whether a *prima facie* showing has been made.¹⁷⁶ Moreover, the issue of whether a *prima facie* showing has been made becomes moot once the court has ruled on the ultimate issue of discrimination.¹⁷⁷ The court further stated that it would only overturn a judge’s decision if it was clearly erroneous.¹⁷⁸ The court held that the defendant’s reasons for exercising the peremptory challenges were insufficient and the judge’s ruling was not clearly erroneous.¹⁷⁹

Christopher J. Marchand

*F. Police officer did not properly preserve for appellate review issues of the trial court’s faulty jury instructions when he objected to sending the issues to the jury; arguments raised for the first time in an appellate brief were properly refused; the court correctly refused jury instructions that were unnecessary or inapplicable to the instant case. Fearnow v. Chesapeake & Potomac Telephone Co.*¹⁸⁰

1. Facts

In 1983, Leon C. Fearnow was a police officer with the Hagerstown Police Department. The Chief of the department placed a wire tap on Fearnow’s telephone with the assistance of other police officers and Donald K. Wood, an employee of the Chesapeake & Potomac Telephone Company of Maryland (C&P). Fearnow sued Wood and C&P for assisting with the illegal interception of his workplace telephone conversations in violation of the Maryland Wiretapping and Electronic Surveillance Act (Wiretap Act).¹⁸¹ Upon a summary judgment in favor of C&P and a reversal of a judgment in favor of Wood, the court of appeals granted certiorari to review

174. *See id.*

175. *Id.* at 625-26, 667 A.2d at 885 (citations omitted).

176. *See id.* (citing *Mejia v. State*, 328 Md. 522, 533, 616 A.2d 356, 361 (1992)).

177. *See id.* at 628, 667 A.2d at 886 (citations omitted).

178. *See id.* at 627, 667 A.2d at 886 (citing *Stanley v. State*, 313 Md. 50, 84, 542 A.2d 1267, 1283 (1988)).

179. *Id.* at 628, 667 A.2d at 886-87.

180. 342 Md. 363, 676 A.2d 65 (1996).

181. MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to -414 (1995 & Supp. 1996) (hereinafter the Wiretap Act).

Maryland's rules on the preservation of issues for appeal, as well as to examine certain provisions of the Wiretap Act.¹⁸²

2. Analysis

This case illustrated that when a party's reasons at trial for an objection to jury instructions are "starkly different" from the reasons outlined in the appellate brief, the party will not properly preserve the issue for appellate review.¹⁸³ For example, in the trial court, Fearnow objected to jury instructions that police officers are presumed to act lawfully in the line of duty.¹⁸⁴ Fearnow asserted that the presumption was confusing and not applicable.¹⁸⁵ However, on appeal Fearnow contended that section 10-402(c)(i)(ii) of the Wiretap Act nullified the presumption because the statute imposed a duty on Wood to inquire whether the police had a court order to tap the telephone line.¹⁸⁶ Since Fearnow failed to mention section 10-402(c)(i)(ii) during his trial court objection, he was barred from asserting the issue before the appellate court.¹⁸⁷

On remand, Fearnow also erred regarding his objection to an instruction on the privacy of parties on a telephone.¹⁸⁸ Fearnow objected to sending the issue of privacy to the jury because he stated that the jury was "bound by" the previous determination by the court of special appeals that he had a reasonable expectation of privacy.¹⁸⁹ However, this objection was not sufficient to alert the trial judge to the errors in his instructions.¹⁹⁰ Essentially, privacy was not a consideration under the statute because the statute only speaks to the willfulness and knowledge of the person tapping the telephone line.¹⁹¹ Thus, the court held that Fearnow did not properly preserve this issue for appeal because the trial judge did not have sufficient notice of any possible errors in his instructions.¹⁹² Consequently, the

182. *See Fearnow*, 342 Md. at 368, 676 A.2d at 67. C & P prevailed on summary judgment because the court held that, even if Wood acted in violation of the Wiretap Act, he did so outside the scope of his employment. *See id.* at 372, 676 A.2d at 69.

183. *See id.* at 381, 676 A.2d at 74; *see also* MD. R. 2-520(e).

184. *See Fearnow*, 342 Md. at 382, 676 A.2d at 74.

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.* at 378, 676 A.2d at 72-73.

189. *See id.*

190. *See id.* at 379, 676 A.2d at 73.

191. *See id.*; *see also* *Sergeant Co. v. Pickett*, 283 Md. 284, 388 A.2d 54 (1978) (holding that an objection in compliance with former Maryland Rule 554 (precursor to Maryland Rule 2-520) is properly preserved for appellate review).

192. *See Fearnow*, 342 Md. at 379, 676 A.2d at 73.

court of appeals affirmed the summary judgment in favor of C&P and ruled in favor of defendant Wood.¹⁹³

Dan Curry

III. CRIMINAL LAW

*A. The doctrine of transferred intent applies when a defendant shoots and wounds an intended victim and with the same bullet hits and kills an unintended victim. Poe v. State*¹⁹⁴

1. Facts

James Allen Poe (Mr. Poe) went to the home of his estranged wife, Karen Poe (Ms. Poe), to visit their children. A dispute ensued over Mr. Poe's plans to take the children to Florida with his girlfriend. As Ms. Poe entered her home declaring that she was going to call the police, Mr. Poe retrieved a shotgun from his car, shouted "Take this, bitch," and fired at least one shot into the house. The bullet hit and wounded Ms. Poe, continued through her and fatally wounded Kimberly Rice, the six-year-old daughter of Ms. Poe's boyfriend.

As part of his instructions to the jury, the trial judge explained the doctrine of transferred intent. The judge explained that if the jury determined that the defendant intended to kill Ms. Poe and if Ms. Poe had died they would have found Mr. Poe guilty of first degree murder, the intent could transfer and they could find Mr. Poe guilty of first degree murder of Rice. The jury convicted Mr. Poe of both attempted murder of Ms. Poe and first-degree murder of Rice. During the sentencing phase, the trial judge stated that he was "old-fashioned" and made reference to his belief in the Bible. He stated,

I guess I'm a dinosaur I still believe in good old-fashioned law and order, the Bible, and a lot of things that people say I shouldn't believe anymore I'm not going to change. Maybe one day they will say you should not sit here anymore because you are too much of a dinosaur. You

193. *See id.* at 388, 676 A.2d at 77.

194. 341 Md. 523, 671 A.2d 501 (1996).

are too conservative in criminal law. You believe too much in the Bible and law and order.¹⁹⁵

After finding no mitigating factors, the trial judge sentenced Mr. Poe to life without the possibility of parole for the murder of Rice and a consecutive 30-year sentence for the attempted murder of Ms. Poe. The Court of Special Appeals of Maryland affirmed the convictions.

Mr. Poe appealed his conviction on two grounds. First, Mr. Poe claimed that the trial court improperly applied the doctrine of transferred intent. Second, Mr. Poe argued that the trial judge's comments about his own religious beliefs required reversal of Mr. Poe's sentence. The Court of Appeals of Maryland granted certiorari and affirmed both the conviction and sentence. Judge Irma Raker, joined by Judges Rodowski and Karwacki, filed a concurring opinion.¹⁹⁶

2. Analysis

a. *Transferred Intent*

In an opinion by Judge Chasanow, the court of appeals first addressed the issue of whether transferred intent applies to the death of an unintended bystander notwithstanding the fact that the intended victim is injured by the same bullet.¹⁹⁷ Based on prior case law, transferred intent would have applied had the defendant missed Ms. Poe entirely, hitting Rice instead.¹⁹⁸ The defendant argued, however, that since the bullet he fired hit and wounded Ms. Poe, his intent was "used up" upon the completion of the crime of attempted

195. *Id.* at 533, 671 A.2d at 505-06.

196. In a concurring opinion, Judge Irma Raker, joined by Judges Rodowski and Karwacki, wrote separately to clarify that she did not believe that the court was making the dicta from *Ford v. State*, 330 Md. 682, 625 A.2d 984 (1993), binding. *See Poe*, 341 Md. at 534, 671 A.2d at 506 (Raker, J., concurring) (discussing *Ford*, 330 Md. at 708-18, 625 A.2d at 996-1001). Judge Raker also rejected the dicta in the majority opinion which narrowed the doctrine of transferred intent, making it inapplicable to "attempted murder where there is no death." *Id.* at 535, 671 A.2d at 507 (Raker, J., concurring). Instead, Judge Raker wrote, the rule should be that "transferred intent should not apply to attempted murder if no one is injured." *Id.* (Raker, J., concurring) (emphasis added). According to Judge Raker, this interpretation of the rule was necessary and important in order not to substantially interfere with the prosecution of criminals for "harm inflicted on innocent bystanders." *Id.* at 539, 671 A.2d at 509 (Raker, J., concurring).

197. *See id.* at 527-28, 671 A.2d at 503.

198. *See id.* at 530, 671 A.2d at 504 (citing *Gladden v. State*, 273 Md. 383, 390-92, 330 A.2d 176, 180-81 (1974)).

murder of Ms. Poe.¹⁹⁹ Although acknowledging that the crime of attempted murder was complete, the court nonetheless rejected Mr. Poe's argument that his intent was "used up" because his intent was to kill Ms. Poe, not *to attempt* to kill Ms. Poe.²⁰⁰

Next, the court addressed Mr. Poe's reliance on *Ford v. State*.²⁰¹ In dicta, the *Ford* court stated that transferred intent did not apply to attempted murder.²⁰² Thus, if a defendant non-fatally injures both an intended victim and an unintended victim, the defendant can only be charged with the attempted murder of the intended victim.²⁰³ Refusing to extend and apply the *Ford* dicta, the court distinguished Mr. Poe's case because, in *Poe*, the unintended victim died.²⁰⁴

The court then analogized the doctrine of transferred intent with the felony murder doctrine.²⁰⁵ The court said that the two were similar in that they both were legal fictions designed to assign liability for the murder of unintended victims.²⁰⁶ Since there is no crime of attempted felony murder, the court concluded there is no transferred intent of attempted murder.²⁰⁷ Thus, in dicta, the court seemed to narrow the application of the doctrine of transferred intent, stating that it "does not apply to attempted murder when there is no death."²⁰⁸ Because an unintended victim did die in the instant case the doctrine of transferred intent was applicable.²⁰⁹ In fashioning the test to determine whether the doctrine of transferred intent applies, the court stated that the relevant question to ask is: "[W]hat could the defendant have been convicted of had he accomplished his intended act?"²¹⁰

b. Judge's Statement of Religious Beliefs During Sentencing

The second major issue addressed by the court was the effect of the judge's statement concerning his religious beliefs during sentenc-

199. *Id.* at 528, 671 A.2d at 503.

200. *See id.* at 528-29, 671 A.2d at 503.

201. *See id.* at 529, 671 A.2d at 503-04 (discussing *Ford v. State*, 330 Md. 682, 625 A.2d 984 (1993)).

202. *See id.* at 529-30, 671 A.2d at 504 (discussing *Ford*, 330 Md. at 714, 625 A.2d at 999).

203. *See id.* at 530, 671 A.2d at 504 (discussing *Ford*, 330 Md. at 714, 625 A.2d at 999).

204. *See id.*

205. *See id.* at 529, 671 A.2d at 504.

206. *See id.*

207. *See id.*

208. *Id.*

209. *See id.* at 530, 671 A.2d at 504.

210. *Id.* at 530-31, 671 A.2d at 504 (citing *Gladden v. State*, 273 Md. 383, 390-92, 330 A.2d 176, 180-81 (1974)).

ing.²¹¹ Mr. Poe contended that his sentence was improperly given because the judge made a statement that he believed “too much in *the Bible* and law and order” during sentencing.²¹² The court rejected this contention, maintaining that despite the trial judge’s reference to his religious beliefs, the trial judge nonetheless properly weighed the factors including any possible mitigating factors.²¹³ Furthermore, the court of appeals noted that a trial judge has broad discretion in sentencing.²¹⁴

The court then distinguished this case from *United States v. Bakker*,²¹⁵ in which the Fourth Circuit held that the judge had improperly brought his own personal religious beliefs into the sentencing of the defendant.²¹⁶ The Court of Appeals of Maryland asserted that the statements made by the trial judge in *Poe* were not as extreme as those made by the sentencing judge in *Bakker*.²¹⁷ In *Bakker*, the sentencing judge stated that the defendant “had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.”²¹⁸ The Fourth Circuit suspected that the sentence somehow “reflected the fact that the court’s own sense of religious propriety had somehow been betrayed.”²¹⁹ In the instant case, the court of appeals reasoned that the statements made by the trial judge did not appear to reflect any sense of religious betrayal.²²⁰ While upholding the sentence, however, the court of appeals was careful not to express approval of the trial judge’s reference to his religious beliefs.²²¹

Jennifer R. Terrasa

*B. The Maryland civil forfeiture statute is subject to Constitutional prohibition against excessive fines; court must consider instrumentality of property and weigh proportionality of the punishment to the seriousness of offense. Aravanis v. Somerset County*²²²

1. Facts

Appellant, Aravanis, appealed from a judgment rendered in the Circuit Court of Maryland for Somerset County against his real

211. *See id.* at 531, 671 A.2d at 505.

212. *Id.* at 533, 671 A.2d at 506 (emphasis added).

213. *See id.* at 531, 671 A.2d at 505.

214. *See id.* (citing *Logan v. State*, 289 Md. 460, 480, 425 A.2d 632, 642 (1981)).

215. 925 F.2d 728 (4th Cir. 1991).

216. *See Poe*, 341 Md. at 533, 671 A.2d at 506 (discussing *Bakker*, 925 F.2d at 740).

217. *See id.* (discussing *Bakker*, 925 F.2d at 740-41).

218. *Id.* (quoting *Bakker*, 925 F.2d at 740).

219. *Id.* (discussing *Bakker*, 925 F.2d at 741).

220. *See id.* at 533-34, 671 A.2d at 506.

221. *See id.* at 534, 671 A.2d at 506.

222. 339 Md. 644, 664 A.2d 888 (1995), *cert. denied*, 116 S. Ct. 916 (1996).

property. Aravanis had pled guilty to one count of possession of a controlled dangerous substance (CDS) in sufficient quantity to indicate intent to manufacture, distribute, or dispense pursuant to Section 286 of the Crimes and Punishment Article of the Maryland Annotated Code.²²³ A 1991 search of the property conducted pursuant to a search and seizure warrant yielded marijuana and drug paraphernalia. Upon the guilty plea, Aravanis was sentenced to five years imprisonment, of which three and one-half years were suspended. Somerset County (the County) subsequently initiated forfeiture proceedings against the real property pursuant to state law, presenting as evidence, *inter alia*, the search and seizure warrant as well as the marijuana and drug paraphernalia found on the property. In granting an order of forfeiture, the trial court rejected Aravanis' *pro se* defense that the *in rem* forfeiture was excessive under both the Eighth Amendment of the United States Constitution as well as Article 25 of the Maryland Declaration of Rights. Prior to consideration by the Court of Special Appeals of Maryland, the Court of Appeals of Maryland granted certiorari on its own motion. Upon hearing the appeal, the court of appeals vacated the trial court's judgment and remanded for a determination of whether the forfeiture violated Article 25 of the Maryland Declaration of Rights.

The significant legal issues in the present case are: (1) whether under Maryland law a civil forfeiture statute is punitive in nature; (2) whether the United States Constitution and Maryland Declaration of Rights prohibitions against excessive fines are applicable to a civil forfeiture statute; and (3) what factors Maryland courts must consider in determining whether or not a forfeiture constitutes an excessive fine.

2. Analysis

Maryland's civil forfeiture statute permits forfeiture proceedings against property involved in the unlawful manufacture, possession or distribution of CDS.²²⁴ The court of appeals held that because the state statute at issue "requires 'direct payment to a sovereign as punishment for some offense'"²²⁵ it was punitive²²⁶ and subject to

222. 339 Md. 644, 664 A.2d 888 (1995), *cert. denied*, 116 S. Ct. 916 (1996).

223. MD. ANN. CODE art. 27, § 286 (1992).

224. *See* MD. ANN. CODE art. 27, § 297 (1992).

225. *Aravanis*, 339 Md. at 655, 664 A.2d at 893.

226. The court of appeals followed the reasoning promulgated in *Austin v. United States*, 509 U.S. 602 (1993) (looking to the historical interpretation of forfeitures as punitive and the intent of Congress to punish only those involved in drug trafficking). *See Aravanis*, 339 Md. at 651-57, 664 A.2d at 892-94.

the Excessive Fines Clause of Article 25 of the Maryland Declaration of Rights.²²⁷

The court of appeals further held that, in Maryland, courts must consider the "instrumentality" of the property subject to forfeiture and whether the "'fine' is out of all reasonable proportion" to the offense committed.²²⁸ In "paint[ing] with a rather broad brush," the *Aravanis* court declined to adopt a specific analysis for determining whether or not a forfeiture constitutes an excessive fine.²²⁹ The court of appeals, however, did discuss with approval the factors considered by other courts which have recently decided this issue.²³⁰ In remanding the case back to the circuit court, the court of appeals left open the issue of how much weight to accord specific factors or which factors to apply. The court instead relied on the trial court's discretion to fashion a test commensurate with the circumstances of the individual case.

Douglas I. Wood

*C. Prosecution's preemptory strikes withstand Batson challenge if prosecutor provides sufficient race-neutral reasons for the strikes. Harley v. State*²³¹

1. Facts

Peter Donald Harley was charged in the Circuit Court of Maryland for Prince George's County with murder and other offenses arising out of an attempted sale and purchase of illegal drugs. During

227. Article 25 is considered *in pari materia* to the Eighth Amendment of the United States Constitution. See *Aravanis*, 339 Md. at 656, 664 A.2d at 893-94. The court declined, however, to reach the issue of whether the forfeiture violated the United States Constitution. See *id.* Rather, the court determined the issue solely on the applicability of article 25. See *id.* at 656-57, 664 A.2d at 893-94.

228. *Id.* at 665, 664 A.2d at 898.

229. *Id.* at 665-66, 664 A.2d at 898.

230. See *id.*; see also, e.g., *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) (describing three-part test for determining excessiveness of *in rem* forfeiture under the Eighth Amendment based on: (1) nexus between offense, property, and extent of property's role in offense; (2) role and culpability of owner; (3) possibility of readily separating offending property from remainder); *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 732 (C.D. Cal. 1994) (prescribing three-factor proportionality test focusing on: (1) inherent gravity of offense compared with harshness of penalty; (2) whether property was integral part of commission of offense; (3) whether criminal activity involving use of property was temporally and/or spatially extensive).

231. 341 Md. 395, 671 A.2d 15 (1996).

voir dire, the State first made peremptory challenges against four black jury pool members. Following the fourth challenge, Harley, who is black, raised a *Batson*²³² objection to the striking of the last two black jurors. The assistant state's attorney replied that these two jurors were struck not because of their race, but because they were under thirty and unmarried. The judge deemed this reason sufficient and jury selection proceeded.

With the panel requiring the selection of one more juror the prosecutor struck a fifty-six year old black woman. The defense again raised the *Batson* objection. In response, the prosecutor replied that the State wanted to place a police officer on the jury, who happened to be positioned next in the jury selection pool. The court denied the challenge, and selection proceeded. The State next struck a twenty-four year old black woman. In response to the *Batson* challenge raised by the defense, the State claimed that the woman had been struck because she was under thirty and unmarried. The court denied the defense motion, stating for the record that eight out of the eleven jurors selected were black. Of the twelve regular and two alternate jurors selected, nine of the regular jurors and both of the alternates were black. The jury convicted Harley of first-degree felony murder, second-degree murder, and related offenses. On petition to the Court of Appeals of Maryland, Harley argued that the jury selection violated the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.²³³

2. Analysis

A trial judge's rulings on a *Batson* challenge are factual findings and will not be overturned unless clearly erroneous.²³⁴ In ruling on a *Batson* challenge, the trial judge must consider (1) whether the stated reason for the challenge "is a pretext for purposeful discrimination" and (2) whether the reason itself denies equal protection.²³⁵ This being the case, the rulings will stand unless the trial judge could not have reasonably found that the reasons proffered were non-pretextual and did not violate equal protection.²³⁶

The *Harley* court concluded that since Harley did not argue either at trial or on appeal that age and marital status were imper-

232. The *Batson* challenge is derived from *Batson v. Kentucky*, 476 U.S. 79, 84 (1986). See *Harley v. State*, 341 Md. 395, 396, 671 A.2d 15, 15 (1996). *Batson* challenges require the prosecution to provide a race-neutral reason for exercise of peremptory challenges in light of the defendant's allegations that the challenges are actually racially motivated. See *id.*

233. U.S. CONST. amend. XIV, § 1.

234. See *Harley*, 341 Md. at 402, 671 A.2d at 18-19.

235. *Id.* (quoting *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995)).

236. See *id.* at 402, 671 A.2d at 18-19.

missibly discriminatory reasons to strike a juror, no equal protection rights were violated by the strikes.²³⁷ The court of appeals also noted that neither the court nor defense counsel objected to the prosecutor's policy of striking jurors based on age and marital status, and that this policy was applied without regard for race.²³⁸ The court of appeals also found plausible the striking of a juror to attempt to empanel a police officer further down the jury list.²³⁹ Finding that the trial judge's rulings were not clearly erroneous, the court of appeals affirmed Harley's conviction.²⁴⁰

Douglas I. Wood

D. Speedy trial period begins anew when charges are refiled after a nol pros²⁴¹ unless nol pros was entered for purpose of circumventing speedy trial period. State v. Brown²⁴²

1. Facts

Otis Alexander Brown was charged by criminal information filed in the Circuit Court for Dorchester County on May 12, 1993 with second degree rape, child abuse, and other offenses arising from allegations that Brown had raped his step-granddaughter. Defense counsel entered an appearance on May 21, 1993, setting the 180-day period for trial to commence no later than November 17, 1993.²⁴³ The trial was initially scheduled for August 3, 1993, then postponed on the defendant's request until October 5, 1993. The prosecutor nol prossed the case on October 5, 1993, stating that undergarments worn by the victim at the time of the offense had been sent to the Maryland State Police Crime Lab for DNA testing, and that the results of the DNA testing, necessary for both the trial preparation

237. *See id.* at 403 n.2, 671 A.2d at 19 n.2. The challenging party must allege and demonstrate that the strike violates the equal protection rights of the juror, not the accused. *See id.*

238. *Id.* at 403, 671 A.2d at 19. The court noted that the prosecutor also struck a 21-year-old, single, white juror. *See id.*

239. *See id.*

240. *See id.* at 404, 671 A.2d at 19.

241. *Nolle prosequi* is a "[v]oluntary withdrawal by prosecuting attorney of present proceedings on a criminal charge . . . commonly called '*nol pros*.'" BLACK'S LAW DICTIONARY 1048 (6th ed. 1990) (citations omitted).

242. 341 Md. 609, 672 A.2d 602 (1996).

243. Maryland law requires that a criminal case in the circuit court generally begin within 180 days of the appearance of defense counsel or the first appearance of the defendant before the circuit court. *See* MD. R. 4-271; MD. ANN. CODE art. 27, § 591 (1996).

of the State as well as compliance with a discovery motion filed by defense counsel, had not been received.

The State refiled the same charges by criminal indictment on January 11, 1994, after the DNA test results had been obtained. Brown filed a motion to dismiss in February of 1994, alleging that the State had violated the 180-day trial commencement requirement of the Maryland law,²⁴⁴ the speedy trial requirement of the Sixth and Fourteenth Amendments to the United States Constitution, and Article 21 of the Maryland Declaration of Rights.

At the motion hearing, Brown acknowledged the "need" for the DNA test results, but claimed that the State should have sought a further postponement of the trial rather than filing the nol pros. In addition, Brown argued that because the State had not sought a postponement past the 180-day commencement period in accordance with the applicable code and rule sections²⁴⁵ dismissal was required. The circuit court denied the dismissal motion, stating that there had been no violation of the code and rule provisions and no violation of the constitutional speedy trial requirement. Brown was subsequently convicted of child abuse and sentenced to four years imprisonment. The Court of Special Appeals of Maryland reversed Brown's conviction, holding that the nol pros had the effect of circumventing the 180-day rule in violation of section 591 and Maryland Rule 4-271. The Court of Appeals of Maryland then granted the State's petition for a writ of certiorari.

2. Analysis

The court of appeals noted that courts generally follow one of three approaches in applying statutory time limits for the commencement of criminal trials in cases where the prosecutor first nol prossed the case and then later refiled the same charges: (1) the speedy trial time period is unaffected by the filing of the nol pros, and the same time period applies after the refiled of the same charges; (2) the trial commencement period is suspended between the filing of the nol pros and the filing of the new charges, but is not restarted anew with the new filing; or (3) the refiled of the same charges after a nol pros begins the time period anew except in cases where the nol pros was entered for the purpose of circumventing the time requirement.²⁴⁶ Under the third scenario, if the purpose of the nol pros and

244. See *supra* note 243.

245. The trial date may be postponed beyond 180 days by a party's motion or on the court's own initiative for "good cause shown." *Brown*, 341 Md. at 611 n.1, 672 A.2d at 603 n.1.

246. See *id.* at 616, 672 A.2d at 606.

refiling was to frustrate the speedy trial requirement, the trial commencement period is held not to have begun anew with the new filing but to have started under the original filing.²⁴⁷ The court of appeals stated that this latter approach is followed by Maryland.²⁴⁸

In *Brown*, the court of appeals found that the nol pros was not filed to evade the time statute because it was possible that the DNA evidence might have been obtained in time to start the trial within the 180-day period.²⁴⁹ Alternatively, the court found the delay in obtaining the DNA test results provided good cause for postponing the trial.²⁵⁰ As such, the entry of nol pros was within the discretion of the prosecutor and did not warrant reversal of the conviction.²⁵¹

Douglas I. Wood

*E. Defendant's right to a fair trial is not denied by the prosecutor's decision to nol pros lesser included offense when the evidence presented at trial virtually compelled the jury to convict the defendant of the greater offense. Burrell v. State*²⁵²

1. Facts

Mack Tyrone Burrell was charged with robbery with a deadly weapon, robbery, theft of \$300 or over, theft under \$300, use of a

247. See *id.* at 616-17, 672 A.2d at 606-07.

248. See *id.* at 616, 672 A.2d 606. In Maryland, the speedy trial period has been held not to begin anew if the nol pros and new filing "clearly circumvented" the 180-day rule and had the "necessary effect" of attempting to avoid dismissal. See *id.* at 617, 672 A.2d at 606. The entry of a nol pros and subsequent refiling have the "necessary effect" of attempting to frustrate the speedy trial requirement when the only alternative to the nol pros is dismissal for failure to meet the statutory time period or when such actions have the "necessary effect" of violating the rule. See *id.*

If the prosecutor is able to show "good cause" for the nol pros and refiling, the 180-day clock will begin anew. See *id.* at 619, 671 A.2d at 607 (discussing *State v. Glenn*, 299 Md. 464, 474 A.2d 509 (1984)). In *Glenn*, the prosecutor nol prosed the case and refiled because of a legitimate belief that the charging documents contained errors and because the defense attorney would not agree to amendment of those documents. See *id.*

Additionally, the *Glenn* court noted that nol prossing the case on the last possible day for trial is a clear indication that the nol pros is intended to circumvent the speedy trial statute. See *id.* Nol prossing the case at the time the good-faith reason for nol prossing is known, preferably some time before the time requirement runs, reduces the appearance that the nol pros was filed to evade the time requirement. See *id.*

249. See *id.* at 620, 672 A.2d at 608.

250. See *id.*

251. See *id.* at 621, 672 A.2d at 608.

252. 340 Md. 426, 667 A.2d 161 (1995).

handgun in the commission of a felony, and use of a handgun in the commission of a crime of violence in connection with the armed robbery of a Baltimore County gas station. At trial, after the conclusion of the evidence but before the jury was charged, the State moved to enter a nol pros²⁵³ to the robbery and theft under \$300 charges. Burrell was then convicted of robbery with a deadly weapon, theft of \$300 or over, and the handgun charges.

On appeal, Burrell argued, *inter alia*, that his common-law right to a fair trial was infringed by the State's entering the nol pros on the two lesser charges because it infringed upon the jury's discretion to convict him only of the lesser offense.

2. Analysis

Generally, the State has sole discretion to enter a nol pros.²⁵⁴ However, this power must yield to the accused's right to a fair trial.²⁵⁵ The court, therefore, may limit the prosecutor's power to nol pros a case if it will result in an unfair trial.²⁵⁶ Unfairness arises when a lesser charge, of which the accused is plainly guilty, is nol prossed over the defendant's objection.²⁵⁷ In such cases, the jury is likely to convict the accused of the more serious offense, even though some element of the more serious offense remains in doubt, rather than allow the defendant to escape all punishment.²⁵⁸ As the *Burrell* court stated, when the defendant is "plainly guilty" of *some* offense,

253. *See supra* note 241.

254. *See Burrell*, 340 Md. at 430, 667 A.2d at 162.

255. *See id.* at 430, 667 A.2d at 163. A paramount consideration is the right of an accused to a fair trial. *See id.* (citing *Crawford v. State*, 285 Md. 431, 451, 404 A.2d 244, 254 (1979)).

256. *See id.*

257. *See id.* at 431-32, 667 A.2d at 163.

258. *See id.* The court of appeals cites the case of *Hook v. State*, 315 Md. 25, 553 A.2d 233 (1989), in which a defendant confessed to robbery and murder and was shown to be intoxicated at the time the offenses occurred. *See Burrell*, 340 Md. at 430-31, 667 A.2d at 163. Over Hook's objection, the prosecutor nol prossed a charge of second-degree murder, and the jury was instructed to either convict or acquit the defendant of first-degree murder based on felony-murder or to convict or acquit the defendant of first-degree murder based on premeditated murder. *See id.* The jury was not instructed that intoxication could preclude a finding of felony murder and mitigate the charge of premeditated murder to second-degree murder because the second-degree murder charge was withdrawn before the jury was charged. *See id.* The court of appeals reversed Hook's first-degree murder conviction on the grounds that the failure to instruct the jury on grounds for second-degree murder resulted in unfair prejudice. *See id.* The rationale for the reversal is that the jury could have reasonably convicted Hook for second-degree murder because of the evidence of intoxication. *See id.*

it is prejudicial for the State to *nol pros* the lesser included offense, over the defendant's objection, because it removes from the jury the option of convicting the defendant of the lesser offense.²⁵⁹

The *Burrell* court stated, however, that if the jury could not find the defendant guilty of the lesser offense without also finding the defendant guilty of the greater offense, the prosecutor is not precluded from *nol pros*ing the lesser offense.²⁶⁰ The court of appeals held that the latter situation best described the case at bar and affirmed the conviction.²⁶¹

Douglas I. Wood

*F. Sentence of life imprisonment for conviction of conspiracy to commit first-degree murder is within permissible statutory range. Gary v. State*²⁶²

1. Facts

Petitioner Morris K. Gary was convicted of conspiracy to commit first-degree murder arising from his involvement in a gang-related "drive-by" shooting. Gary was sentenced by the trial judge to life imprisonment. The Court of Special Appeals of Maryland, in an unreported opinion, affirmed the trial court. The Court of Appeals of Maryland accepted Gary's writ of certiorari and affirmed.

2. Analysis

In Maryland, the trial judge has great discretion in sentencing,²⁶³ and sentences are only reviewable on appeal on three grounds: (1)

259. *See id.* at 432, 667 A.2d at 163-64 (emphasis added).

260. *See id.* at 433-34, 667 A.2d at 164. The state is precluded from *nol pros*ing a lesser included offense only when the jury could reasonably convict the defendant of the lesser offense only. *See id.*

261. *See id.* at 436, 667 A.2d at 165-66. Burrell's argument was that he was guilty of simple robbery only and not robbery with a deadly weapon because he did not know of or intend to use a gun in the robbery, and that therefore the jury was prejudiced because it did not have the option to convict him of simple robbery. *See id.* at 435, 667 A.2d at 165. The court of appeals rejected this argument, noting that there was uncontradicted evidence presented at trial that a deadly weapon was used in the robbery. *See id.* at 436, 667 A.2d at 165-66. This being the case, the jury could not have rationally found Burrell guilty of simple robbery rather than robbery with a deadly weapon. *See id.*

262. 341 Md. 513, 671 A.2d 495 (1996).

263. *See id.* at 516, 671 A.2d at 496.

that the sentence violates constitutional requirements, *i.e.*, cruel and unusual punishment; (2) that the sentencing judge was motivated by impermissible considerations, *i.e.*, ill will or prejudice; or (3) that the sentence is not within statutory limits.²⁶⁴ Gary attacked his sentence claiming his sentence was illegal.

The *Gary* court stated that the sentence imposed was not unlawful by statute, because the punishment imposed for conviction of conspiracy of a crime is limited to the maximum punishment for the crime that the conspiracy intended to commit.²⁶⁵ Maryland statutory law provides that conspiracy to commit murder is a premeditating factor raising the offense to one of the first degree,²⁶⁶ and that the permissible punishments for first degree murder are death, life imprisonment, or life imprisonment without the possibility of parole.²⁶⁷

The court of appeals also rejected Gary's argument that since the court of special appeals had previously held that the death penalty statute did not allow the imposition of the death penalty for conspiracy to commit a capital offense, the statute did not authorize the imposition of life imprisonment for conspiracy to commit murder.²⁶⁸ The court of appeals noted that the death penalty was one of "unique nature" and that simply because the death penalty was not authorized for conspiracy did not necessarily imply that life imprisonment was not authorized.²⁶⁹

Douglas I. Wood

*G. Defendant who received probation before judgment for drunk driving was held ineligible for probation before judgment for subsequent drunk driving offense committed within five years of conviction or sentencing for prior offense. State v. Purcell*²⁷⁰

264. *See id.* at 516, 671 A.2d at 496. The *Gary* court stated that only the latter issue was raised on appeal. *See id.* at 517, 671 A.2d at 497.

265. *See id.*; *see also* MD. ANN. CODE art. 27, § 38 (1996) ("The punishment of every person convicted of the crime of conspiracy shall not exceed the maximum punishment provided for the offense he or she conspired to commit.").

266. *See id.* at 517 n.2, 671 A.2d at 497 n.2.

267. *See id.* The court of appeals also noted that it had previously endorsed sentences of life imprisonment for conspiracy to commit murder by allowing such sentences to stand. *See id.* at 518, 671 A.2d at 497.

268. *See id.* at 519-20, 671 A.2d at 498.

269. *See id.* at 520, 671 A.2d at 498. The *Gary* court noted that the death penalty varied from imprisonment "not in degree but in kind." *Id.* (quoting *Woods v. State*, 315 Md. 591, 605, 556 A.2d 236, 243 (1989)). It is this difference in the *type* of punishment that places it in a unique classification. *See id.* at 520, 671 A.2d at 498.

270. 342 Md. 214, 674 A.2d 936 (1996).

1. Facts

John Paul Purcell was arrested after failing field sobriety tests during a traffic stop on May 19, 1994. He pled guilty in the Circuit Court of Maryland for Montgomery County on November 28, 1994 to driving under the influence of alcohol in violation of Section 21-902(b) of the Transportation Article of the Annotated Code of Maryland. At the hearing, Purcell admitted that he had received probation before judgment (PBJ) on March 14, 1990 for a previous drunk driving offense occurring on November 2, 1989.

Purcell's attorney argued that since more than five years had passed between the November 28, 1994 hearing and Purcell's previous offense on November 2, 1989, Purcell was eligible to receive PBJ for the second offense.²⁷¹ The State claimed, however, that the relevant period for measuring eligibility for PBJ was that between the occurrence of the two offenses, rendering Purcell ineligible for a second PBJ.

The circuit court decided that the relevant period was that between the dates of conviction or granting of probation for each offense making March 14, 1995 the earliest date on which Purcell could receive PBJ for the second offense. In light of Purcell's refusal to withdraw his guilty plea, the court decided to postpone sentencing until after March 15, 1995 stating that sentencing was to be deferred until more than five years had elapsed.

At the sentencing hearing on May 10, 1995, the court stated that the disposition date for the second offense, not the date of the guilty plea, was determinative for sentencing. Thus, the court concluded that five years had elapsed and granted PBJ for the second offense. Before Maryland's intermediate appellate court considered the state's appeal, the Court of Appeals of Maryland granted certiorari on this case of first impression.

2. Analysis

The Court of Appeals of Maryland first noted that the trial court was correct in its determination that in regard to the prior offense, the date of conviction or granting of PBJ started the five

271. Courts generally have discretion to grant PBJ. *See* MD. ANN. CODE art. 27, § 641(a)(1)(i) (1992). However, section 641(a)(2) states that:

[A] court may not stay the entering of judgment and place a person on probation for a violation of any provision of § 21-902 of the Transportation Article if the person has been convicted under, or has been placed on probation under this section after being charged with a violation of § 21-902 of the Transportation Article within the preceding 5 years.

year period in which the defendant would be ineligible for a subsequent PBJ.²⁷² The *Purcell* court rejected, however, Purcell's argument that the trial court had discretion to delay sentencing in order to grant a subsequent PBJ.²⁷³ The court of appeals found that in delaying sentencing the trial court had abused its discretion.²⁷⁴

If a defendant is found guilty of a drunk driving offense within five years of the date of being found guilty for a previous drunk driving offense, the defendant is ineligible for PBJ.²⁷⁵ Because less than five years had passed between Purcell's grant of PBJ for the first offense and his guilty plea on the second offense, the grant of PBJ was reversed.²⁷⁶

Douglas I. Wood

*H. Sixth Amendment right to counsel does not carry over from one charge to another if the charges are unrelated; bad acts evidence may be admitted within the narrow exception in United States v. Byrd; hearsay evidence may be admitted in death penalty sentencing hearings; double jeopardy prohibition does not bar murder prosecution of defendant arising out of same event for which defendant was convicted of robbery. Whittlesey v. State*²⁷⁷

272. See *Purcell*, 342 Md. at 223, 674 A.2d at 941.

273. See *id.* at 228, 674 A.2d at 943.

274. See *id.* *Purcell*, citing the "rule of lenity" — that statutes are strictly construed in favor of the accused — argued that the current version of the statute was intended to give judges discretion to delay sentencing until after the five year period. See *id.* at 228-29, 674 A.2d at 943-44. The court of appeals rejected this argument, stating that the intention of the legislature in passing an amendment was to limit judicial discretion, rather than expand it, in the granting of PBJ. See *id.* at 228, 674 A.2d at 943. As such, the date the defendant's guilt is determined, not the date of disposition, should be determinative of whether PBJ can be granted for the second offense, as this construction is consistent with the legislature's purpose of restricting judicial discretion. See *id.* The court of appeals went on to say that an interpretation which allowed the trial court to "exercis[e] the very discretion that [the legislature] seeks to remove" was an unacceptable frustration of legislative intent. *Id.* at 229, 674 A.2d at 944.

275. See *id.* at 227, 674 A.2d at 943. The court rejected the contention that the date of the later offense is relevant, because if both offenses had occurred before adjudication of the first offense, the defendant could receive PBJ for the second offense because the defendant would not have committed an offense since receiving the first PBJ. See *id.* The court noted that the situation occurred in the case of *State v. McGrath*, 77 Md. App. 310, 550 A.2d 402 (1988), and that the Maryland General Assembly amended section 641(a)(2) in 1991 expressly to overrule *McGrath*. *Purcell*, 342 Md. at 228, 674 A.2d at 943.

276. See *id.* at 229, 674 A.2d at 944.

277. 340 Md. 30, 665 A.2d 223 (1995) (hereinafter *Whittlesey II*).

1. Facts

In 1982, James Rowan Griffen disappeared. Michael Whittlesey was the focus of police suspicion from the outset of their investigation. During the investigation, a police informant tape recorded several incriminating conversations made by Whittlesey. Because the authorities were unable to locate Griffen's body, Whittlesey was tried and convicted of robbery when he was found in possession of Griffen's personal effects.

In 1990, Griffen's remains were discovered and Whittlesey was indicted for the first-degree murder of Griffen. Whittlesey filed a motion to dismiss asserting that the murder prosecution violated the Double Jeopardy Clause of the United States Constitution because it was based on the same conduct²⁷⁸ as his robbery conviction.²⁷⁹ The court of appeals affirmed the trial court's denial of the motion to dismiss holding that the exception carved out in *Diaz v. United States*²⁸⁰ applied in the instant case. The Court of Appeals of Maryland remanded and Whittlesey was tried and found guilty of both premeditated murder and felony murder. The same jury then sentenced him to death.

On appeal to the court of appeals, Whittlesey raised eleven issues for review. Four related to the validity of his conviction²⁸¹ and seven

278. At the time of Whittlesey's appeal, the same conduct test enunciated in *Grady v. Corbin*, 495 U.S. 508 (1990), was the law of the case. See *Whittlesey II*, 340 Md. at 44, 665 A.2d at 230. *Grady* was later overruled by *United States v. Dixon*, 509 U.S. 688 (1993). See *Whittlesey II*, 340 Md. at 44, 665 A.2d at 230.

279. *Id.*; see also *Whittlesey v. State*, 325 Md. 502, 606 A.2d 225 (1992) (hereinafter *Whittlesey I*) (holding that an exception enunciated in *Diaz v. United States*, 223 U.S. 442 (1912), permits a subsequent prosecution on a greater charge after conviction of a lesser charge where "a reasonable prosecutor, having full knowledge of the facts which were known and in the exercise of due diligence should have been known to the police and the prosecutor at the time, would not be satisfied that he or she would be able to establish the suspect's guilt beyond a reasonable doubt").

280. 223 U.S. 442 (1912).

281. Of the four challenges, only two represent issues of first impression. Thus, only two are discussed below. The remaining issues include a *Batson* claim and a jury instruction challenge.

The first challenge raised by Whittlesey was a *Batson* challenge; however, the court of appeals held that Whittlesey failed to make a *prima facie* showing of purposeful discrimination. See *Whittlesey II*, 340 Md. at 46-47, 665 A.2d at 231. Thus, the trial court's ruling on the *Batson* challenge was affirmed.

Whittlesey also excepted to the trial judge's jury instruction on first-degree murder. See *id.* at 65, 665 A.2d at 240. The court held that the instruction adequately conveyed the difference between first- and second-degree murder and thus was not in error. See *id.* The court emphasized that it would have been preferable to "include language to the effect that the defendant thought

related to the penalty phase of his trial. Maryland's high court affirmed his conviction, but vacated his death sentence and remanded for a new sentencing proceeding.

2. Analysis

a. Objections Raised to Conviction

Whittlesey moved to exclude the tape recorded conversations between himself and the informant on Sixth Amendment grounds.²⁸² Specifically, Whittlesey asserted that his Sixth Amendment right to counsel had attached and, therefore, the tapes were inadmissible.²⁸³ The court dismissed his first theory — that right to counsel had attached — because he was the focus of a police investigation.²⁸⁴ Additionally, the court rejected his assertion that the right to counsel had attached upon the filing of a false statements charge.²⁸⁵

Whittlesey also asserted that the trial court erroneously admitted evidence of prior bad acts despite the court of appeals's adherence to the general rule that such evidence be excluded.²⁸⁶ The court

about the killing, and that there was enough time before the killing, though it may have only been brief, for the defendant to consider the decision, whether to kill and enough time to weigh the reasons for and against the choice." *Id.*

282. *See id.* at 48, 665 A.2d at 232.

283. *See id.* The three factors that must be present to exclude evidence under the Sixth Amendment right to counsel are: (1) the statement was made out of the presence of counsel; (2) the statement was made in response to interrogation by an agent of the state; and (3) the right to counsel had attached with respect to the charge being tried. *See id.* The court conceded that the first two factors had been satisfied and only attachment was at issue. *See id.*

284. *See id.* The court noted that focus alone cannot trigger the attachment of the right to counsel. *See id.*

285. *See id.* at 50, 665 A.2d at 232. The Maryland high court noted that, although the Supreme Court has frequently held that the Sixth Amendment right to counsel is offense-specific, two exceptions to this general rule may have operated to allow attachment. *See id.* at 50, 665 A.2d at 323-33; *see also* *Maine v. Moulton*, 474 U.S. 159 (1985); *Brewer v. Williams*, 430 U.S. 387 (1977). Instead of relying on these exceptions, however, the court of appeals relied on *Bruno v. State*, 93 Md. App. 501, 613 A.2d 440 (1992), *aff'd*, 332 Md. 673, 632 A.2d 1192 (1993). Declining to decide whether the Sixth Amendment ever requires carry-over from one offense to another, the court instead focused on whether the two charges were closely related to each other. *See Whittlesey II*, 340 Md. at 52-53, 665 A.2d at 234-35. The court determined that the two charges were not closely related based on several factors: (1) different situs between the murder and the false statements; (2) distinct conduct — "committing a crime is separate from an attempt to avoid responsibility for it"; and (3) that the "proof for the two crimes does not necessarily require identical evidence." *Id.* at 56, 665 A.2d at 236.

286. *See id.* at 57-58, 665 A.2d at 236-37.

acknowledged that the evidence in question was "bad acts evidence"²⁸⁷ and was inadmissible under the general rule.²⁸⁸ The court declined to exclude the evidence, however, and adopted the limited exception to the admissibility of "bad acts evidence" delineated in *United States v. Byrd*.²⁸⁹ According to the *Byrd* exception, "evidence of prior bad acts may be admitted without satisfying the clear-and-convincing threshold if the 'probative value [of the proffered evidence] . . . does not depend on whether the misconduct it reports actually took place.'"²⁹⁰ Applying this exception to the disputed evidence, the court found that the evidence was not offered to prove the truth of the matter asserted, but rather, went to Whittlesey's state of mind and specifically, his consciousness of guilt.²⁹¹ The court also found that the evidence was highly relevant and had little, if any, prejudicial impact.²⁹² Thus, the court held that the evidence was properly admitted.²⁹³

b. Objections Raised Regarding the Sentencing Phase

Whittlesey raised seven objections²⁹⁴ to the sentencing phase of his trial.²⁹⁵ Finding merit in one of these challenges, the court vacated

287. *Id.* at 58, 665 A.2d at 237.

288. *See id.* Bad acts evidence can only be admitted if the *Harris-Faulkner* test is satisfied. That is: (1) the evidence "is relevant to the offense charged on some basis other than mere propensity to commit crime"; (2) there is clear and convincing evidence that the defendant participated in the alleged act; and (3) the probative value of the evidence must substantially outweigh its potential for unfair prejudice. *Id.* at 59, 665 A.2d at 237 (citations omitted).

289. *Id.* (discussing *United States v. Byrd*, 771 F.2d 215 (7th Cir. 1985) (relaxing the clear and convincing prong and allowing admission of prior bad acts under a limited exception)).

290. *Whittlesey II*, 340 Md. at 60, 665 A.2d at 238 (quoting *Byrd*, 771 F.3d at 223). The court stressed, however, that the other two prongs of the *Harris-Faulkner* test must be satisfied. *See id.* at 44, 665 A.2d at 230.

291. *See id.* at 61-62, 64, 665 A.2d at 238, 239-40.

292. *See id.*

293. *See id.* at 62, 66, 665 A.2d at 238, 240.

294. Three of these objections, if meritorious, would have precluded the imposition of the death penalty:

(1) The Double Jeopardy Clause of the United States Constitution and Maryland's common-law double jeopardy doctrine prohibit the use of the robbery for which appellant was already convicted as the predicate felony underlying the charge of felony murder or as the aggravator in the sentencing phase[;] (2) [t]he Maryland death penalty statute [Md. ANN. CODE art. 27, § 413 (1996)] violates the Eighth Amendment to the United States Constitution in two respects[.:] First, by permitting the use of the same act as a predicate felony for felony murder purposes and as an aggravating circumstance in the sentencing phase, the statute fails to narrow sufficiently the class of murders for

the death penalty and remanded for resentencing.²⁹⁶ Specifically, the court held that hearsay evidence, proffered as mitigating factors by Whittlesey, was improperly excluded.²⁹⁷ Sentencing hearings, carried out pursuant to Maryland's death penalty statute,²⁹⁸ are not strictly confined by the rules of evidence.²⁹⁹ The court stated that "in determining the admissibility of evidence at a sentencing proceeding, the court should not merely apply the evidentiary standards that would govern at trial. Instead, the court must exercise its 'broad authority to admit evidence it deems probative and relevant to sentencing.'" ³⁰⁰ The court found that the record reflected the trial judge's concession that some of the proffered hearsay testimony was relevant.³⁰¹ The trial judge failed to determine if the evidence was reliable, however, because he believed it to be *per se* inadmissible.³⁰² Thus, the court remanded for resentencing, directing the trial judge to exercise discretion and to admit any reliable and relevant mitigating evidence, including hearsay evidence, if the State again seeks the death penalty.³⁰³

which capital punishment is imposed and [s]econd, the allocation of the burden of proof as to mitigating circumstances precludes the sentencer from considering a full range of mitigating factors, and the standard of proof prescribed for the final weighing process inadequately guarantees the reliability of the outcome; and] (3) [t]he State violated § 412(b) of Article 27 by serving notice of intent to seek the death penalty on appellant's counsel, rather than directly upon appellant.

Whittlesey II, 340 Md. at 38, 665 A.2d at 227. Whittlesey's final four objections would require only a new sentencing hearing, at which the State would be free to again seek the death penalty:

[(1) The trial court erred in excluding, on grounds of hearsay, certain mitigating evidence offered by appellant; (2) [t]he trial court's refusal to propound appellant's requested voir dire questions concerning the attitudes of prospective jurors toward the death penalty impaired appellant's efforts to select an impartial jury, in violation of his rights under the Due Process Clause of the United States Constitution, as construed in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Morgan v. Illinois*, 504 U.S. 719 (1992); (3) Appellant's right to due process was violated when he was required to appear before the sentencing jury in leg shackles; and (4) [t]he trial court erred in permitting the State to introduce a videotape as victim impact evidence.

Id. (parallel citations omitted).

295. *See id.* at 38, 665 A.2d at 227.

296. *See id.* at 66, 665 A.2d at 240.

297. *See id.* at 71, 665 A.2d at 243.

298. MD. ANN. CODE art. 27, § 413(c)(1) (1996).

299. *See Whittlesey II*, 340 Md. at 70-71, 665 A.2d at 242-44.

300. *Id.* at 71, 665 A.2d at 243 (quoting *Harris v. State*, 306 Md. 344, 366, 509 A.2d 120, 131 (1991)).

301. *See id.*

302. *See id.*

303. *See id.* at 71, 665 A.2d at 243.

Next, the court of appeals addressed Whittlesey's Double Jeopardy claim. The court stated that this claim consisted of four separate elements: (1) the Double Jeopardy Clause barred the murder trial; (2) the common law barred the murder trial; (3) the Double Jeopardy Clause barred the sentencing; and (4) the common law barred the sentencing.³⁰⁴

The *Whittlesey II* court first rejected the appellant's claim of a constitutional bar to the murder trial, stating that this issue had previously been addressed in *Whittlesey I*.³⁰⁵ The court next examined Whittlesey's assertion that the common law prohibition against double jeopardy barred the murder prosecution.³⁰⁶ The *Whittlesey II* court stated that the double jeopardy rule does not prohibit the prosecution of a defendant for intentional homicide, despite the fact that the defendant was previously convicted of other crimes arising from the same incident.³⁰⁷

The *Whittlesey II* court next rejected the appellant's claim that the use of the robbery as an element of the prosecution during the capital sentencing hearing was violative of the Double Jeopardy Clause, noting that this claim essentially raised the same issue as the contention of a constitutional bar to the murder trial.³⁰⁸ Whittlesey's theory was that a sentencing hearing was the constitutional equivalent of a trial.³⁰⁹ The court rejected this approach as well, stating that

304. *See id.* at 74, 665 A.2d at 244.

305. *See id.* The court of appeals noted that Whittlesey raised the issue that the Double Jeopardy Clause barred separate prosecutions of robbery and murder in a motion to dismiss prior to trial. *See id.* The motion was denied, and the court of appeals affirmed that denial, stating that, because the case fell within an exception to the Double Jeopardy Clause held in *Diaz v. United States*, 223 U.S. 442 (1912), the denial was proper. *See Whittlesey II*, 340 Md. at 74, 665 A.2d at 244.

306. *See id.* at 75, 665 A.2d at 245. The common law double jeopardy claim was limited to the felony murder claim. *See id.*

307. *See id.* at 75, 665 A.2d at 245. The *Whittlesey II* court noted that Judge Bell's dissent appeared premised on the theory that an underlying felony conviction constituted a prior prosecution for first degree murder. *See id.* at 75 n.15, 665 A.2d at 245 n.15. While the majority appeared to concede that the felony murder conviction was improper, it stated that the first-degree murder conviction was still proper based on the premeditated murder conviction. *See id.; cf. State v. Frye*, 283 Md. 709, 716, 393 A.2d 1372, 1376 (1978) (holding that first degree murder charge and conviction based on events occurring during commission of a felony is not same offense as felony itself, provided independent proof of wilfulness, premeditation, and deliberation exist).

308. *See Whittlesey II*, 340 Md. at 76-77, 665 A.2d at 246. Whittlesey argued that because robbery was an element in the State's case at the death penalty hearing, he was unconstitutionally retried after conviction. *See id.* at 77, 665 A.2d at 246. The *Whittlesey II* court rejected this claim on the same grounds as the constitutional double jeopardy claim concerning the murder trial. *See id.*

309. *See id.* at 78, 665 A.2d at 246. Whittlesey cited *Bullington v. Missouri*, 451

sentencing hearings are not always equivalent to trials, and that the defendant merely has the right not to be convicted of a *penalty* of which he has already been acquitted.³¹⁰

The court rejected Whittlesey's allegation that Maryland's death penalty is unconstitutional, noting that this issue had been previously addressed on numerous occasions.³¹¹ The court also found no merit in Whittlesey's assertion that the prosecution's service of the Notice of Intent to Seek the Death Penalty on his attorney, rather than to him, personally, violated statutory requirements.³¹²

The court declined to address the remaining issues raised by Whittlesey. The court did, however, address them in dicta. First, the court urged the trial court to follow the procedures established in *Bowers v. State*³¹³ and *Hunt v. State*³¹⁴ prior to employing extraordinary security measures like shackling.³¹⁵ Additionally, it counseled the trial judge to articulate, on the record, the reasons for any extraordinary security measures implemented.³¹⁶ Finally, the court did not find that victim impact evidence introduced at the sentencing hearing was an abuse of discretion.³¹⁷

Laurel Anne Albin

*I. Eighth Amendment is not violated by duplication of an element of an underlying murder offense at death-penalty sentencing proceeding; aggravating circumstance of participating in murder-for-hire constitutionally narrows the class of defendants eligible for the death penalty. Grandison v. State*³¹⁸

1. Facts

Anthony Grandison received two sentences of death stemming from his murder-for-hire conviction. At the time, a narcotics case

U.S. 430 (1981), in which the Supreme Court held that a defendant who was sentenced to life imprisonment in a separate death penalty hearing following a murder trial could not be sentenced to death after being convicted in a new trial. See *Whittlesey II*, 340 Md. at 78-79, 665 A.2d at 246-47.

310. See *id.* at 81, 665 A.2d at 248. The *Whittlesey II* court noted that in *Bullington* the defendant had already been "acquitted" of the death penalty by the sentencing jury during the first hearing. See *id.* at 78-79, 665 A.2d at 247. As such, *Bullington* was inapplicable to the present case. See *id.* at 82, 665 A.2d at 248.

311. See *id.* at 83, 665 A.2d at 249.

312. See *id.*

313. 306 Md. 120, 507 A.2d 1072 (1986).

314. 321 Md. 387, 583 A.2d 218 (1990).

315. See *Whittlesey II*, 340 Md. at 85, 665 A.2d at 250.

316. See *id.*

317. See *id.*

318. 341 Md. 175, 670 A.2d 398 (1995).

was pending against Grandison in federal district court. Grandison allegedly hired a hit man, Vernon Lee Evans, Jr., for \$9000 to kill David Piechowicz and his wife, Cheryl, who were witnesses scheduled to testify against him in the federal trial. Evans shot and killed David Piechowicz as well as Susan Kennedy, Cheryl's sister, whom Evans mistook for Cheryl. Grandison was subsequently charged in circuit court with and found guilty of, *inter alia*, two counts of first degree murder and conspiracy to commit those murders. The jury then sentenced Grandison to death for each of the two murder convictions. The court of appeals, on writ of certiorari, later awarded a new capital sentencing proceeding after Grandison successfully argued that the first sentencing proceeding violated his constitutional rights. As a result of the resentencing proceeding, Grandison was again given two death sentences.

On appeal, Grandison argued that application of the death penalty violated his rights under the Eighth and Fourteenth Amendments of the United States Constitution as well as Article 25 of the Maryland Declaration of Rights.

2. Analysis

Grandison's appeal raised the contention that the "murder for hire" aggravating circumstance found in the Annotated Code of Maryland does not sufficiently "narrow" the class of defendants eligible to receive a death sentence.³¹⁹ The court of appeals noted that the narrowing requirement of the Eighth Amendment dictates that the State justify the imposition of a more severe sentence (i.e. death) on the defendant than the punishment accorded to others found guilty of murder.³²⁰ The *Grandison* court stated that the gravamen of Grandison's appeal was that the duplicate use of the finding that he hired Evans to commit the murders for both the trial and the sentencing proceeding was insufficient to accomplish the required narrowing.³²¹ In his appeal, Grandison stated that "he was

319. *See id.* at 196, 670 A.2d at 408.

320. *See id.* at 197-98, 670 A.2d at 409. The Supreme Court stated that in order to meet the requirements of the Eighth Amendment, any capital-sentencing arrangement must narrow the class of death-eligible offenses at either the trial stage or the sentencing stage. *See id.* at 197-98, 670 A.2d at 408-09; *see also* *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988).

321. *See Grandison*, 341 Md. at 175, 670 A.2d at 408. Grandison contended that the Maryland capital-sentencing scheme is unconstitutional because the aggravating circumstance utilized at the sentencing did not narrow the class of murders eligible for a death sentence. *See id.* Under the Maryland statutory scheme, "only those convicted as principals in the second degree of first degree murder who engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration." *Id.* at 198, 670 A.2d at 409; *see also* MD. ANN. CODE art. 27, § 413(d)(7) (1996).

only eligible for the death penalty because the State alleged that he hired Vernon Evans to commit murder."³²²

The *Grandison* court rejected the appellant's contention, however, stating that the Eighth Amendment was not violated because the aggravating circumstance of involvement in murder-for-hire sufficiently narrowed the class of death-eligible defendants at the trial stage.³²³ In affirming the conviction on this and other grounds, the court of appeals stated that the aggravating circumstance met the narrowing requirement of the Eighth Amendment.³²⁴

Douglas I. Wood

*J. Precluding cross-examination of witnesses about pending, unrelated, criminal or violation of probation charges is not an abuse of discretion when evidence is of little probative value and witnesses expected no leniency in exchange for their testimony. Ebb v. State*³²⁵

1. Facts

Jeffrey Damon Ebb was tried and convicted on two counts of first degree murder and related charges arising out of an attempted robbery. At trial, Ebb filed a motion requesting that the State disclose whether any witnesses had been offered leniency in their pending, unrelated criminal cases or violation of probation charges in exchange for their testimony. The State denied having made any promises or inducements. Notwithstanding the State's denial, Ebb proposed to cross-examine three State witnesses regarding their pending charges in order to impeach their credibility. In response, the judge held a hearing outside the jurors' presence to determine whether Ebb's proposed cross-examinations were appropriate. After the hearing, the judge ruled that Ebb could not cross-examine two of the three witnesses regarding their pending charges, finding those witnesses were neither promised nor expected leniency for their testimony.

On appeal, Ebb argued that his right to confront the State's witnesses was unconstitutionally curtailed, asserting that a defendant

322. *Id.* at 197, 670 A.2d at 408.

323. *See id.* at 198, 670 A.2d at 409. The court of appeals noted that the Supreme Court had held that the narrowing may occur at either the trial stage or the sentencing stage of the proceeding. *See id.* In addition, the Court held that the duplication of an element of the underlying offense at the sentencing stage was not unconstitutional. *See id.*

324. *See id.*

325. 341 Md. 578, 671 A.2d 974 (1996), *cert. denied*, No. 95-8968, 1996 WL 271708 (U.S. Oct. 7, 1996).

has an unqualified right to question a witness before the jury about that witness's expectation of leniency in pending charges. In an unreported opinion,³²⁶ the court of special appeals reaffirmed that a judge has discretion to limit cross-examination, holding that the judge in Ebb's trial properly exercised his discretion with a balanced handling of the issue. The court of appeals granted certiorari.

2. Analysis

The court of appeals held that a trial judge has discretion to preclude questioning a witness about unrelated, pending criminal or violation of probation charges when such evidence is of little probative value and potentially prejudicial and confusing to the jury.³²⁷ The court noted that, generally, pending charges are inadmissible to impeach a witness.³²⁸ However, when such evidence is offered to establish bias, prejudice, or motive of the witness, an exception exists.³²⁹ Relying on *Watkins v. State*,³³⁰ the court stated that a judge confronted with this issue should engage in a balancing test, weighing the probative value of the unrelated, pending charges against the potential for the prejudicial or confusing effect which such questioning may have on the jury.³³¹

In the case *sub judice*, the court found that the judge had properly considered the relevant factors, both in substance and procedure, and had not abused his discretion by precluding such inquiry.³³² The court was particularly impressed with the fact that the two witnesses had testified outside the presence of the jury that

326. *Ebb v. State*, 101 Md. App. 721 (1994).

327. *See Ebb*, 341 Md. at 590, 671 A.2d at 980.

328. *See id.* at 588, 671 A.2d at 979.

329. *See id.*

330. 328 Md. 95, 613 A.2d 379 (1992). In a dissenting opinion, Judge Bell reiterated his disagreement with the holding in *Watkins*. *See Ebb*, 341 Md. at 600, 671 A.2d at 985 (Bell, J., dissenting). Judge Bell argued that the probative value of placing evidence of pending charges against a witness before the jury outweighs the potential for confusion and is essential in order for the jury to make accurate credibility assessments regarding a witness's testimony. *See id.* at 601, 671 A.2d at 985 (Bell, J., dissenting). Specifically, he contended that the jury would comprehend that the two State's witnesses in Ebb's trial might be willing to testify without explicit agreements for leniency, nonetheless hoping for later favorable treatment. *See id.* (Bell, J., dissenting). Thus, there was no danger that the jury would be confused or diverted in Ebb's case. *See id.* (Bell, J., dissenting).

331. *See Ebb*, 341 Md. at 591, 671 A.2d at 980.

332. *See id.* The court noted that it would not have been an abuse of discretion if the judge had allowed the cross-examinations to proceed. *See id.* at 590 n.3, 671 A.2d at 980 n.3.

they expected no benefit and that "there was no basis to infer an expectation of any benefit" from their testimony.³³³

Gregory T. Lawrence

*K. Under Maryland's implied consent statute, an administrative law judge may base a decision to suspend a driver's license on an advice of rights form signed by officer and motorist, notwithstanding motorist's contrary testimony. Motor Vehicle Administration v. Karwacki*³³⁴

1. Facts

Lee Daniel Karwacki was stopped and detained for driving through a red light. During the detention, Karwacki refused to submit to an alcohol concentration test requested by the detaining officer. Both Karwacki and the officer signed an Advice of Rights form which stated in preprinted text: "Your refusal [to submit to testing] shall result in an administrative suspension of your Maryland driver's license. . . . The suspension . . . shall be . . . one year for a second offense. . . . [Signing this form certifies that] I have read or have been read [the foregoing]."

Under the Maryland implied consent statute,³³⁵ a detaining officer must advise the detainee that mandatory sanctions are imposed for refusal to submit to testing. Moreover, the statute provides that "[t]he sworn statement of the police officer . . . shall be *prima facie* evidence of a test refusal."³³⁶ Karwacki, having previously been sanctioned for refusal to submit to testing, testified before an administrative law judge (ALJ) that the officer failed to advise him of the increased sanctions for a second offense.³³⁷ Based on the officer's sworn statement on the Advice of Rights form, but without the officer testifying,³³⁸ the ALJ decided against Karwacki and ordered a one year suspension of his driver's license. On appeal, the Circuit Court of Maryland for Baltimore City reversed the ALJ's decision,

333. *Id.*

334. 340 Md. 271, 666 A.2d 511 (1995).

335. MD. CODE ANN., TRANSP. II § 16-205.1 (Supp. 1996).

336. *Id.* § 16-205.1(f)(7)(ii).

337. A person may request a "show cause" hearing, at which mandatory sanctions must be imposed if the ALJ determines, *inter alia*, that "[t]he police officer requested a test after the person was fully advised of the administrative sanctions that shall be imposed." *Id.* § 16-205.1(f)(8)(i)(3).

338. Neither Karwacki nor the Motor Vehicle Administration subpoenaed the officer. See *Karwacki*, 340 Md. at 276-77, 666 A.2d at 513-14.

finding it was unsupported by competent, material, and substantial evidence. The circuit court based its ruling on the absence of testimony to rebut Karwacki's testimony. The court of appeals granted certiorari prior to consideration of the intermediate appellate court and reversed the circuit court.

2. Analysis

The court of appeals held that the officer's sworn statement provided adequate support for the ALJ's conclusion that the officer advised Karwacki of the consequences of a test refusal, notwithstanding Karwacki's testimony to the contrary.³³⁹ Generally, hearsay evidence, if reliable, is admissible in administrative hearings and may support an administrative decision.³⁴⁰ In this case, the implied consent statute provides that the sworn statements of an officer amount to *prima facie* evidence that a detainee refused testing.³⁴¹ Moreover, the court noted that it has previously held that the Advice of Rights form adequately conveys those rights granted by the statute.³⁴² Thus, faced with conflicting evidence, the ALJ was within his authority to find that the documentary evidence was more credible than Karwacki's testimony.³⁴³ Further, because credibility determinations are afforded great deference upon review, the court concluded that the ALJ's decision could not be overturned simply because the officer was not present at the hearing.³⁴⁴

339. *See id.* at 285, 666 A.2d at 518.

340. *See id.*

341. *See supra* text accompanying note 336. Notably, the majority never explicitly held that the officer's sworn statement established *prima facie* evidence that the officer advised Karwacki of the consequences of refusing to take the test. *See Karwacki*, 340 Md. at 273-89, 666 A.2d at 512-20. The court stated that the ALJ was forced to either accept Karwacki's testimony, "in which case the *prima facie* evidence of the officer's sworn statement would be rebutted, or he must reject it and leave the *prima facie* evidence intact." *Id.* Therefore, the court impliedly held that an officer's sworn statement establishes *prima facie* evidence that a detainee was advised of the consequences of a test refusal. *See id.* at 289, 666 A.2d at 520.

342. *See id.* at 282, 666 A.2d at 516.

343. *See id.* at 289, 666 A.2d at 520. The court noted that by not subpoenaing the officer, Karwacki had presented the ALJ with an all or nothing choice of either accepting his testimony or the officer's sworn statement. *See id.* Under these circumstances, the ALJ was not obligated to believe Karwacki. *See id.*

344. *See id.* at 284, 666 A.2d at 517 (quoting *Anderson v. Department of Public Safety*, 330 Md. 187, 217, 623 A.2d 198, 212 (1993)); *see also supra* note 343. In *Anderson*, 330 Md. at 217, 623 A.2d at 212, the court of appeals addressed the deference afforded to credibility findings of an agency representative on further agency review, not judicial review.

In addressing the circuit court opinion, the court of appeals made the distinction between stipulated evidence and sworn statements.³⁴⁵ The court reaffirmed that a fact-finder must have some basis on which to assess the credibility of conflicting stipulated evidence.³⁴⁶ A sworn statement, however, is distinct from stipulated evidence; rather, it is documentary evidence.³⁴⁷ Moreover, the implied consent statute³⁴⁸ provides that the sworn statements of an officer amount to *prima facie* evidence that a detainee refused testing. Thus, without rebuttal, a sworn statement is sufficient to support an ALJ's decision.³⁴⁹

Gregory T. Lawrence

*L. Because the offense of felony theft does not merge into robbery, maximum penalty for felony theft was not lowered to that of robbery when defendant was prosecuted for both offenses involving same property and convicted only of felony theft. Spitzinger v. State*³⁵⁰

1. Facts

Steven Spitzinger was indicted and tried for, *inter alia*, robbery and felony theft involving the same property. He was convicted only of felony theft and sentenced to twelve years imprisonment. At the time of trial, felony theft and robbery carried statutory maximum penalties of fifteen and ten years imprisonment, respectively.³⁵¹

On appeal, Spitzinger contended that because he was acquitted of robbery, the maximum penalty he could incur for felony theft

345. See *Karwacki*, 340 Md. at 286-87, 666 A.2d at 518-19.

346. See *id.* at 286-87, 666 A.2d at 518.

347. See *id.* at 287, 666 A.2d at 518-19.

348. In a dissenting opinion, Judge Fischer contended that the majority extended the *prima facie* effect of an officer's sworn statement beyond what the informed consent statute provided. See *Karwacki*, 340 Md. at 292-94, 666 A.2d at 521-22 (Fischer, J., dissenting). Specifically, Judge Fischer noted that the explicit language of the statute only establishes *prima facie* evidence of the detainee's refusal to submit to testing and does not establish that the officer complied with the advice of rights requirement. See *id.* (Fischer, J., dissenting).

349. See *id.* at 287, 289, 666 A.2d at 518-19, 521.

350. 340 Md. 114, 665 A.2d 685 (1995).

351. See MD. ANN. CODE art. 27, § 342 (1996) (theft of property valued at \$300 or greater, felony theft; fifteen years maximum sentence); § 486 (simple robbery, robbery; ten years maximum sentence). In 1996, section 486 was amended to increase the maximum sentence for robbery from ten to fifteen years.

was thereby lowered from fifteen to ten years, the maximum for robbery.³⁵² He asserted that the offense of felony theft merges into robbery or, in the alternative, the penalty for felony theft merges into the penalty robbery. In a per curiam opinion, the court of special appeals affirmed the trial court's sentence of twelve years. The court of appeals granted certiorari and affirmed.

2. Analysis

The court of appeals first held that felony theft is not a lesser included offense of robbery.³⁵³ Thus the offense of felony theft does not merge into robbery.³⁵⁴ The court declared that legislative intent, not the *Blockburger* required evidence test, controls when construing criminal offenses and their punishments.³⁵⁵ Therefore, because the felony theft and robbery statutes each contain an important element not common to the other, the court found it "patently obvious" that these offenses were not intended to be merged and that neither is a lesser included offense of the other.³⁵⁶ Moreover, the court noted that even under the *Blockburger* test these offenses do not merge.³⁵⁷

Next, the court addressed the merger of penalties. The court found that there are circumstances under which two statutory offenses do not merge, but their penalties should merge.³⁵⁸ One such instance is under the rule of lenity, whereby ambiguity is to be resolved in

352. Spitzinger's appeal was premised on the rule adopted in *Simms v. State*, 288 Md. 712, 421 A.2d 957 (1980). In *Simms*, the court of appeals held that when a lesser included offense is merged into a greater offense, the penalties imposed for a conviction only of the lesser included offense is thereby limited to the maximum penalty allowable for the greater offense. *Id.* at 724, 421 A.2d at 964.

353. *See Spitzinger*, 340 Md. at 121-22, 665 A.2d at 688.

354. *See id.*

355. *See id.* at 119, 665 A.2d at 687. The *Blockburger* test provides that where the same conduct constitutes a violation of two separate statutory provisions, the test to determine whether there are two offenses or only one, i.e., whether the offenses merge, is whether each provision requires proof of an additional fact which the other does not; if no such additional proof is required, the offenses merge into one. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932), *quoted in Spitzinger*, 340 Md. at 119 n.1, 665 A.2d at 687 n.1. However, the *Spitzinger* court also emphasized that the legislature may provide for multiple punishments or cumulative sentences even if that might constitute the same offense under the *Blockburger* test. *See Spitzinger*, 340 Md. at 119, 665 A.2d at 687.

356. *See id.* at 121-22, 665 A.2d at 688. The court noted that "[r]obbery requires a taking of property of any value whatsoever which is accomplished by violence or putting in fear. Felony theft requires taking of property valued at \$300 or greater." *Id.* at 121, 665 A.2d at 688 (citations omitted).

357. *See id.*

358. *See id.* at 125, 665 A.2d at 690.

favor of the defendant.³⁵⁹ The court found that because it was unclear whether the legislature intended to authorize cumulative or successive punishment for felony theft and robbery, the rule of lenity requires that these penalties merge.³⁶⁰ Nonetheless, the court held that when penalties merge, as distinguished from merger of offenses, the lesser penalty merges into the greater.³⁶¹ Again, the court found legislative intent dictated the result.³⁶² By prescribing variable maximum penalties for theft offenses, the legislature constructed a sentencing hierarchy based on a graduation of severity.³⁶³ This construction, the court reasoned, should not be invalidated simply because the State elects to also charge a defendant with a related offense.³⁶⁴ Therefore, Spitzinger's acquittal for robbery had no effect on the maximum penalty which could be imposed for his felony theft conviction.³⁶⁵

Gregory T. Lawrence

*M. Detention of passenger during a traffic stop was not warranted when officer testified that his intention in commanding the passenger to stay in vehicle was to ensure officer's own safety. Dennis v. State*³⁶⁶

NOTE: This case has been VACATED AND REMANDED by a recent United States Supreme Court decision, *Whren v. United States*.

1. Facts

Bruce Lamont Dennis was a passenger in an vehicle driven through a red light. An officer saw the traffic violation and pursued

359. *See id.* at 124-25, 665 A.2d at 690.

360. *See id.* at 124, 665 A.2d at 690. In a dissenting opinion, Judge Raker contended that felony theft should merge into robbery for sentencing purposes where the two convictions arise from the same conduct. *See id.* at 130, 665 A.2d at 693 (Raker, J., dissenting). She asserted that merger of felony theft into robbery is consistent with the historical practice at common law. *See id.* at 139, 665 A.2d at 697 (Raker, J., dissenting). Because Judge Raker believed that the legislature did not intend to abrogate this common-law merger rule, she asserted that the majority's holding was in error. *See id.* at 135, 142, 665 A.2d 695, 698 (Raker, J., dissenting).

361. *See id.* at 126, 665 A.2d at 690-91 (quoting *Williams v. State*, 323 Md. 312, 322, 593 A.2d 671, 676 (1991)).

362. *See id.* at 126-27, 665 A.2d at 691.

363. *See id.* at 127, 665 A.2d at 691.

364. *See id.* at 126-27, 665 A.2d at 691.

365. *See id.* at 130, 665 A.2d at 692.

366. 342 Md. 196, 674 A.2d 928, *vacated and remanded*, 117 S. Ct. 40 (1996).

the vehicle with his emergency lights on. The driver attempted to elude the police. Eventually, the driver turned into a driveway, stopped, and both the driver and Dennis opened their car doors and began walking away from the vehicle. An officer commanded Dennis to get back in the car, but Dennis ignored the command and continued to walk away. The officer pursued him, a struggle ensued and Dennis struck the officer. Finally, the officer subdued Dennis and placed him back in the vehicle.

Dennis was charged with and convicted of disorderly conduct and battery. At trial, the officer testified that his reason for detaining Dennis was to ensure the officer's own safety. On appeal, the court of special appeals affirmed the convictions in an unreported opinion. The court of appeals granted certiorari and reversed.

2. Analysis

The court of appeals was presented with the issue of whether, during a stop for a traffic violation, an officer may command a passenger to stay in the vehicle when the detaining officer testified that his intention in doing such was to ensure the officer's own safety.³⁶⁷ In a unanimous opinion overturning the court of special appeals, the court of appeals held that an officer's detention of an automobile passenger must be based on a reasonable suspicion that the passenger himself engaged in criminal activity and that the officer must intend to conduct further investigation based on that suspicion.³⁶⁸ In this case, because the officer testified that the detention of the passenger was only to ensure the officer's own safety, his command to the passenger to stay in the vehicle was unwarranted.³⁶⁹

367. *See id.* at 198, 674 A.2d at 929.

368. *See id.* at 211-12, 674 A.2d at 935. Elsewhere in the opinion, the court noted that there is another possible ground under which an officer might detain a passenger. *See id.* at 203, 674 A.2d at 931 (citing *Barnhard v. State*, 325 Md. 602, 602 A.2d 701 (1992)). In *Barnhard*, the court reiterated that there are circumstances under which an officer may briefly "freeze" a putative crime scene in order to make decisions about how to further proceed. *See Barnhard*, 325 Md. at 615, 602 A.2d at 708 (citations omitted). Nonetheless, the *Dennis* court rejected these grounds as a basis for Dennis's detention because no testimony was offered that the police believed Dennis was an "important witness" to the criminal activities of the driver or that Dennis was a suspect in the case. *See Dennis*, 342 Md. at 204, 674 A.2d at 931-32.

369. *See id.* at 211-12, 674 A.2d at 935. Because the court held that the detention was unwarranted, the disorderly conduct and battery charges, arising from Dennis's defiance, were thus in error. *See id.* at 201, 674 A.2d at 930-31 (citing, e.g., *Drews v. State*, 224 Md. 186, 193, 167 A.2d 341, 344 (1961), for the proposition that an officer's command must be reasonable to sustain a disorderly conduct conviction and noting a person's right to resist an unlawful arrest).

Notably, the court pointed out that the record "may well have" contained sufficient evidence to warrant the officer's reasonable suspicion that the passenger aided and abetted the driver.³⁷⁰ Thus, the court reasoned, that had the officer intended to make an investigatory stop, a different result may have been appropriate.³⁷¹

On writ of certiorari, the Supreme Court vacated the judgment and remanded the case to the court of appeals for further consideration in light of its opinion in *Whren v. United States*.³⁷²

*WHREN V. UNITED STATES*³⁷³

In *Whren*,³⁷⁴ the Court unanimously held that "subjective intentions play no role in [an] ordinary, probable-cause Fourth Amendment analysis."³⁷⁵ The petitioners in *Whren* were a passenger and a driver whose convictions on drug charges were supported by evidence seized during a traffic stop. They contended that the test for reasonableness of a traffic stop should be whether a reasonable officer would have made the stop for the reasons given by the detaining officer.³⁷⁶ In rejecting this contention, the Court held that the decision to stop a vehicle is reasonable where an officer has probable cause to believe that a traffic violation has occurred, notwithstanding any ulterior motives an officer may possess.³⁷⁷

Gregory T. Lawrence

*N. A sentencing judge may consider a defendant's lack of remorse concerning crimes for which the defendant has been convicted. Jennings v. State*³⁷⁸

1. Facts

Arnold Jerome Jennings, Jr., convicted of three counts of armed robbery and the use of a handgun in the commission of a felony,

370. *See id.* at 208-09, 674 A.2d at 934.

371. *See id.* at 209, 674 A.2d at 934.

372. *Maryland v. Dennis*, 117 S. Ct. 40 (1996) (citing *Whren v. United States*, 116 S. Ct. 1769 (1996)).

373. 116 S. Ct. 1769 (1996).

374. *Id.*

375. *Id.* at 1174.

376. *See id.* at 1773.

377. *See id.* at 1774.

378. 339 Md. 675, 664 A.2d 903 (1995).

addressed the court prior to his sentencing. Advised by the judge that Jennings's statements were of great import, Jennings pleaded: "Your Honor, jury found me guilty. You have got to sentence me. But when you do, can you make it as least as possible? I'd like to be there with my kid."³⁷⁹ The judge gave Jennings a sentence of sixty-five years and stated that he would not suspend any portion of it due to Jennings's lack of remorse.³⁸⁰ On appeal to the court of special appeals, Jennings contended that the trial court impermissibly considered his refusal to admit guilt at sentencing when imposing the sentence. The intermediate court rejected Jennings's contention and affirmed. The court of appeals granted certiorari and affirmed.

2. Analysis

In Maryland, the main objectives of sentencing are punishment, rehabilitation, and deterrence.³⁸¹ Essentially, a sentencing court has "virtually boundless discretion" in the types of information it may consider while pursuing these sentencing objectives.³⁸²

Despite the discretion given to a sentencing judge, restrictions exist to protect the fundamental rights of the offender.³⁸³ For instance, the judge may not consider that the defendant pled not guilty and demanded a trial.³⁸⁴ Here, however, the court determined that the judge considered the defendant's lack of remorse and not that the defendant chose to plead not guilty and thus go to trial.³⁸⁵ This is a permissible consideration when deciding not to mitigate a sentence if it pertains to the defendant's refusal to show remorse or accept responsibility for his criminal behavior.³⁸⁶

Laura L. Chester

379. *Id.* at 678, 664 A.2d at 905.

380. *See id.* at 679, 664 A.2d at 905. The maximum sentence the defendant could have received was 80 years. *See* MD. ANN. CODE art. 27, § 36(B)(b) (1992).

381. *See Jennings*, 339 Md. at 682, 664 A.2d at 907 (citing *State v. Dopkowski*, 325 Md. 671, 679, 602 A.2d 1185, 1189 (1992)).

382. *See id.* at 683, 664 A.2d at 907.

383. *See id.* at 683, 664 A.2d at 907 (citing *Reid v. State*, 302 Md. 811, 820, 490 A.2d 1289, 1294 (1985)) (holding that judge may not impose a sentence that is cruel and unusual, violative of the constitution, exceeds statutory limitations, or that is motivated by prejudice, ill-will, or other impermissible considerations).

384. *See id.* at 684, 664 A.2d at 908 (citing *Johnson v. State*, 274 Md. 536, 542-43, 336 A.2d 113, 116-17 (1975)).

385. *See id.* at 687, 664 A.2d at 909.

386. *See id.* at 688, 664 A.2d at 910.

*O. It is within the discretion of the trial court to permit discharge of counsel after meaningful trial proceedings have commenced; however, denial of the discharge is erroneous if the court has not conducted an inquiry that meets constitutional standards to determine the reason for the dismissal. State v. Brown*³⁸⁷

1. Facts

Respondent Shawn L. Brown was indicted in the Circuit Court of Maryland for Wicomico County on two counts of possession of a controlled dangerous substance and on two counts of distribution of a controlled dangerous substance. A few days prior to trial, Brown's counsel said that he would be prepared for the trial to proceed as scheduled. However, at the beginning of the trial, Brown's counsel requested a continuance stating he had not had enough time to prepare for the trial. The continuance was denied.

While the State was examining its first witness, Brown's counsel advised the court that his client wished to discharge him. When the judge inquired as to why the client wished to discharge his counsel, his counsel stated that the client's father had advised him to do so. Brown made no comment during the inquiry. The judge did not allow the respondent to discharge his counsel. Brown appealed the trial court's decision to the court of special appeals. The court reversed and remanded, holding that the defendant should have been allowed to explain his reasons for requesting the discharge of his counsel. The court of appeals accepted certiorari and affirmed.

2. Analysis

The Maryland Rules proscribe procedures a trial judge must follow when a defendant requests permission to discharge his counsel, whether he chooses to proceed with substitute counsel or to proceed *pro se*.³⁸⁸ However, these procedures do not apply after meaningful trial proceedings have commenced.³⁸⁹ Once a trial has begun, the defendant must be able to establish that the prejudice to his legitimate interests outweighs the potential disruption of the proceedings already

387. 342 Md. 404, 676 A.2d 513 (1996).

388. *See id.* at 409, 676 A.2d at 516; *see also* Md. R. 4-215.

389. *See id.* at 423, 676 A.2d at 522 (citing *Chapman v. United States*, 553 F.2d 886, 895 (5th Cir. 1977)). After meaningful trial proceedings have commenced, the right to proceed *pro se* or to obtain substitute counsel must be limited in order to prevent undue interruptions with the administration of justice. *See id.* at 414, 676 A.2d at 518 (citing *Fowlkes v. State*, 311 Md. 586, 605, 536 A.2d 1149, 1159 (1988)).

in progress.³⁹⁰ “[D]isagreements short of a total breakdown in communication between attorney and client generally do not warrant mid-trial substitution of counsel.”³⁹¹

In the case at bar, however, the court of appeals determined the trial judge abused his discretion by not letting defendant state his reasons for wanting to discharge his counsel.³⁹² The trial judge bears the responsibility to determine the reason for the defendant’s request,³⁹³ and his inquiry must meet constitutional standards.³⁹⁴ Maryland’s high court further suggested that trial judges consider the following factors when contemplating the discharge of counsel after trial has commenced: (1) reason for discharge; (2) quality of counsel’s representation prior to request; (3) any disruptive effect the discharge would have; (4) timing of request; (5) the stage and complexity of trial; and (6) prior requests by defendant to discharge counsel.³⁹⁵

Laura L. Chester

*P. An attorney’s opening statement that a rape victim consented to sexual intercourse by trading sex for drugs is considered sexual conduct under the Rape Shield Statute and will not be admissible absent other evidence to substantiate the statement. Shand v. State*³⁹⁶

1. Facts

Leroy Anthony Shand, Floyd Jackson Bailey, and Kevin Christopher Allen were convicted of first-degree rape and other related charges. The three youths, along with two other youths, entered the victim’s apartment³⁹⁷ to collect money that her brother owed Shand

390. *See id.* at 421, 676 A.2d at 522 (quoting *United States v. Catino*, 403 F.2d 491 (2nd Cir. 1968)). The court was concerned that this was a tactic to delay the proceedings or to confuse the jury, either of which increases the risk of a mistrial. *See id.* at 427, 676 A.2d at 525.

391. *Id.* at 416, 676 A.2d at 519 (citing *Commonwealth v. Miskel*, 308 N.E.2d 547, 552 (Mass. 1974)). The First and Ninth Circuits also consider the timeliness of the motion. *Id.* at 422, 676 A.2d at 522 (citing *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988)).

392. *See id.* at 431, 676 A.2d at 526.

393. *See id.*

394. *See id.* at 428, 676 A.2d at 525.

395. *See id.*

396. 341 Md. 661, 672 A.2d 630 (1996).

397. *See id.* at 668, 672 A.2d at 633. Lamiah Hall was tried with the other three defendants and acquitted. *See id.* The fifth person was never apprehended by the police. *See id.* at 668 n.4, 672 A.2d at 633 n.4.

for drugs. When he was unable to pay his debt, the youths pushed the victim's brother out of the apartment and proceeded to rape the victim. The defendants alleged that the victim had consented to sexual intercourse in exchange for drugs. The State filed a motion *in limine* to exclude evidence relating to this defense alleging that it was in violation of the Rape Shield Statute. The court called the victim to the stand during an *in camera* hearing in which she denied she had ever agreed to trade sex for drugs with the defendants. The court ruled that this line of questioning was prohibited by the Rape Shield Statute, and that the defense could not make any statements regarding the alleged trade during its opening statement. Further, the court ruled that it would determine the relevancy of other evidence relating to the alleged trade as it developed during the course of the trial.³⁹⁸

Shand, Bailey, and Allen appealed their conviction arguing that the trial court committed reversible error when it granted the state's motion *in limine*. The court of special appeals rejected this assertion and affirmed the convictions. The court of appeals granted certiorari and affirmed.

2. Analysis

The Rape Shield Statute³⁹⁹ was enacted to prohibit reputation and opinion evidence concerning the victim's chastity in prosecutions for rape or sexual offenses in the first degree.⁴⁰⁰ Evidence of specific instances of the rape victim's prior sexual conduct will only be admissible if two criteria are met: (1) there must be an *in camera* hearing to determine that the evidence is relevant, and that the prejudicial value does not outweigh the probative value, and (2) the evidence must be within one of four exceptions.⁴⁰¹

398. *See id.* at 674, 672 A.2d at 636. No other evidence was offered during the trial to establish there had been a trade. *See id.* The defendants wanted to establish that a trade of sex for drugs occurred so they could show the victim had an ulterior motive for claiming the defendants raped her. *See Johnson v. State*, 332 Md. 456, 632 A.2d 152 (1993) (holding that evidence concerning a trade of sex for drugs was admissible when the victim conceded to trading sex for drugs in the recent past and the evidence tended to show that the victim alleged rape when the defendant did not provide drugs as his part of the bargain).

399. *See MD. ANN. CODE art. 27, § 461(A)* (1992).

400. *See Shand*, 341 Md. at 663, 672 A.2d at 631.

401. *See id.*; *see also MD. ANN. CODE art. 27, § 461(A)* (1992). The four exceptions are:

- (1) Evidence of the victim's past sexual conduct with the defendant;
- or (2) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma; or (3)

The court determined that evidence relating to a trade of sex for drugs is sexual conduct,⁴⁰² and thus, the opening statement referring to the alleged trade was restricted by the rape shield statute.⁴⁰³ The opening statement would have only been relevant, and therefore admissible, had there been other evidence to substantiate the alleged trade occurred on that night.⁴⁰⁴ The court also dismissed the defendant's argument that the evidence was relevant to show that the victim had traded sex for drugs in the past.⁴⁰⁵ According to the court, an allegation that a trade of sex for drugs occurred prior to the night in question, but not on the night in question, would only go to establish that the victim was sexually promiscuous. Thus, the court held that the trial court properly excluded the evidence because the prejudice to the victim clearly outweighed the probative value of the evidence.⁴⁰⁶

Laura L. Chester

*Q. It is not mandatory, thus not an abuse of discretion, for a judge to refuse to ask voir dire questions concerning physical impairments of venire members. Boyd v. State*⁴⁰⁷

1. Facts

Zade Boyd was convicted of attempted armed robbery and other related offenses in the Circuit Court of Maryland for Baltimore City. In an unrelated trial, Trevor Brooks was convicted of second degree murder and handgun offenses in the Circuit Court of Maryland for Baltimore City. Both defendants' attorneys asked the trial judge to

Evidence of which supports a claim that the victim has an ulterior motive in accusing the defendant of the crime; or (4) Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.

MD. ANN. CODE art. 27, § 461(A) (1992). The allegation that the victim had traded drugs for sex would have fallen into the third exception establishing that the victim had an ulterior motive to allege the defendant had raped her. *See Shand*, 341 Md. at 673, 672 A.2d at 636.

402. *See Shand*, 341 Md. at 675, 672 A.2d at 637. The court determined the General Assembly did not limit sexual contact to only apply to forms of physical sexual contact. *See id.*

403. *See id.* at 673, 672 A.2d at 636.

404. *See id.*

405. *See id.* at 669, 672 A.2d at 634.

406. *See id.* at 673, 672 A.2d at 636.

407. 341 Md. 431, 671 A.2d 33 (1996).

ask *voir dire* regarding any physical impairment or ailment a juror had that would hinder his performance as a juror. In both cases the request was denied.

2. Analysis

Criminal defendants are guaranteed the right to a trial by an impartial jury.⁴⁰⁸ *Voir dire* was developed to guarantee juror impartiality.⁴⁰⁹ Although a judge has broad discretion to determine the scope and form of questions asked during *voir dire*,⁴¹⁰ there are specific mandatory questions which must be asked because of their likelihood to reveal grounds for disqualification.⁴¹¹ The grounds for disqualification of a prospective juror are that the juror does not meet the minimum statutory qualifications⁴¹² or that he or she possesses a state of mind which would unduly influence a determination of guilt.⁴¹³ Defendants have a right to have certain questions asked of the potential jurors when they are likely to reveal a specific cause for disqualification.⁴¹⁴ In turn, if the question is not reasonably likely to reveal cause for disqualification, "it will not be an abuse of discretion for the judge to refuse to ask it."⁴¹⁵

An inquiry into the potential juror's physical and mental abilities occurs before the individual becomes a member of the jury pool, rendering any further questions during *voir dire* unnecessary.⁴¹⁶ In Maryland, jurors are screened on at least three levels: (1) they must complete a juror qualification form; (2) they must appear before the judge or commissioner at the courthouse; and (3) the trial judge must observe each juror during the *voir dire*.⁴¹⁷ In both of the cases before the court of appeals there was a fourth level of screening for disqualifications in which the judges asked a catchall question as to any reason why the jurors should not serve.⁴¹⁸

Identification of someone with a physical disability does not automatically lead to that juror's disqualification. Instead, if a judge

408. *Id.* at 435, 671 A.2d at 35 (citing U.S. CONST. amend. VI; MD. DECLARATION OF RIGHTS art. XXI).

409. *See id.* (citing *Hill v. State*, 339 Md. 275, 279, 661 A.2d 1164, 1166 (1995)).

410. *See id.* at 436, 671 A.2d at 35 (citing *Davis v. State*, 333 Md. 27, 34, 633 A.2d 867, 870-71 (1993)).

411. *See id.* at 436, 671 A.2d at 36 (citing *Davis*, 333 Md. at 35-36, 633 A.2d at 871).

412. *See* MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (1995).

413. *See Boyd*, 341 Md. at 436, 671 A.2d at 35-36 (citing *Davis*, 333 Md. at 35-36, 633 A.2d at 871).

414. *See id.* at 436, 671 A.2d at 36 (citing *Hill*, 339 Md. at 280, 661 A.2d at 1166).

415. *Id.* at 439, 671 A.2d at 37.

416. *See id.* at 441, 671 A.2d at 38.

417. *See id.*

418. *See id.* at 444-45, 671 A.2d at 40.

determines a juror suffers from a physical impairment, the judge will likely attempt to accommodate the juror rather than excuse him.⁴¹⁹ Therefore, it is not mandatory, thus not an abuse of discretion, for a judge to refuse to ask *voir dire* questions concerning physical impairments of venire members.⁴²⁰

Laura L. Chester

*R. Absent a reasonable and articulable suspicion that criminal activity has occurred, it is not reasonable to detain a potential visitor of a prison if the visitor has expressed a desire to leave rather than be submitted to the detention. Gadson v. State*⁴²¹

1. Facts

Petitioner Tyrone Jerome Gadson (Gadson) planned to visit an inmate at the house of correction in Jessup. He drove approximately one quarter of a mile and passed three signs warning visitors that they were subject to be searched. After Gadson reached the guard booth he was told that a canine sniff of his vehicle would be performed. Gadson indicated that he would prefer to leave as opposed to being subjected to the search. The trooper instructed Gadson to turn off his vehicle and proceeded to have a canine search his vehicle. As a result of the canine search, drugs and drug paraphernalia were found in Gadson's possession.

2. Analysis

The Fourth Amendment of the United States Constitution and Article 26 of the Maryland Declaration of Rights prohibit the detention of a person absent an articulable reason that the person has been engaged in criminal activity.⁴²² There is no dispute that the detaining of Gadson by the trooper was a seizure.⁴²³ Therefore the question to be determined by the court was whether the seizure was reasonable.⁴²⁴ The reasonableness of a seizure is determined by weigh-

419. *See id.* at 440, 671 A.2d at 37.

420. *See id.* at 447, 671 A.2d at 41.

421. 341 Md. 1, 668 A.2d 22 (1995).

422. *See id.* at 9, 668 A.2d at 26. The State did not contend that the officer had any basis for a suspicion that there were drugs in the vehicle. *See id.* at 16, 668 A.2d at 30.

423. *See id.* at 9, 668 A.2d at 26 (citing *Little v. State*, 300 Md. 485, 493, 479 A.2d 903, 907 (1984)).

424. *See id.* (citing *Little*, 300 Md. at 493, 479 A.2d at 907).

ing the governmental interest against the intrusion of the individual's Fourth Amendment rights.⁴²⁵ The governmental interest being served in the case *sub judice* was keeping drugs out of its correctional facilities.⁴²⁶ However, that objective was met when Gadson attempted to leave the facility.⁴²⁷ Because the seizure was not necessary to serve the State's articulated interest, it was unreasonable.⁴²⁸

Laura L. Chester

*S. Circumstantial evidence may be used in handgun-offense prosecution to establish whether a firearm is operable; the state is not required to investigate into operability of a confiscated firearm. Mangum v. State*⁴²⁹

1. Facts

Petitioner, Steven Mangum, was arrested by Baltimore County Police for possession of a sawed-off shotgun. He was charged in district court with one count of unlawfully carrying a handgun and one count of unlawful possession of a short-barrel shotgun.⁴³⁰

At trial, Mangum motioned for acquittal, arguing that the State had failed to prove that the weapon was operable, which the State conceded was an element of the offense, because the weapon, now in the possession of the State, was never test-fired. The State contested Mangum's motion, contending that circumstantial evidence was sufficient to support a finding that the weapon was operable. Mangum was convicted of both counts, and the conviction was affirmed by both the Court of Special Appeals of Maryland and the Court of Appeals of Maryland.

2. Analysis

The court of appeals rejected Mangum's contention that if the State obtains custody of the handgun at issue in a handgun-possession

425. *See id.* at 10, 668 A.2d at 27 (citing *Little*, 300 Md. at 494, 479 A.2d at 907).

426. *See id.* at 12, 668 A.2d at 28.

427. *See id.* at 20-21, 668 A.2d at 32.

428. *See id.* at 21, 668 A.2d at 32.

429. 342 Md. 392, 676 A.2d 80 (1996).

430. *See id.* at 395-96, 676 A.2d at 81-82. Under Maryland's handgun-possession law, a short-barreled shotgun is considered a handgun. *See* MD. ANN. CODE art. 27, § 36B,F (1992).

case, the State must conduct a test-firing of the weapon to support a finding of operability.⁴³¹ The court stated that Mangum's argument did not recognize the settled legal principle that circumstantial evidence is considered to be equally probative as direct evidence.⁴³² The court of appeals noted that other jurisdictions have considered circumstantial evidence sufficient to determine the operability of a firearm,⁴³³ and that "neither policy nor logic supports a special evidentiary distinction" for determining whether a firearm is operable.⁴³⁴ Holding that there was adequate circumstantial evidence to support a finding that the shotgun was operable,⁴³⁵ the court of appeals found that the trial court correctly determined that the firearm was operable.⁴³⁶

Mangum also asserted that the State violated his due process rights by not test-firing the gun because the weapon was under the exclusive control of the State.⁴³⁷ The court of appeals summarily rejected this argument, stating that Mangum had the right to order a test-firing of the weapon under discovery procedures or a request to produce,⁴³⁸ and that, because no request was made, the argument was groundless.⁴³⁹

The holding of this case closes a possible loophole in the handgun-offense law which would require the state to test-fire all recovered handguns used as evidence in handgun-possession cases. Any defendant charged with handgun offenses who wishes to argue that the handgun is inoperable must request that the gun be test-fired. Thus, a defendant cannot argue that the weapon does not

431. See *Mangum*, 342 Md. at 396-98, 676 A.2d at 82; see also *Howell v. State*, 278 Md. 389, 364 A.2d 797 (1976) (holding that "handgun" must be a firearm to be within statute, and that weapon must be operable in order to be a "firearm"). The Annotated Code of Maryland prohibits the "unlawful wearing, carrying, or transporting of handguns." MD. ANN. CODE art. 27, § 36B(b) (1996).

432. See *Mangum*, 342 Md. at 398, 676 A.2d at 82-83 (quoting *Hebron v. State*, 331 Md. 219, 226, 627 A.2d 1029, 1032 (1993) (stating that there is no difference between direct and circumstantial evidence)).

433. See *id.* at 400, 676 A.2d at 84.

434. *Id.* at 398, 676 A.2d at 83.

435. See *id.* at 400-01, 676 A.2d at 84. The court noted the State's evidence of shotgun shells in the possession of Mangum, Mangum's testimony of prior involvement in shooting a shotgun, and testimony of fearing for his life allowed the trial court to infer beyond a reasonable doubt that the weapon was operable. See *id.*

436. See *id.* at 401, 676 A.2d at 84.

437. See *id.*

438. See *id.* at 401-02, 676 A.2d at 84-85. Maryland's evidentiary rule requires that defendant be allowed to inspect documents and tangible items of the State's evidence in a criminal trial. MD. R. 4-263(b)(5).

439. See *id.* at 402, 676 A.2d at 85.

meet the statutory definition of a handgun merely because it was not test-fired.

Douglas I. Wood

IV. CONSTITUTIONAL LAW

*A. A court order conditioning media access to juvenile proceedings upon newspaper publication of court order is unconstitutional. Baltimore Sun Co. v. State*⁴⁴⁰

1. Facts

During the course of a closed juvenile proceeding,⁴⁴¹ The Baltimore Sun (The Sun) and other members of the media filed a motion for access to the proceedings and to some related documents. The juvenile court granted the motion on the condition that the media not use the juvenile's full name, but instead refer to him as "Maurice" or "Maurice M." Nine days later, The Sun published an article containing a photograph of the juvenile with a caption identifying him as "Maurice Bouknight." Although "Maurice Bouknight" was not the juvenile's legal name, Bouknight was the juvenile's mother last name and thus, "a name of identification."⁴⁴² The Sun obtained the juvenile's photograph from the Baltimore City Police Department.

The court conducted a hearing to determine whether The Sun had violated the conditions of its order. The court held that the order specifically limited all references to the child to "Maurice" or "Maurice M." and that The Sun had attempted to "get around" the order by identifying the child by his mother's last name. The court then proposed to amend the order to emphasize that the media could only refer to the juvenile as "Maurice" or "Maurice M." and to provide that no photographs or visual representation of the child could be displayed by the media. The court also asserted that it would deny the media further access to the proceedings unless The Sun published the amended order in all its editions the following day. The Sun refused to publish the order, and the court barred the media from the proceedings. Upon petition by the media for recon-

440. 340 Md. 437, 667 A.2d 166 (1995).

441. See *In re Maurice M.*, 314 Md. 391, 550 A.2d 1135 (1988), *rev'd sub nom. Maurice M. v. Bouknight*, 493 U.S. 549 (1990).

442. *Baltimore Sun*, 340 Md. at 444-45, 667 A.2d at 170 (quoting the juvenile court findings).

sideration, the court allowed access to all members of the media except The Sun, under the conditions of its amended order.

The Sun filed an appeal with the court of special appeals requesting a reversal of the order denying access to the proceedings. The Court of Appeals of Maryland granted certiorari prior to intermediate appellate review and reversed.

2. Analysis

The court of appeals held that the juvenile court's order conditioning media access to the proceedings upon The Sun's publication of the amended order was unconstitutional.⁴⁴³ The court noted that under *Miami Herald Publishing Company v. Tornillo*⁴⁴⁴ a state's statute mandating the press to publish specific materials constitutes an impermissible exercise of control over editorial judgment and prerogative.⁴⁴⁵ This, the court continued, equally applied to the juvenile court's order requiring the media to use specific terms to refer to the child.⁴⁴⁶

The court of appeals also held that the juvenile court's order banning further publication of the child's picture was unconstitutional.⁴⁴⁷ The court noted that although the state has an interest in protecting the juvenile's anonymity, this interest must yield to the constitutional right to print information lawfully obtained outside the proceedings.⁴⁴⁸ The court concluded that the juvenile court's discretion to impose conditions on the media in return for access to the proceedings "can only extend as far as confidential information obtained from the juvenile proceedings."⁴⁴⁹

Gabriel A. Terrasa

*B. Suspension of an individual's driver's license pursuant to Section 16-205.1 of the Transportation Article of the Annotated Code of Maryland and subsequent conviction for driving while intoxicated do not constitute double jeopardy within the meaning of the United States Constitution or Maryland common law. State v. Jones*⁴⁵⁰

443. See *id.* at 453, 667 A.2d at 174.

444. 418 U.S. 241 (1974).

445. See *Baltimore Sun*, 340 Md. at 453, 667 A.2d at 174.

446. See *id.* at 455, 667 A.2d at 175.

447. See *id.* at 460, 667 A.2d at 177.

448. See *id.* See generally Eric B. Easton, *Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence*, 45 DEPAUL L. REV. 1, 6 (1995) ("[T]he First Amendment imposes a presumption against the suppression of speech when suppression would be futile. Suppression is futile when the speech is available to the same audience through some other medium or at some other place.").

449. *Baltimore Sun*, 340 Md. at 458, 667 A.2d at 176.

450. 340 Md. 235, 666 A.2d 128 (1995), *cert. denied*, 116 S. Ct. 1265 (1996).

1. Facts

Ernest Jones, Jr. was arrested and charged with driving while intoxicated (DWI). An administrative law judge suspended Jones's driver's license for thirty days pursuant to Section 16-205.1 of the Transportation Article of the Annotated Code of Maryland.⁴⁵¹ The district court found Jones guilty of driving while intoxicated. Jones appealed his conviction to the circuit court claiming that after having his license suspended, a DWI conviction constituted double jeopardy. The circuit court agreed and dismissed the case. The court of appeals granted certiorari prior to intermediate appellate review and reversed.

2. Analysis

The court of appeals held that suspension of an individual's driver's license pursuant to section 16-205.1 and subsequent conviction for driving while intoxicated did not constitute double jeopardy within the meaning of the United States Constitution or Maryland common law.⁴⁵²

Following United States Supreme Court precedent,⁴⁵³ the court of appeals devised a three-step analytical model to determine whether the statutory sanction was remedial or punitive.⁴⁵⁴ First, the court "examine[d] prior uses of license suspension to determine whether they have been generally understood as punitive or non-punitive."⁴⁵⁵ Second, the court scrutinized the language, structure, and legislative history of section 16-205.1 to determine whether the statute itself "evidence[d] a purpose different from the historical understanding given to similar statutes."⁴⁵⁶ Third, because the statute served both remedial and punitive purposes, the court analyzed section 16-205.1 to determine whether "the non-punitive purposes alone fairly justif[ied] the sanction imposed."⁴⁵⁷ The court held that despite the section's possible punitive

451. Section 16-205.1(b)(1)(i)(1) mandates a 45 day suspension of the driver's license for a first-time offender whose blood alcohol content tests above 0.10. Section 16-205.1(f) provides that the driver may request an administrative hearing at which the suspension of the license can be reduced or modified under certain circumstances.

452. See *Jones*, 340 Md. at 265-66, 666 A.2d at 143.

453. See *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994); *Austin v. United States*, 509 U.S. 602 (1993); *United States v. Halper*, 490 U.S. 435 (1989).

454. The Double Jeopardy Clause of the Fifth Amendment "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and *multiple punishments* for the same offense." *Jones*, 340 Md. at 242, 666 A.2d at 131 (quoting *Halper*, 490 U.S. at 440).

455. *Jones*, 340 Md. at 250, 666 A.2d at 135.

456. *Id.*

457. *Id.*

purposes, its remedial purpose of keeping drunk drivers off the roads “amply” justified its driver’s license suspension provision.⁴⁵⁸

Regarding the Maryland double jeopardy protection claim, the court noted that “[t]he rule against double jeopardy in Maryland is not established by the Constitution of the State but derives from the common law.”⁴⁵⁹ Thus, even if section 16-205.1 violates Maryland’s common law double jeopardy doctrine, the statute prevails over common law.⁴⁶⁰

Gabriel A. Terrasa

*C. Re-polling the jury after a juror gives an ambiguous answer to the polling question is not sufficient or appropriate to cure the ambiguity. Bishop v. State*⁴⁶¹

1. Facts

Paul Renard Bishop was tried on charges of robbery and conspiracy to commit robbery. After the foreman of the jury announced a guilty verdict on both counts, Bishop’s counsel requested that the jury be polled. Each juror was asked whether the foreman’s verdict was that juror’s verdict. The third juror polled responded “uhh, reluctantly, yes.” Bishop’s counsel, at bench conference, requested the court to send the jury back and to further question the “reluctant” juror. The court instead re-polled the entire jury; this time all jurors answered affirmatively, and the verdict was enrolled.

Bishop appealed to the court of special appeals, claiming that: (1) the response “uhh, reluctantly, yes” to the jury poll was ambiguous; (2) under *Lattisaw v. State*⁴⁶² the trial court was required to solve the ambiguity by non-coercive means; and (3) re-polling the jury after a juror showed reluctance to the verdict was coercive. The court of special appeals affirmed the conviction holding that the determination of whether the juror’s response was ambiguous was within the discretion of the trial judge. The Court of Appeals of Maryland granted certiorari and reversed the conviction.

458. *See id.* at 265, 666 A.2d at 142.

459. *Id.* at 266, 666 A.2d at 142 (quoting *Ford v. State*, 237 Md. 266, 269, 205 A.2d 809 (1965)).

460. *See id.*

461. 341 Md. 288, 670 A.2d 452 (1996).

462. 329 Md. 339, 619 A.2d 548 (1993). In *Lattisaw*, a juror responded “yes, with reluctance” to the jury-poll question. *See id.* The juror was visibly upset, and the trial court recognized that there was reluctance in her demeanor. *See id.*

2. Analysis

The court of appeals held that, while the determination of whether a juror's response is ambiguous would ordinarily lie within the trial judge's discretion, it was clear under the circumstances of the case that the "reluctant" juror's response was ambiguous.⁴⁶³ The court noted that the purpose of polling the jury is to determine whether "the verdict is being given with 'free and unqualified' assent," and that the reluctant juror's response in this case did not fulfill that purpose.⁴⁶⁴

Addressing the question of the appropriateness of re-polling the jury,⁴⁶⁵ the court noted that *Lattisaw* offered two alternatives for clearing ambiguity in a juror's response: "'The safest course'" is to send the jury out for further deliberations, instructing them to return an unanimous verdict.⁴⁶⁶ "Alternatively," the court may attempt to clarify the ambiguity by questioning the juror in a non-coercive manner.⁴⁶⁷ The court concluded that re-polling the jury did not resolve the ambiguity of the juror's response and may have coerced the juror into giving an affirmative answer.⁴⁶⁸

Gabriel A. Terrasa

*D. State police may deny application to purchase a handgun on the basis that possession of handgun by applicant would violate federal law. Department of Public Safety v. Berg*⁴⁶⁹

1. Facts

Randolph Berg submitted an application to purchase a handgun from a gun dealer in Maryland. After conducting a background

463. See *Bishop*, 341 Md. at 293, 670 A.2d at 455.

464. *Id.*

465. Judge Chasanow, joined by Judge Raker, dissented, noting that if the "reluctant" juror response was ambiguous, the trial judge took appropriate steps to cure the ambiguity by re-polling the jury. See *id.* at 296-97, 670 A.2d at 457 (Chasanow, J., dissenting). The dissenters interpreted *Lattisaw's* two alternatives for clarifying a juror's response as suggested means and not as exclusive options. See *id.* at 295-96, 670 A.2d at 456 (Chasanow, J., dissenting). The dissenters also noted that the trial judge has the benefit of observing "the manner of answering and demeanor" of the "reluctant" juror, and as such, the trial judge is in a better position to determine whether the juror is uncertain about the verdict or merely unhappy about rendering the decision. See *id.* at 296, 670 A.2d at 456 (Chasanow, J., dissenting).

466. *Id.* at 293-94, 670 A.2d at 455 (quoting *Lattisaw*, 329 Md. at 347, 619 A.2d at 552).

467. *Id.* (quoting *Lattisaw*, 329 Md. at 347, 619 A.2d at 552).

468. See *id.* at 294, 670 A.2d at 456.

469. 342 Md. 126, 674 A.2d 513 (1996).

investigation, the Department Public Safety and Correctional Services (State Police) denied Berg's application. The denial was based on Berg's prior conviction for possession of cocaine in violation of state law and on the federal Gun Control Act of 1968.⁴⁷⁰ Berg appealed the denial of the application to the Circuit Court of Maryland for Carroll County, claiming that the State Police could only apply the federal law if it was officially adopted by the state and if the guns were involved in interstate commerce. The circuit court reversed the State Police's decision, holding that the State Police should have considered whether Berg was entitled to an exemption from the statutory prohibition.⁴⁷¹ The State Police appealed to the court of special appeals. The Court of Appeals of Maryland granted certiorari prior to intermediate appellate review and reversed.

2. Analysis

The court of appeals held that the State Police were empowered to apply federal law in denying Berg's application for a handgun.⁴⁷² The court noted that through Clause 2 of Article VI of the United States Constitution, underscored by Article 2 of the Maryland Declaration of Rights, "an Act of Congress 'is as valid a command within the borders of [Maryland] as one of its own statutes.'"⁴⁷³ The court concluded that state and local law enforcement officials are empowered to enforce federal law.⁴⁷⁴

Addressing Berg's contention that the State Police could only enforce the federal law if the guns were involved in interstate commerce, the court noted that federal courts have consistently held the statute to apply even with a minimal nexus to interstate commerce.⁴⁷⁵ The court held that, because the handgun Berg intended to purchase

470. The Gun Control Act of 1968, 18 U.S.C. § 921, prohibits the sale of a handgun to a person convicted of a crime punishable with imprisonment over a year. *Id.* § 922(b). The statute also prohibits a person convicted of such crime to possess or receive a handgun. *See id.* § 922(g). In Maryland, the crime of possession of cocaine carries a maximum sentence of four years imprisonment. *See MD. ANN. CODE art. 27, § 287 (1996).*

471. Section 925(c) of the Gun Control Act of 1968 provides that "[a] person who is prohibited from possessing . . . or receiving firearms . . . may make application to the Secretary [of Treasury] for relief from the disabilities imposed by Federal laws." *Berg*, 342 Md. at 134, 674 A.2d at 516 (quoting 18 U.S.C. § 925(c) (1968)).

472. *See id.* at 139, 674 A.2d at 519.

473. *Id.* at 136, 674 A.2d at 519 (quoting *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928)).

474. *See id.* at 138-39, 674 A.2d at 518-19.

475. *See id.* at 141-42, 674 A.2d at 520.

was manufactured outside of Maryland, the requisite connection to interstate commerce existed.⁴⁷⁶

The court of appeals also held that the circuit court erred in directing the State Police to determine whether Berg was entitled to an exemption from the federal statute.⁴⁷⁷ The court noted that the Gun Control Act of 1968 specifically delegated that function to the Secretary of the Treasury or his designee.⁴⁷⁸ The court concluded that the State Police had no jurisdiction to grant relief from the federal prohibition.⁴⁷⁹

Gabriel A. Terrasa

V. EVIDENCE LAW

*A. Maryland's statute authorizing admission of DNA evidence eliminates the need to perform Frye-Reed hearings. Armstead v. State*⁴⁸⁰

1. Facts

Petitioner, Michael Armstead (Armstead), was charged with rape, sexual assault, and other offenses arising out of the 1991 robbery and rape of a Howard County woman. At trial, the State presented evidence of a DNA analysis on blood and semen samples taken from the victim which linked Armstead to the crime.

Armstead sought, by motion *in limine*, to exclude the DNA evidence on statutory and constitutional grounds. The trial court rejected both statutory and constitutional arguments and ruled that the DNA evidence was admissible. Armstead was subsequently convicted.

2. Analysis

Armstead's primary arguments were that: (1) Section 10-915 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland permits introduction of DNA evidence, but still requires an "inverse Frye-Reed hearing," a preliminary hearing to rebut the

476. *See id.* at 142, 674 A.2d at 521.

477. *See id.* at 140-41, 674 A.2d at 519.

478. *See id.*

479. *See id.* at 140-41, 674 A.2d at 519-20.

480. 342 Md. 38, 673 A.2d 221 (1996).

admissibility of DNA evidence,⁴⁸¹ and (2) despite the existence of section 10-915, the trial court must still perform a balancing test to determine if the probative value of the DNA evidence outweighs its prejudicial value.⁴⁸²

The court rejected Armstead's arguments,⁴⁸³ stating that the legislature's intent in passing section 10-915 was to remove the requirement of a hearing, not merely to shift the burden to the defendant to show that DNA evidence was unreliable.⁴⁸⁴ Additionally, the court of appeals concluded that any discretion allowed to the trial court centered on a determination of the relevance of this evidence rather than its reliability.⁴⁸⁵ As such, the trial court was not required to conduct *any* inquiry into the reliability of DNA evidence.⁴⁸⁶

Douglas I. Wood

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481. *See id.* at 55, 673 A.2d at 230. The Frye-Reed test requires that, absent a statute allowing admissibility, evidence relating to a scientific technique, such as DNA analysis, must meet the standard of "general acceptance" in the relevant scientific community." *Id.* at 54, 673 A.2d at 228-29; *see also* Reed v. State, 283 Md. 374, 381, 391 A.2d 364, 368 (1978) (discussing Frye v. United States, 293 F. 1014 (D.C. Cir. 1923)).
482. *See id.* at 61-62, 673 A.2d at 232-33.
483. Armstead asserted that rather than doing away with the Frye-Reed test, section 10-915 merely shifts the burden from the prosecution to show that DNA evidence is reliable to the defendant to show that DNA evidence is unreliable. *See id.* at 60-61, 673 A.2d at 232. Armstead's second argument was that despite the existence of section 10-915 authorizing admission of DNA evidence, the trial court retained discretion to balance the probative value of such evidence against its prejudicial effect. *See id.* at 61, 673 A.2d at 232.
484. *See id.* at 60-61, 673 A.2d at 232. The court of appeals noted that when the DNA legislation was initially proposed, the Senate Judicial Proceedings Committee's Report stated that the purpose of the bill was to eliminate the need for hearings into the reliability of DNA evidence. *See id.* at 57-58, 673 A.2d at 230. The court also noted that the preamble to the statute shows the Legislature's position that DNA evidence is sufficiently reliable to eliminate the Frye-Reed inquiry. *See id.* at 59-61, 673 A.2d at 231-32. As such, the legislative history shows an intent to remove the need for hearings completely.
485. *See id.* at 62, 673 A.2d at 233. The court of appeals stated that although the statute has eliminated the trial court's role in determining the reliability of DNA evidence for purposes of admission, the trial judge still retains discretion to evaluate the relevancy of such evidence. *See id.* at 62, 673 A.2d at 233. In addition, the trial court may exclude DNA evidence as unreliable if the manner in which a particular DNA test was performed would render that test unreliable. *See id.* at 63, 673 A.2d at 233. For example, a trial judge could refuse to admit certain DNA evidence which was obtained through erroneous laboratory procedures, rendering the test unreliable. *See id.*
486. *See id.* at 62, 673 A.2d at 232.

*B. Decision to compel disclosure of financial records by expert witnesses lies within sound discretion of trial judge. Araiza v. Roskowinski-Droneburg*⁴⁸⁷

1. Facts

Heather Jean Roskowinski-Droneburg (Plaintiff) filed an action in Maryland Health Claims Arbitration (HCA) after suffering complications arising from a 1989 laparoscopy procedure. After the claim was filed, Gerardo Araiza, M.D., Gerrit J. Schipper, M.D., and their professional corporation, Drs. Araiza and Schipper, P.A. (Defendants), sent a notice of deposition to Marshall Klavan, M.D., a Pennsylvania resident whom the Plaintiff intended to call as an expert witness. The notice requested that Klavan bring with him to the deposition all documents and records listing the number of hours billed, the compensation earned as a medical expert, and all records and documents indicating the identity of cases, parties, and attorneys with which he was involved as a medical expert over the past five years.

At the deposition, Klavan testified as to the estimated amount of his annual income derived from forensics over the past ten years, as well as the proportion of his work it represented. Klavan did not produce his tax returns, however, and stated that he would not produce them even if ordered to do so by the court. Klavan also stated that he did not possess any 1099 tax forms, and that he did not maintain a record of billings for medical legal evaluations and testimony. Klavan confirmed that he had testified in all 118 of the cases named on a list obtained from the Defendants' insurer.

The parties subsequently waived arbitration, and suit was filed against the Defendants in the Circuit Court of Maryland for Frederick County. On October 11, 1994, less than two weeks before trial, the Defendants obtained two subpoenas *duces tecum* directed at Klavan. One was taken to the Pennsylvania court which had jurisdiction over the venue of Klavan's medical office. That court issued an order for service of the subpoena on Klavan, who was personally served on October 21. The subpoena required Klavan to bring all documents and records indicating the amount of hours billed and compensation earned through involvement in medical legal cases; copies of all 1099s; a list of medical cases indicating the identity of the cases, parties, and the attorney who retained him; and a list of all laparoscopy cases he had performed during the past five years.

On the day of the trial, both parties filed motions *in limine* in open court. The Defendants' motion asked the court to order Dr.

487. 341 Md. 314, 670 A.2d 466 (1996).

Klavan to either comply with the subpoena or be barred from testifying. The Plaintiff's motion requested that the court relieve Klavan from complying with the subpoena pursuant to Maryland Rule 2-510(e), which allows the court to protect individuals from unduly burdensome or oppressive demands. The trial judge granted the Plaintiff's motion, finding that the request was "extremely burdensome" given that the Defendants had over two years to take action after Klavan's refusal to comply with the original request, but waited until three days before trial to serve the subpoena *duces tecum*. The court also noted that all information requested in the subpoena, with the exception of the tax forms, had been substantially obtained at deposition. The jury trial proceeded, resulting in a verdict partially in favor of the Plaintiffs and partially in favor of the Defendants.

The Defendants appealed to the Court of Special Appeals of Maryland. Before the intermediate court could consider the case, the Court of Appeals of Maryland granted certiorari to address Defendants' argument that medical experts be required to disclose, as a matter of course and without a discovery request, financial information for impeachment purposes.

2. Analysis

The court of appeals did not reach the issue of whether disclosure of financial information by an expert witness for the purpose of impeachment was compulsory without a formal discovery request.⁴⁸⁸ Instead, the court held that the trial judge had appropriately exercised his discretion in deciding whether to compel disclosure by the expert witness.⁴⁸⁹

The court of appeals noted that there appeared to be substantial legislative resistance to an automatic disclosure requirement. The Defendants' based their argument for automatic disclosure on the policy behind Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, which require automatic disclosure by a party of a list of cases and depositions in which an expert witness retained by that party had testified.⁴⁹⁰ The *Araiza* court noted, however, that the federal

488. *See id.* at 315, 670 A.2d at 467-68.

489. *See id.* at 322, 670 A.2d at 469-70. The *Araiza* court noted that the judge must consider "upon principles of reason and equity" whether compliance with a request for production should be honored. *Id.* at 322, 670 A.2d at 470 (quoting *Amey v. Long*, 9 East. 473 (1808)).

490. *See id.* at 323, 670 A.2d at 470. The *Araiza* court stated that the Defendants' contention "carries well beyond the philosophy's limits in the federal rule." *Id.*

rule does not require automatic disclosure of financial records.⁴⁹¹ The court also noted that a proposal for automatic disclosure of *non-financial* records in civil cases had been proposed by the Maryland Rules Committee, but received such strong opposition that it was later withdrawn.⁴⁹² The court concluded that in light of purposeful legislative inaction it would be inappropriate to impose an automatic disclosure requirement by judicial decree.⁴⁹³

Douglas I. Wood

C. *Posthumous permanent impairment ratings are admissible in worker's compensation claims. Sears, Roebuck & Co. v. Ralph*⁴⁹⁴

1. Facts

Calvin Ralph, was employed by the defendant, Sears, Roebuck and Company, Inc. (referred to collectively with its insurer, Allstate Insurance Company, as Sears) as an appliance repairman. In February 1991, while making a service call, he slipped, fell, and injured his back. Sears thereafter paid Ralph temporary total disability benefits until his unrelated death from cancer in November 1991.

Ralph visited Dr. Shah (Shah) on March 1, 1991, complaining of lower back pain radiating to both hips. Shah performed an X-ray which revealed spinal column and nerve degeneration and disease in Ralph's lower back. Ralph visited Shah five more times in April and May of 1991. Shah referred Ralph for a neurological examination, which established that a myelogram and CT scan were necessary to determine the extent of Ralph's nerve disease and to develop an appropriate plan of treatment.

After Ralph's visit on June 21, 1991, Shah made notes that Ralph was "totally disabled" and incapable of gainful employment. Shah then wrote a letter to Sears stating that Ralph was not ready for a work-hardening program and should not return to work, even

491. *See id.*

492. *See id.* The new proposed Rule 2-403 generated an "outpouring of opposition from the legal and other communities" and was later proposed to be limited to tort cases involving motor vehicles. Subsequently, the proposed rule was abandoned in lieu of scheduling conference orders to determine the appropriate level and scope of discovery necessary for reaching an expedient settlement. *See id.*

493. *See id.*

494. 340 Md. 304, 666 A.2d 1239 (1995).

for a "lighter job schedule." Before resolution of this action, however, Ralph died of an unrelated illness.

After her husband's death, Ralph's widow (Mrs. Ralph) continued the action to receive permanent disability benefits. Four months after Ralph's death, Shah wrote a letter of medical rating to Mrs. Ralph's counsel stating that Ralph had 50% disability of his lumbar spine, 40% total body disability, and 100% disability to return to work. A hearing was held in March of 1993 before the Maryland Workers' Compensation Commission (the Commission), during which the Commission determined that, based on the evidence submitted, Ralph had not reached the maximum medical level of improvement.

At trial, both parties moved for summary judgment. The circuit court granted Sears's motion based on a finding that there was insufficient evidence submitted to determine the claim, apparently because the medical rating was issued posthumously. Mrs. Ralph moved to alter the judgment based on a letter from Shah which stated that as of June 21, 1991, Ralph had reached maximum medical improvement and, because of his work-related injuries, would never be able to return to employment. The circuit court denied the motion to alter.

The decision was reversed on appeal to the Court of Special Appeals of Maryland, and Sears petitioned the Court of Appeals of Maryland for certiorari. Certiorari was granted to determine whether under Maryland law a posthumous permanent impairment rating can be used to determine a Workers' Compensation Claim.

2. Analysis

Sears's position that a posthumous permanent impairment rating was insufficient to determine a Workers' Compensation Claim was based on the interplay of Maryland statutory and regulatory provisions.⁴⁹⁵ The court of appeals stated, however, that the mere fact

495. See *id.* at 308, 666 A.2d at 1241. The Labor and Employment Article of the Annotated Code of Maryland provides a cause of action to continue a Workers' Compensation claim for permanent disability after the claimant's death. MD. CODE ANN., LAB. & EMPL. §§ 9-632, -640(b) (1991); see also *Sears*, 340 Md. at 308 n.1, 666 A.2d at 1241, n.1. Permanent impairments are to be evaluated by a physician and reported to the Commission in accordance with the regulations of the Commission. LAB. & EMPL. § 9-721(a); see also *Sears*, 340 Md. at 310-11, 666 A.2d at 1242.

The court of appeals stated that the gravamen of Sears's argument is that the permanent impairment evaluation required by Maryland law can only be furnished by a medical witness who issued a formal evaluation, in accordance with the American Medical Association Guidelines of the Third Edition for

that the medical disability rating was not issued until after the claimant's death does not render the evaluation inadmissible.⁴⁹⁶

The court based its decision on a review of the relevant statutes and legislative history.⁴⁹⁷ The court of appeals noted that the purpose of the enactment of the current and former workers' compensation statutes, requiring compliance with the Guides,⁴⁹⁸ was to reduce the costs of workers' compensation insurance, not to preclude coverage in cases where the disability rating was issued before a claimant's death.⁴⁹⁹ The court also noted that the survival provisions of the Workers' Compensation Act had not been construed to require that an award of compensation be made prior to a claimant's death.⁵⁰⁰ Therefore, legislative history and statutory interpretation did not preclude compensation when the claimant has died of unrelated causes.⁵⁰¹

Finally, the court of appeals noted that in states which do not require an award to be issued prior to the claimant's death, determination of the survivability of a claim is made on a case-by-case basis.⁵⁰² A "bright-line" rule, such as that advocated by Sears, precluding admission of an impairment evaluation issued after the claimant's death, is inconsistent with this line of reasoning.

Evaluation of Permanent Impairment (the Guides), during the claimant's lifetime. *See id.* at 312, 666 A.2d at 1243; *see also* MD. CODE ANN., LAB. & EMPL. § 9-721 (1991). Because Dr. Shah's formal letter of evaluation in accordance with the Guides was not issued until after Ralph's death, under Sears's hypothesis it would be incompetent evidence.

496. *See Sears*, 340 Md. at 312-13, 666 A.2d at 1243.

497. *See id.*

498. *See id.* at 313, 666 A.2d at 1243. The disability evaluation was given according to the Guides. *See id.*

499. *See id.* at 312-14, 666 A.2d at 1243-44.

500. *See id.* at 314-15, 666 A.2d at 1244. The court stated that a claim which was "payable" for purposes of a survival action under Section 9-640(b) of the Labor and Employment Article of the Annotated Code of Maryland was a claim which was payable because a compensable injury resulting in permanent disability occurred, not merely payable because an award was made prior to the claimant's death. *See id.* at 308 n.1, 314-15, 666 A.2d at 1241 n.1, 1244.

501. *See id.* at 315, 666 A.2d at 1244. The court implied that the physician must have gathered sufficient underlying information and data during the claimant's lifetime to issue an evaluation in accordance with the Guides. *See id.* at 312-13, 666 A.2d at 1243. If the physician possesses such information, it follows that a re-evaluation would be redundant.

502. *See id.* at 316, 666 A.2d at 1244-45. The evidence of the evaluation supporting an impairment rating in the cases cited in the text was evaluated on its own merits. *See id.* The mere fact that the impairment evaluation was not issued before death does not preclude its admission. *See id.* at 315-16, 666 A.2d at 1244-45. Survival claims were upheld where the pre-death medical record of the claimant was found sufficient to support an award and have been denied where the record was insufficient to show that the claimant reached the maximum level of medical improvement. *See id.* at 316, 666 A.2d at 1245.

Thus, the *Sears* court found that posthumous permanent impairment ratings were admissible as evidence in workers' compensation cases.

Douglas I. Wood

*D. Statute allowing admissibility of motor vehicle speed measurements by radar does not preclude admissibility of laser speed measurements. Goldstein v. State*⁵⁰³

1. Facts

Petitioner Goldstein was issued a citation by a Howard County Police officer charging him with driving at a speed of 74 miles per hour in a 55 mile per hour zone. Goldstein's speed was measured using an LTI 20-20 laser speed gun: a device that uses a laser beam to measure velocity.

At trial in the district court, Goldstein was convicted of speeding. Goldstein appealed to the Circuit Court of Maryland for Howard County, where he filed a motion to exclude the laser evidence. The court denied the motion to exclude, holding that the State had proven by a preponderance of evidence that the LTI 20-20 was "generally accepted in the relevant scientific community" and that the evidence was thus admissible.

2. Analysis

Goldstein contended that the state legislature had impliedly rejected laser evidence to prove the speed of a motor vehicle.⁵⁰⁴ Goldstein argued that the statute allowing the admission of radar speed readings did not specifically mention laser readings,⁵⁰⁵ and that the legislature had actually rejected proposals to amend the radar-measurement statute to allow laser speed measurements.⁵⁰⁶

In rejecting Goldstein's "legislative inaction" argument, the court of appeals stated that Maryland's general rule is that failure to adopt legislation or provisions of a proposal does not provide a sound basis for determining legislative intent, particularly where there may have

503. 339 Md. 563, 664 A.2d 375 (1995).

504. *See id.* at 567, 664 A.2d at 377; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 12-401 (Supp. 1996).

505. *See Goldstein*, 339 Md. at 565, 664 A.2d at 376.

506. *See id.* at 569 n.1, 664 A.2d at 377 n.1.

been several reasons for rejecting a particular proposal.⁵⁰⁷ The court further asserted that the absence of a specific legislative mandate that laser readings be allowed does not preclude the court from determining their admissibility under common-law evidentiary principles.⁵⁰⁸

The *Goldstein* court also discounted the petitioner's argument that the LTI 20-20 laser gun had not been accepted as reliable as a new scientific technique.⁵⁰⁹ Although the court of appeals stated that the trial court had properly found that the LTI 20-20 speed detection device satisfied the criteria for admissibility of a new scientific techniques — the *Frye-Reed* test⁵¹⁰ — the court stated that the *Frye-Reed* test need only be applied to scientific techniques, not to specific adoptions of that technique.⁵¹¹

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*E. Prior convictions for the same offense or an offense similar to one charged are not automatically excluded, but are subject to balancing of probative value against unfair prejudice. Jackson v. State*⁵¹²

1. Facts

Appellant, Robert M. Jackson (Jackson), was charged with the theft of a computer from the campus of the University of Maryland

507. *See id.* at 570, 664 A.2d at 378. The court noted that Maryland's position on legislative inaction, like that of the majority of jurisdictions which have considered the issue, is that the rejection of proposed legislation "is a rather weak reed upon which to lean in ascertaining legislative intent." *Id.* (quoting *Automobile Trade Ass'n v. Insurance Comm'r*, 292 Md. 15, 24, 437 A.2d 199, 203 (1981)). The court of appeals further noted that courts are generally reluctant to infer legislative intent when there is more than one possible reason a bill was defeated. *See id.* at 570, 664 A.2d at 378.

508. *See id.* at 571, 664 A.2d at 378-79. The *Goldstein* court concluded that if a statute supersedes the common law only to the extent that the statutory language expressly so provides, then certainly the failure of a legislative body to take action cannot be construed to overrule common law. *See id.*

509. *See id.* at 573-74, 664 A.2d at 380.

510. The court of appeals adopted the *Frye* standard for admissibility of scientific evidence in *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978). *See Goldstein*, 339 Md. at 574, 664 A.2d at 380. The standard requires that evidence of a scientific technique be "generally accepted within the relevant scientific community" in order to be admissible. *Id.* at 573, 664 A.2d at 380.

511. *See id.* The court stated that the issue was the merit of the theory upon which a device operates, not the specific device itself. *See id.* at 574-75, 664 A.2d at 380. However, courts will reject a specific application of a generally accepted technique when the application of the technique interferes with the theory. *See*

at Baltimore.⁵¹³ Before trial, Jackson filed a motion *in limine* to exclude evidence of two prior theft charges brought against him. In the first case, Jackson received probation before judgment; in the second case, he was convicted in the Circuit Court of Maryland for Prince George's County of theft of \$300 or more, theft under \$300, and conspiracy to commit theft, all resulting from the same incident. Jackson's counsel argued that the finding of probation before judgment was inadmissible as impeachment evidence because it was not a criminal conviction, and that the prior theft conviction was unduly prejudicial because it was for the same crime as that with which Jackson was charged.⁵¹⁴ The trial judge granted Jackson's motion concerning the probation before judgment determination, but denied the motion with respect to the prior conviction, ruling that its probative value, for the impeachment of Jackson, outweighed its prejudicial effect.

At trial, Jackson testified on his own behalf and denied involvement in any criminal activity. On cross-examination, the State offered evidence of the prior theft conviction. Jackson was convicted and sentenced to five years imprisonment.

2. Analysis

The court of appeals rejected Appellant's contention that the trial court erred in admitting the prior conviction.⁵¹⁵ Jackson contended that the prior theft conviction was unduly prejudicial because it was for a similar crime, and was therefore automatically excluded by Maryland Rule 5-609.⁵¹⁶ In rejecting this argument, the court noted that there was an "increasing flexibility" in this Rule, and that the similarity between the prior conviction and the current criminal charge was only one of several factors to be considered when determining whether the prior conviction was admissible.⁵¹⁷ The

id. at 576, 664 A.2d at 380. For example, a version of the "gunpowder residue test," a generally accepted method of detecting the presence of certain chemicals in gunpowder on a subject's skin, was rejected when filter paper used in the test contained the chemicals the test was meant to detect. *Id.* at 575, 664 A.2d at 380-81 (quoting *State v. Smith*, 362 N.E.2d 1239, 1245 (Ohio Ct. App. 1976)).

512. 340 Md. 705, 668 A.2d 8 (1995).

513. *See id.* at 708-09, 668 A.2d at 10. Jackson was arrested and charged with one count of theft of \$300 or more, in violation of Section 342 of Article 27 of the Annotated Code of Maryland. *See id.* at 709, 668 A.2d at 10.

514. Defense counsel argued that the prior conviction for theft would lead the jury to the improper inference that because the Defendant had done it before he must be guilty in this case also.

515. *See Jackson*, 340 Md. at 722, 668 A.2d at 16.

516. *See id.* at 711, 668 A.2d at 11.

517. *See id.* at 712-13, 668 A.2d at 11-12. The court of appeals noted that Rule 5-609, which governs admissibility of prior convictions for impeachment of

court of appeals noted that only the "third prong" of this test, the balancing of the probative value versus unfair prejudice, was at issue.⁵¹⁸

The court of appeals rejected Jackson's contention that a prior conviction for the same or a similar crime as that with which a defendant was charged was not always inadmissible.⁵¹⁹ While recognizing the danger that a jury might use prior convictions for the improper purpose of inferring present guilt,⁵²⁰ the court emphasized that Rule 5-609 was adopted to avoid this type of unfair prejudice by requiring the trial judge to weight the probative value of the evidence against its prejudicial effect.⁵²¹

In affirming the trial court's conviction, the court of appeals stated the trial court had properly balanced the factors, and that because the trial court did not abuse its discretion, the conviction must be affirmed.⁵²²

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*G. A witness's prior inconsistent written statement on a photo array identifying defendant, a witness's grand jury testimony, and a witness's recantation of identification are admissible as substantive evidence. Stewart v. State*⁵²³

witnesses, includes a three-part test to be used in determining if a conviction is admissible for impeachment: First, the conviction must "fall within the eligible universe," which consists of (1) infamous crimes; and (2) other crimes relating to credibility of the witness. Second, if the conviction falls within one of these two categories, it must be established by the party seeking admission that the conviction occurred within the preceding 15 years. Third, the trial court must determine that the probative value of the conviction outweighs the possibility of unfair prejudice to the defendant. *Id.*

518. *See id.* at 713, 668 A.2d at 12. Jackson conceded the first two parts of the test were satisfied. *See supra* note 517.

519. *See id.* at 718, 668 A.2d at 14.

520. *See id.* at 715, 668 A.2d at 13.

521. *See id.* Rule 5-609 was designed to determine when admission of past convictions is properly sought to aid in a determination of the defendant's credibility and when admission of prior convictions is sought for the improper purpose of merely creating an unfavorable impression that the defendant is a "bad person" in the eyes of the jury. *See id.* at 715-16, 668 A.2d at 13. The party seeking introduction of the prior conviction (in this case the State) has the burden of showing that the probative value of the conviction outweighs its prejudicial value. *See id.* at 718 n.8, 668 A.2d 14 n.8.

The court of appeals noted that various courts consider different factors in determining the probative value versus prejudicial effect of past convictions. *See id.* at 717, 668 A.2d at 14. Some of these factors include: (1) impeachment value of the past crime; (2) defendant's circumstances at the time of the crime and his subsequent behavior; (3) similarity of past crime and charged offense; (4) the importance of defendant's testimony; (5) the importance of the defendant's credibility. *See id.* (discussing *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976)).

522. *See id.* at 719, 668 A.2d at 15. Such a finding is subject to an abuse of

1. Facts

Petitioner, Michael Stewart, was convicted of first degree murder and use of a handgun in the commission of a crime of violence in connection with the shooting death of James Brandon. George Booth was a key witness to the crime. Booth identified Stewart in an array of photographs and signed a statement stating he was positive Stewart shot Brandon. Booth also testified before a grand jury that Stewart shot Brandon. As the trial approached, however, Booth became reluctant to testify and recanted his testimony. Booth's grand jury testimony, his written out-of-court statement, and his inconsistent testimony at trial were admitted into evidence. Stewart was convicted.

On appeal, Stewart argued that the statements were inadmissible because the State's only objective in calling Booth was to have his out-of-court statements admitted into evidence. The court of special appeals affirmed the conviction. The Court of Appeals of Maryland affirmed on certiorari.⁵²⁴

2. Analysis

Traditionally, a witness's prior inconsistent statements, when offered to prove the truth of the matter asserted, are hearsay and, thus, inadmissible as substantive evidence.⁵²⁵ The Court of Appeals of Maryland set forth an exception⁵²⁶ to this general rule, however, in *Nance v. State*.⁵²⁷ The court held that the factual portion of a witness's out-of-court statement is admissible as substantive evidence when: (1) the statement is inconsistent with the witness's testimony at trial; (2) the prior statement is based on the declarant's own

discretion standard. *See id.*

In applying the "Mahone" test, the court stated that four of the five factors listed above favored admission of Jackson's past theft conviction: (1) because theft was a crime of "deceitfulness," its impeachment value favored admission; (2) the prior conviction was within three years of the current charge, and its close proximity in time weighed in favor of admission; (3) the similarity of the prior theft conviction to the offense charge weighed against admission; (4) in balancing the defendant's right to testify against the State's right to impeach a witness by cross-examination and the centrality of the defendant's credibility to the case, because the appellants credibility was central to the case, the probative value of the evidence strongly outweighed its danger of unfair prejudice, thus favoring admission on these two issues. *See id.* at 720-21, 668 A.2d at 16.

523. 342 Md. 230, 674 A.2d 944 (1996).

524. *See id.*

525. *See id.* at 236, 674 A.2d 947.

526. *See id.* at 237, 674 A.2d at 947.

527. 331 Md. 549, 629 A.2d 633 (1993).

knowledge; (3) the witness has written and signed the statement; and (4) the witness is subject to cross-examination.⁵²⁸

Applying the requirements of admissibility set forth in *Nance*, the court found that Booth's out-of-court statements were properly admitted as substantive evidence of Stewart's guilt.⁵²⁹ Both Booth's signed statement and his grand jury testimony were clearly inconsistent with Booth's trial testimony.⁵³⁰ Before trial, Booth stated in writing and under oath that Stewart was the man who killed Brandon.⁵³¹ At trial, Booth denied knowing who killed Brandon.⁵³²

Nonetheless, Stewart argued that Booth's out-of-court statements should have been excluded because the State only called Booth to get his out-of-court statements into evidence.⁵³³ Stewart contended that the State was barred from employing this tactic because its genuine motive was to circumvent the hearsay rule in order to present otherwise inadmissible evidence to the jury.⁵³⁴ The court indicated that this rationale only applies when the evidence is admitted to impeach the witness.⁵³⁵ In this case, the prior inconsistent statements were admitted not for impeachment purposes, but as substantive evidence.⁵³⁶

Furthermore, Stewart asserted that Booth's recanting testimony had to surprise the State in order for the State to admit the inconsistent testimony as evidence.⁵³⁷ The court disagreed and noted that the prerequisite that the State be surprised by a witness's inconsistent statement was constructed to prevent the jury from misusing impeachment evidence.⁵³⁸ Since the out-of-court testimony was admitted as substantive evidence rather than impeachment evidence, this requirement did not apply.⁵³⁹ Thus, the court held the statements were properly admitted.

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528. *See id.* at 569, 629 A.2d at 643. These principles have since been codified in Maryland Rule 5-802.1. *See Stewart*, 342 Md. at 238, 674 A.2d at 948.

529. *See Stewart*, 342 Md. at 238, 674 A.2d at 948.

530. *See id.* at 239, 674 A.2d at 949.

531. *See id.*

532. *See id.*

533. *See id.* at 240, 674 A.2d at 949.

534. *See id.* at 240-41, 674 A.2d at 949-50; *see also* *Spence v. State.*, 321 Md. 526, 530-31, 583 A.2d 715, 717 (1991) (holding that it is improper for the State to call a witness solely to introduce the witness's prior inconsistent statements regarding the defendant's guilt to impeach that witness).

535. *See Stewart*, 342 Md. at 242, 674 A.2d at 950.

536. *See id.*

537. *See id.* at 243, 674 A.2d at 951.

538. *See id.*

539. *See id.*

*H. Witness with first-hand knowledge of events is not required to authenticate videotape; "silent witness" theory and business records exception to the hearsay rule may suffice to make videotape admissible. Department of Public Safety and Correctional Services v. Cole*⁵⁴⁰

1. Facts

Gregory Cole, a state prison employee was charged with using unnecessary force against a prisoner in a cell extraction. The incident was videotaped. An administrative law judge (ALJ) held the tape was admissible and sustained the charges. On appeal, the circuit court judge reversed the ALJ's ruling, and Court of Special Appeals of Maryland affirmed the reversal. The Court of Appeals of Maryland granted certiorari to consider whether the videotape was properly authenticated.

2. Analysis

Cole contended that only a witness with first-hand knowledge of the events depicted on the videotape could testify to its accuracy.⁵⁴¹ Because the Department of Public Safety and Correctional Services (Department) did not produce such a witness, Cole argued that the videotape was not properly authenticated.⁵⁴² The court disagreed and noted that this is not the sole method of authenticating a videotape.⁵⁴³

The "silent witness" theory of admissibility is another method of authenticating videotape.⁵⁴⁴ This method does not require the testimony of a witness with first-hand knowledge because the videotape "speaks with its own probative effect."⁵⁴⁵ The court compared the videotape with an X-ray which is admissible despite that fact that no one has first-hand knowledge that an X-ray is a correct and accurate representation of the inside of a body.⁵⁴⁶

540. 342 Md. 12, 672 A.2d 1115 (1996).

541. *See id.* at 20, 672 A.2d at 1119.

542. *See id.*

543. *See id.*

544. *See id.* at 21, 672 A.2d at 1119.

545. *Id.*; *see also* Sisk v. State, 236 Md. 589, 591-92, 204 A.2d 684, 685 (1964). A majority of jurisdictions utilize the "silent witness" theory of admissibility. *See Cole*, 342 Md. at 21, 672 A.2d at 1119; *see also, e.g.*, Fisher v. State, 643 S.W.2d 571, 575-76 (Ark. App. 1982); Bergner v. State, 397 N.E.2d 1012, 1015-16 (Ind. Ct. App. 1979). The rationale behind the theory is that if there is an adequate foundation which assures the accuracy of the videotaping process, then the videotape should be admissible as a witness that "speaks for itself." 3 WIGMORE ON EVIDENCE § 790, at 219-20 (Chadbourn rev. 1970).

546. *See Cole*, 342 Md. at 22, 672 A.2d at 1120.

Additionally, the court held that the videotape could have been admitted because of the business records exception to hearsay.⁵⁴⁷ Maryland Rule of Evidence 5-803(b)(6) establishes that records of regularly conducted business activity may be admitted into evidence.⁵⁴⁸ Warden Galley testified that it was common practice to videotape cell extractions, primarily for the protection of the inmate and the institution.⁵⁴⁹ Therefore, the court concluded that the videotape qualified as a part of the Department's ordinary business records and held that the videotape was authentic.⁵⁵⁰

Accordingly, the Court of Appeals of Maryland held that the videotape was admissible evidence on two alternative grounds: (1) the "silent witness" theory; and (2) the business records exception to the hearsay rule.⁵⁵¹

Dan Curry

*I. A decision to admit or exclude expert testimony is within the discretion of the trial judge to be reversed only if it is based upon an error of law or a serious mistake, or if the judge has abused his discretion. Franch v. Ankney*⁵⁵²

1. Facts

During her employment in 1982, Lottie Ankney slipped and fell on an icy parking lot. After receiving an award from the Workers' Compensation Commission, Ankney negotiated a settlement with the owner of the parking lot. Consequently, the Commission terminated her payments on the grounds that the unauthorized settlement foreclosed her right to future benefits.

Ankney's attorney, William A. Franch, concurred with the Commission's ruling, and thus advised Ankney that she would have little chance of prevailing on appeal. In January 1988, Ankney filed a malpractice action against Franch alleging negligence for advice given

547. *See id.* at 28, 672 A.2d at 1123. The business record exception applies to items that are part of an organization's official record. *See id.*; *see also, e.g.*, *Queen v. Sate*, 26 Md. App. 222, 229-31, 337 A.2d 199, 204 (1975) (illustrating that a photograph in a file would be included as part of a business record). In the instant case, the court considered the videotape, the envelope in which the tape was stored, and the chain of custody form to be part of the official record. *See Cole*, 342 Md. at 28-29, 672 A.2d at 1123.

548. *See Cole*, 342 Md. at 29, 672 A.2d at 1123.

549. *See id.*

550. *See id.* at 30, 672 A.2d at 1124.

551. *See id.* at 33, 672 A.2d at 1125.

552. 341 Md. 350, 670 A.2d 951 (1996).

regarding the prospects of successfully appealing the Commission's unfavorable ruling.

At trial, Ankney produced two expert witnesses that testified, contrary to Franch's advise, that an appeal of the Commission's ruling would have been successful. However, the trial judge granted Franch's motion to strike the experts' testimony on the grounds that the opinions were based on incorrect interpretations of Maryland law. The trial judge then ruled in favor of Franch, reasoning that Ankney failed to produce any admissible evidence establishing the relevant standard of care. The Court of Special Appeals of Maryland held that the judge's striking of the testimony constituted an abuse of discretion and remanded the case. The Court of Appeals granted certiorari and reversed the decision of the intermediate court.⁵⁵³

2. Analysis

In Maryland, the decision to admit or exclude expert testimony is within the discretion of the trial judge.⁵⁵⁴ Thus, a trial judge's decision to admit or exclude expert testimony will be reversed only if it is based upon an error of law or some serious mistake, or if the judge has abused his discretion.⁵⁵⁵ The court of special appeals found that the judge abused his discretion by striking the testimony of Ankey's experts, testimony which the judge considered "unduly prejudicial" to the defendant.⁵⁵⁶ Ankney was left without the required expert testimony to prove the applicable standard of care.⁵⁵⁷

The Court of Appeals of Maryland disagreed with the intermediate appellate court's analysis. Maryland's high court asserted that when an expert's testimony is based upon incorrect interpretations of law, the judge is not barred from striking the opinions simply because those opinions are necessary to a party's case.⁵⁵⁸ Here, because the experts' opinions were based on an incorrect interpretation of Maryland law, the trial judge properly excluded the testimony.⁵⁵⁹

553. *See id.* at 351, 670 A.2d at 954.

554. *See Hartless v. State*, 327 Md. 558, 576, 611 A.2d 581, 590 (1992).

555. *See id.*

556. *See Ankney v. Franch*, 103 Md. App. 83, 115, 652 A.2d 1138, 1153 (1995), *rev'd*, 341 Md. 350, 670 A.2d 951 (1996).

557. *See id.*

558. *See Franch*, 341 Md. at 365, 670 A.2d at 958.

559. *See id.* The experts' opinions that Franch's advice was negligent were based upon an unsound premise. Both experts believed that any prejudice the employer's insurance company may have suffered as a result of Ankney's unauthorized settlement was irrelevant to the insurance company's liability to pay benefits. In fact, the amount of prejudice was relevant because under Maryland law, the insurance company is entitled to an amount equal to any prejudice that it could demonstrate it suffered as a result of the unauthorized settlement. *See id.* at 364, 670 A.2d at 958.

Furthermore, the court noted that Ankney was on notice that the testimony was incorrect before commencement of the trial and proceeded, nonetheless, to offer the testimony.⁵⁶⁰ The court thus concluded that the trial judge's ruling could not have been "unduly prejudicial" to Ankney.⁵⁶¹

Dan Curry

VI. FAMILY LAW

*A. Shares of stock were "deferred compensation" encompassed within the meaning of Section 8-205(a) of the Family Law Article of the Annotated Code of Maryland, and ownership of the shares may be transferred upon divorce at the discretion of the court. Klingenberg v. Klingenberg*⁵⁶²

1. Facts

Barry and Carolyn Klingenberg were married on August 10, 1968. The couple separated and Mrs. Klingenberg filed for divorce on June 21, 1993. In the course of allocating property during the divorce proceedings, a question arose regarding the characterization of shares of stock Mr. Klingenberg received from his employer. The issue on appeal was whether the shares of stock qualified as "deferred compensation" under Section 8-205(a) of the Family Law Article of the Maryland Annotated Code 8-205(a).⁵⁶³

2. Analysis

Mrs. Klingenberg argued that her husband's stock plan was "deferred compensation" within the meaning of section 8-205(a).⁵⁶⁴ She further maintained that, as deferred compensation, the proceeds from the stock could be transferred to her when Mr. Klingenberg sold the stock.⁵⁶⁵ The Court of Appeals of Maryland concluded that the stock plan was "deferred compensation" within the meaning of section 8-205(a).⁵⁶⁶

560. *See id.* at 365, 670 A.2d at 958.

561. *See id.*

562. 342 Md. 315, 675 A.2d 551 (1996).

563. *See id.* at 318, 675 A.2d at 552.

564. *See id.* at 324, 675 A.2d at 555.

565. *See id.*

566. *See id.*

Generally, deferred compensation refers to money received at a later date, for work done at an earlier date.⁵⁶⁷ It is taxed when it is received rather than when it is earned.⁵⁶⁸ A deferred compensation plan is frequently used as an incentive plan given to executives of companies.⁵⁶⁹ In the instant case, Mr. Klingenberg was allowed to invest in the stock plan as long as he remained employed with the company.⁵⁷⁰ The plan was an incentive designed to maximize the benefits given to high-level executives, such as Mr. Klingenberg, if they stayed with the company until retirement.⁵⁷¹ Thus, the court concluded that Mr. Klingenberg's stock plan was deferred compensation in the plain and ordinary meaning of the term.⁵⁷² The court noted, however, that section 8-205(a) gives the circuit court discretion to transfer the stock as deferred compensation or as "stock" pursuant to the reconciliation agreement. The court of appeals thus remanded the case to the circuit court to determine the form of distribution.

Dan Curry

*B. Evidence of history of domestic abuse is admissible at a protective order hearing regardless of whether the allegations were sufficiently pleaded in the original petition for protection. Coburn v. Coburn*⁵⁷³

1. Facts

On March 3, 1995, Marcia Coburn filed a petition in district court for protection from domestic violence against her estranged husband, William E. Coburn, Jr. The petition alleged that on February 25, 1995, Mr. Coburn slapped, punched, and threatened Ms. Coburn. Ms. Coburn also noted on the petition that Mr. Coburn had abused and threatened her on several prior occasions. The district court granted the petition in favor of Ms. Coburn. On appeal to the circuit court, a de novo protective order hearing was held. At this hearing, the court allowed, over the objection of Mr. Coburn, new allegations of prior instances of abuse in addition to those presented

567. *See id.* at 328, 675 A.2d at 557; *see also* Greensboro Pathology Assocs. v. United States, 698 F.2d 1196 (Fed. Cir. 1982) (defining deferred compensation as compensation received in the future for work done in the past).

568. *See Klingenberg*, 342 Md. at 328, 675 A.2d at 557.

569. *See id.*

570. *See id.* at 329, 675 A.2d at 557.

571. *See id.*

572. *See id.*

573. 342 Md. 244, 674 A.2d 951 (1996).

at the original hearing in district court. The circuit court granted the protective order and Mr. Coburn petitioned the Court of Appeals of Maryland for a writ of certiorari. The court of appeals granted certiorari to address the question of whether a judge presiding over a protective order hearing may admit evidence of prior incidents of domestic abuse.⁵⁷⁴

2. Analysis

The court began its analysis by inquiring into the Maryland legislature's intent in drafting the domestic violence statute.⁵⁷⁵ The court noted that the statute was designed to "'aid victims of domestic abuse by providing an immediate and effective' remedy."⁵⁷⁶ Its primary purpose is to afford protection and prevent any future harm.⁵⁷⁷ Furthermore, section 4-504(b)(1)(ii) requires that the petition for temporary relief include any previous acts of abuse perpetrated by the respondent against the victim.⁵⁷⁸ Moreover, remedial statutes are generally liberally construed in order "to 'suppress the evil and advance the remedy.'"⁵⁷⁹ Accordingly, the court held that the legislature intended for incidents of past abuse to be admissible at both the temporary and final protective order hearings.⁵⁸⁰

Aside from the issue of legislative intent, the court disagreed with Mr. Coburn on three other independent and separate grounds.⁵⁸¹ First, rejecting Mr. Coburn argument that the prior incidents of abuse were irrelevant to the hearing on the February incident,⁵⁸² the court noted that the remedy for one act of abuse would not equal the remedy for several abusive acts.⁵⁸³

Second, the court disagreed with Mr. Coburn's assertion that evidence of prior abuse was inadmissible under Maryland Rule of Evidence 5-404(b) which prohibits "admission of evidence of prior

574. The court noted that the instant case was moot because the protective order at issue expired on September 26, 1995. *See id.* at 250, 674 A.2d at 954. However, the court decided to address the merits because the case presented unresolved issues in a matter of important public concern. *See id.*

575. *See id.* at 250, 674 A.2d at 954; *see also* MD. CODE ANN., FAM. LAW §§ 4-501 to -516 (1991).

576. *Coburn*, 342 Md. at 252, 674 A.2d at 955 (quoting *Barbee v. Barbee*, 311 Md. 620, 623, 537 A.2d 224, 225 (1988)).

577. *See id.* at 260, 674 A.2d at 958.

578. *See id.* at 257, 674 A.2d at 957.

579. *Id.* at 256, 674 A.2d at 957. (quoting *Harrison v. John F. Pilli & Sons, Inc.*, 321 Md. 336, 341, 582 A.2d 1231, 1234 (1990)).

580. *See id.* at 257, 674 A.2d at 957.

581. *See id.* at 257-61, 674 A.2d at 957-59.

582. *See id.* at 257, 674 A.2d at 957-58.

583. *See id.* at 258, 674 A.2d at 958.

bad acts to prove that the person acted in conformity with those acts.⁵⁸⁴ The court held that rule 5-404(b) did not apply to the instant case because the evidence was not admitted to prove that Mr. Coburn acted in conformity with his prior acts.⁵⁸⁵ Rather, it was admitted to illustrate the probability that future abuse would occur, and thus, show Ms. Coburn's need for protection.⁵⁸⁶

Finally, Mr. Coburn argued that he was denied due process because he had no notice that the alleged incidents of past abuse were going to be admitted at the hearing.⁵⁸⁷ The court replied that Mr. Coburn was put on notice when Ms. Coburn filed the *ex parte* petition for protection.⁵⁸⁸ In addition, a petitioner's failure to list every single incident of abuse will not preclude a petitioner from introducing evidence of prior abuse unless there is an obvious prejudice to the respondent.⁵⁸⁹ No such prejudice existed here, hence the evidence was held admissible.⁵⁹⁰

Dan Curry

*C. Failure of the circuit court judge to make a determination regarding a claim for counsel fees under sections 11-110 and 12-103 of the Family Law Article of the Annotated Code of Maryland does not alone deprive a divorce judgment of finality. Blake v. Blake*⁵⁹¹

1. Facts

Clifton Avon Blake and Luvenilde Margott Blake were married on November 8, 1976, and they separated in January 1987. In 1990 both parties filed for divorce. Ms. Blake's complaint, in addition to seeking an absolute divorce and other remedies, sought counsel fees pursuant to Sections 11-110 and 12-103 of the Family Law Article of the Annotated Code of Maryland. On July 30, 1993, the circuit court judge filed his opinion and the order was docketed on August 9, 1993. Ms. Blake filed a thirty day motion to revise the judgment, pursuant to Maryland Rule 2-535, which does not stop the running of the thirty day appeal period. On April 12, 1994, the circuit court

584. *Id.* at 259-60, 674 A.2d at 959.

585. *See id.* at 260, 674 A.2d at 959.

586. *See id.*

587. *See id.* at 260-61, 674 A.2d at 959.

588. *See id.* at 261, 674 A.2d at 959.

589. *See id.* at 261, 674 A.2d at 959-60.

590. *See id.* at 261-62, 674 A.2d at 960.

591. 341 Md. 326, 670 A.2d 472 (1996).

denied Ms. Blake's motion to revise the judgment. Ms. Blake filed a notice of appeal on May 11, 1994, claiming that the circuit court erred in ruling that personal injury proceeds, which Mr. Blake received during their marriage, were not marital property. The Court of Appeals of Maryland granted certiorari on its own motion, prior to consideration of the case by the court of special appeals.

2. Analysis

The court of appeals used this appeal to *sua sponte* raise the issue of whether unresolved counsel fees may prevent an otherwise final judgment from being final.⁵⁹² Despite the fact that neither party raised the counsel fee issue on appeal, the court considered the central issue to be "whether a claim for counsel fees under §§ 11-110 and 12-103 [of the Family Law Article of the Annotated Code of Maryland] should be treated as part of the claim for relief on the merits, so that the August 9, 1993 judgment in the Blakes' divorce action was not . . . final."⁵⁹³ If the judgment of August 9, 1993 was final, then the notice of appeal filed by Ms. Blake on May 11, 1994 would have been untimely because her motion to revise the judgment did not stop the running of the thirty day appeal period.

The court of appeals surveyed the jurisprudence of other states on this question and noted that in the majority of jurisdictions an appeal on the merits does not usurp jurisdiction from the judgment-rendering court on the issue of an award of counsel fees.⁵⁹⁴ The court affirmed the trial court judgment without addressing the merits of the appeal, holding that although a statute may require counsel fees to be a part of a judgment on the merits, the rule that best serves courts and litigants is that a judgment is final, regardless of whether attorneys fees have been adjudicated.⁵⁹⁵ Ms. Blake's notice of appeal was thus untimely.

Dan Curry

*D. A father's incarceration constitutes a temporary material change of circumstances justifying modification of child support obligation; prisoner is not voluntarily impoverished absent a showing that the crime was committed with the intent of going to prison or otherwise becoming impoverished. Wills v. Jones*⁵⁹⁶

592. See *id.* at 339, 670 A.2d at 479 (Chasanow, J., concurring).

593. *Id.* at 336, 670 A.2d at 477.

594. See *id.* at 336, 670 A.2d at 477-78 (citing *Newman v. Riley*, 314 Md. 364, 379-80 n.12, 550 A.2d 959, 967 n. 12 (1988)).

595. See *id.* at 338, 670 A.2d at 478.

596. 340 Md. 480, 667 A.2d 331 (1995).

1. Facts

Randy Jones and Natasha Wills are the parents of Rhondell Durell Jones who was born in 1982. In 1992, Jones was incarcerated and began serving a mandatory ten year sentence. At that time, Jones was required to pay Wills fifty dollars per week in child support. During his incarceration, Jones's income dropped to twenty dollars per month. The circuit court granted Jones's motion to stay child support payments, finding that Jones had not committed the crime with the intent of impoverishing himself and thus avoiding the child support payments.⁵⁹⁷

2. Analysis

The first issue the court considered was whether there was a material change of circumstance sufficient to modify Jones's obligation to pay child support.⁵⁹⁸ Under section 12-104(a) of the Family Law Article of the Annotated Code of Maryland, the court has the authority to modify the child support award if the circumstances have materially changed from the time of the original support order.⁵⁹⁹ Essentially, the test is whether the parent's income has changed.⁶⁰⁰ The court found that Jones's income had decreased due to his incarceration.⁶⁰¹

The second issue the court addressed was whether Jones voluntarily impoverished himself when he committed a crime which carried a punishment of incarceration.⁶⁰² In Maryland, the parent's intent is crucial in determining whether a parent has voluntarily impoverished himself or herself.⁶⁰³

Wills argued that Jones intended to impoverish himself when he made a conscious choice to commit a crime.⁶⁰⁴ Wills asserted that because Jones's criminal behavior was in his control, incarceration was a foreseeable consequence, and therefore, his impoverishment was voluntary.⁶⁰⁵ The court disagreed with Wills's logic and determined that the word "voluntary" evokes the element of intent.⁶⁰⁶

597. *See id.* at 480, 667 A.2d at 331.

598. *See id.* at 488-89, 667 A.2d at 334-35.

599. *See id.* at 487, 667 A.2d at 334.

600. *See id.* at 489, 667 A.2d at 335.

601. *See id.* at 485, 667 A.2d at 333.

602. *See id.* at 489, 667 A.2d at 335.

603. *See id.*; *see, e.g.,* *Goldberger v. Goldberger*, 96 Md. App. 313, 327, 624 A.2d 1328, 1335 (1993) (indicating that voluntary impoverishment occurs when a parent freely and consciously renders himself or herself without adequate resources).

604. *See Wills*, 340 Md. at 491, 667 A.2d at 336.

605. *See id.*

606. *See id.* at 494-95, 667 A.2d at 338.

Jones's intent was to commit a crime, not to cast himself into poverty.⁶⁰⁷ Accordingly, the court held that only a prisoner who commits a crime with the intent of becoming incarcerated and impoverished may be considered "voluntarily impoverished."⁶⁰⁸

Dan Curry

*E. The mere establishment of common residence with an unrelated man was insufficient to establish "cohabitation" and therefore, did not violate requirements of a separation agreement. Gordon v. Gordon*⁶⁰⁹

1. Facts

Joel Spencer Gordon brought this action against his former wife, Sara Jenkins Gordon to terminate his alimony obligation. Their separation agreement read, in part, as follows: "Husband shall pay to Wife as alimony the sum of six thousand dollars per month Payments shall . . . terminate in the event the Wife resides with any unrelated man without the benefit of marriage for a period continuing for beyond sixty . . . days."⁶¹⁰

In 1993, Mr. Gordon suspected that Ms. Gordon was living with another man in violation of their separation agreement. A private investigator confirmed that Ms. Gordon shared a common residence with another man for a period longer than sixty days. Mr. Gordon filed a petition in the Circuit Court of Maryland for Montgomery County to terminate alimony payments to Ms. Gordon. The court referred the case to a domestic relations master who concluded that Ms. Gordon had violated the separation agreement because she had resided with an unrelated male for more than sixty days. The master recommended that the court confirm Mr. Gordon's termination of support payments to Ms. Gordon. The court adopted the recommendations. The Court of Appeals of Maryland granted certiorari on its own motion prior to intermediate appellate review.

2. Analysis

Section 8-101 of the Family Law Article of the Annotated Code of Maryland explicitly authorizes a husband and wife to enter into

607. *See id.* at 497, 667 A.2d at 339.

608. *See id.*

609. 342 Md. 294, 675 A.2d 540 (1996).

610. *Id.* at 296-97, 675 A.2d at 541-42.

separation agreements.⁶¹¹ The agreements typically make provisions for support which will terminate if the spouse receiving support enters into a cohabitation arrangement with another person.⁶¹² However, the Court of Appeals of Maryland had not previously set forth the factors characterizing a cohabitation arrangement.⁶¹³

The court began its analysis by looking at the ordinary meaning of the term.⁶¹⁴ "Cohabitation," the court concluded, connotes an arrangement whereby a man and women live together and jointly assume "the duties and obligations associated with marriage."⁶¹⁵ With this definition in mind, the court formulated a list of factors to guide trial courts when considering whether a relationship qualifies as cohabitation: (1) establishment of a common residence; (2) long-term intimate or romantic involvement; (3) shared assets or common bank accounts; (4) joint contribution to household expenses; and (5) recognition of the relationship by the community.⁶¹⁶

Next, the court interpreted the phrase "resides with any unrelated man without the benefit of marriage for a period continuing for beyond sixty . . . consecutive days" as synonymous with cohabitation.⁶¹⁷ Essentially, this phrase was intended to exclude living situations with roommates or boarders.⁶¹⁸

Accordingly, the court reversed the domestic relations master ruling.⁶¹⁹ The master's ruling was based only upon the sixty-day time requirement instead of the factors which determine cohabitation.⁶²⁰ The court noted that while the number of consecutive days living together is important, the nature of the relationship is key to determining whether it constitutes cohabitation.⁶²¹

Dan Curry

VII. PROFESSIONAL RESPONSIBILITY

*A. An attorney who is disbarred for failure to disclose material information that would disqualify him from being admitted to the bar under Rule 14, may later be readmitted if he passes the comprehensive examination. In re Keehart*⁶²²

611. See MD. CODE ANN., FAM. LAW § 8-101 (1991).

612. See *Gordon*, 342 Md. at 301, 675 A.2d at 544.

613. See *id.* at 305, 675 A.2d at 545.

614. See *id.* at 308, 675 A.2d at 547.

615. *Id.*

616. See *id.* at 308-09, 675 A.2d at 547-48.

617. *Id.* at 311, 675 A.2d at 549.

618. See *id.*

619. See *id.* at 312-13, 675 A.2d at 549.

620. See *id.* at 312-13, 675 A.2d at 549-50.

621. See *id.* at 313, 675 A.2d at 550.

622. 342 Md. 121, 674 A.2d 510 (1996).

1. Facts

Petitioner, Michael Patrick Keehan, deliberately failed to disclose a material fact requested on the Maryland bar application. Although he had been admitted to the Pennsylvania bar and maintained a law office with a partner in Pennsylvania, his residence and place of full-time employment, working as a claims adjuster, were in Maryland. He submitted an application to the Maryland bar for admission pursuant to Rule 14, which if accepted would require him to take only a limited three hour exam.⁶²³ On his application he did not mention his full-time employment as a claims adjuster. Based on the information given in his application, he was admitted to the Maryland bar in November 1981. When it was discovered he had failed to disclose all relevant information, he was disbarred on November 20, 1987 in the Circuit Court of Maryland for Baltimore County. The petitioner filed for readmission to the Maryland bar.

2. Analysis

A lawyer is subject to disciplinary action if he deliberately fails to disclose a material fact that was requested on his application for admission to the bar.⁶²⁴ Keehan deliberately failed to disclose his employment as a claims adjuster so that he would be admitted to the bar under Rule 14.⁶²⁵ Had he been honest on the application, he would not have been admitted to the bar under Rule 14.⁶²⁶

In order for a person to be readmitted to the bar, four criteria must be examined: (1) the nature and the circumstances of the petitioner's original conduct; (2) the petitioner's subsequent conduct; (3) the petitioner's present character; and (4) petitioner's present qualifications and competence to practice law.⁶²⁷ The court was convinced that the petitioner had satisfied the first three aforemen-

623. Maryland Rule 14 permits a person who has been admitted to the bar in another state to apply to be a member of the Maryland bar without taking the full two day exam. MD. R. 14. However, for at least five of the seven years prior to his application, he must have been regularly engaged as a practitioner of law. A practitioner of law is defined as a member of the bar of another state who has regularly engaged in the practice of law as his principal means of earning his livelihood. *See In re Keehan*, 342 Md. 121, 123, 674 A.2d 510, 511 (1996). The rule was devised under the premise that a lawyer who has regularly engaged in the practice of law has sufficient legal knowledge. *See Id.* at 124, 674 A.2d at 512.

624. *See In re Patrick*, 342 Md. 121, 123, 674 A.2d 510, 511 (1996) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-101(A) (1980)).

625. *See Keehan*, 342 Md. at 123, 674 A.2d at 511.

626. *See id.*

627. *See id.* at 125, 674 A.2d at 512 (citing *In re Braverman*, 271 Md. 196, 199-200, 316 A.2d 246, 248 (1974)).

tioned criteria; however, petitioner had not satisfied his present qualifications and competence to practice law.⁶²⁸ Therefore, the court concluded that Keehan could be admitted to the bar if he successfully passes the comprehensive Maryland bar exam.⁶²⁹

Laura L. Chester

*B. Failure to keep client funds in escrow, using client funds for improper purposes, and engaging in dishonest conduct by obliging a client's request not to disburse funds in order for the client's son to receive more financial assistance for college warrants an indefinite suspension from the practice of law for at least one year. Attorney Grievance Commission v. Glenn*⁶³⁰

1. Facts

The Attorney Grievance Commission filed a petition for disciplinary action against John Wheeler Glenn alleging violations of the Rules of Professional Conduct. On at least two different occasions, the funds that Glenn held for clients in escrow accounts were less than what was owed to the clients, and money had to be added to the escrow account from Glenn's private funds before checks could be issued to the clients. Glenn claimed that he was not aware of this problem because his bookkeepers were in charge of maintaining balances.⁶³¹ On at least one occasion, Glenn was told by a bookkeeper that his accounts were "in a jumble" but he took no measures to resolve the problem. Judge Clifton J. Gordy of the Circuit Court for Baltimore City made findings of fact and concluded that Glenn had violated the following: (1) Maryland Rule of Professional Conduct 1.15(a) because he did not keep his own property separate from client funds;⁶³² (2) Maryland Rule BU 9 because he used funds

628. *See id.*

629. *See id.* at 126, 674 A.2d at 512-13. He must also pay all costs of the review proceeding and will be subject to character updates. *See id.*

630. 341 Md. 448, 671 A.2d 463 (1996).

631. *See id.* at 452, 671 A.2d at 465. The court found that because Respondent was the only person able to sign the checks from the escrow accounts, he should have been aware that the clients' funds were being withdrawn. *See id.* at 466, 671 A.2d at 472. There was a manual detailing the procedures that a bookkeeper should follow to ensure that sufficient funds were in the escrow account, but the bookkeepers testified that they told Glenn they did not understand the instructions. *See id.* at 487, 671 A.2d at 482.

632. *See id.* at 457, 671 A.2d at 467. "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property . . ." *Id.* (citing MD. R. PROF. CONDUCT 10.5(a)).

required to be in trust for an unauthorized purpose;⁶³³ (3) Rule 5.3(b) and (c) for allowing bookkeepers to engage in conduct that was incompatible with his legal obligations;⁶³⁴ and (4) Section 10-306 of the Business Occupations and Professions Article of the Annotated Code of Maryland for using trust money for a purpose other than that for which it was entrusted to the lawyer.⁶³⁵ Judge Gordy also found that Glenn violated Rule of Professional Conduct 8.4(c) by withholding a client's settlement in order for his client's child to receive greater financial assistance for his college tuition.⁶³⁶

2. Analysis

The court of appeals makes an independent review of the record to determine whether attorney misconduct has occurred.⁶³⁷ Here, the court agreed with Judge Gordy that all violations occurred with the exception of the Section 10-306 of the Business Occupations and Professions Article of the Annotated Code of Maryland.⁶³⁸ The court determined that "in order to trigger disciplinary proceedings under the Maryland Rules . . . [section] 10-307 [of the Business Occupations and Professions Article] requires that the attorney's violation of

633. *Id.* at 457, 671 A.2d at 467. "An attorney . . . may not borrow or pledge any funds . . . to be deposited in an attorney trust account . . . or use any funds for an unauthorized purpose." *Id.* at 459, 667 A.2d at 468 (quoting MD. R. BU 9).

634. *See id.* at 457, 671 A.2d at 467. "[W]ith respect to a nonlawyer employed or retained by or associated with a lawyer: (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer" *Id.* at 462, 671 A.2d at 470 (quoting MD. R. 5.3(b)).

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm which the person is employed, or has direct supervisory authority over that person, and knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id. at 466, 671 A.2d at 471-72 (quoting MD. R. 5.3(c)).

635. *See id.* at 457, 671 A.2d at 467. "A lawyer may not use trust money for any purpose other than the purpose for which the trust money is entrusted to the lawyer." *Id.* at 482, 671 A.2d at 479 (quoting MD. CODE ANN., BUS. OCC. & PROF. § 10-306 (1995)).

636. *See id.* at 457, 671 A.2d at 467. "It is unprofessional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.* at 460, 671 A.2d at 469 (quoting MD. R. PROF. CONDUCT 8.4(c)).

637. *See id.* at 470, 671 A.2d at 473-74.

638. *See id.* at 482-83, 671 A.2d at 479-80.

section 10-306 be willful.”⁶³⁹ The court held that Judge Gordy erred in finding that Glenn willfully misused escrow funds in violation of section 10-306 simply because there was “absence of evidence that the escrow deficit was caused by an appropriate reimbursement or legal fee.”⁶⁴⁰ Therefore, the court held that Glenn did not violate section 10-306.

After determining that misconduct occurred, the court determines the appropriate sanction to “protect the public and the integrity of the legal profession.”⁶⁴¹ Although Glenn had been an upstanding member of the bar and been involved in numerous beneficial activities, the court found that he knowingly misappropriated funds and “breached his legal duty to the legal profession and to the public.”⁶⁴² Thus, he was indefinitely suspended from the practice of law and not able to apply for reinstatement for at least one year.⁶⁴³

Laura L. Chester

*C. Willful failure to file tax returns and to pay taxes in a timely fashion is conduct that is inherently prejudicial to the administration of justice and thus warrants suspension from the practice of law. Attorney Grievance Commission v. Breschi*⁶⁴⁴

1. Facts

George Armando Breschi failed to file his federal income taxes for the years 1989 and 1990. During 1989 and 1990, Breschi was counsel in a demanding case which occupied most of his time. In the beginning of 1991, Respondent experienced several traumatic occurrences involving family members and the death of his partner in legal practice. Respondent pleaded guilty to willfully failing to file an income tax return in 1989.⁶⁴⁵ Judge Byrnes of the Circuit Court for Baltimore County determined that Breschi’s failure to file a tax return for 1989 constituted “engag[ing] in conduct that is prejudicial to the administration of justice” in violation of Maryland Rule of Professional Conduct 8.4(d). Bar counsel took exception to Judge Byrnes’s conclusion of law that the disciplinary charges were based only on Breschi’s failure to file his 1989 tax return and not his

639. *Id.* at 482, 671 A.2d at 479.

640. *Id.* at 482, 671 A.2d at 480.

641. *Id.* at 483, 671 A.2d at 480.

642. *Id.* at 484, 671 A.2d at 481.

643. *See id.* at 491, 671 A.2d at 484.

644. 340 Md. 590, 667 A.2d 659 (1994).

645. *See* I.R.C. § 7203 (1988).

failure to file his 1990 tax return because the criminal prosecution did not include this charge. Counsel argued that the charges also included Breschi's failure to file a 1990 tax return.

2. Analysis

The Court of Appeals of Maryland makes the ultimate decision as to whether professional rules have been violated⁶⁴⁶ by independently reviewing the record to determine that the hearing judge's findings of fact were based upon clear and convincing evidence.⁶⁴⁷ Once this is determined, the court of appeals then determines the appropriate sanction.⁶⁴⁸ The court held that absence of prosecution for the year 1990 does not mean that a Rule had not been violated, nor does late payment of all monies due.⁶⁴⁹ Although Breschi was not prosecuted for his failure to file his 1990 tax returns and pay his taxes in a timely fashion, it is still "conduct that is prejudicial to the administration of justice."⁶⁵⁰

Next, the court determined the appropriate sanction for Breschi. The main purpose of disciplining an attorney is not to punish the attorney, but to protect the public from an unscrupulous practitioner and "maintain public trust in the legal profession by demonstrating intolerance for unprofessional conduct."⁶⁵¹ The court may consider mitigating factors and give a lesser sanction for compelling extenuating circumstances.⁶⁵² Although Breschi experienced extremely difficult circumstances and was very remorseful, his first failure to file his taxes was the result of a trial and not his subsequent tragic events. Furthermore, he paid his personal expenses before his taxes.⁶⁵³ The court balanced the mitigating circumstances against the respondent's voluntary and intentional violation of a known legal obligation and imposed a sanction of a six month suspension from the practice of law.⁶⁵⁴

Laura L. Chester

646. *See Breschi*, 340 Md. at 599, 667 A.2d at 663 (citing Attorney Grievance Comm'n v. Powell, 328 Md. 276, 287, 614 A.2d 102, 108 (1982)).

647. *See id.* at 599, 667 A.2d at 664 (citing Md. R. BV10(d)).

648. *See id.* (citing Attorney Grievance Comm'n v. Boyd, 333 Md. 298, 303, 635 A.2d 382, 384 (1994)).

649. *See id.*

650. *Id.*

651. *Id.* at 601, 667 A.2d at 665 (citing Attorney Grievance Comm'n v. Myers, 333 Md. 440, 446-47, 635 A.2d 1315, 1318 (1994)).

652. *See id.* (citing Attorney Grievance Comm'n v. Kenney, 339 Md. 578, 587, 664 A.2d 854, 858 (1995)).

653. *See id.* at 602, 667 A.2d at 665. From 1989 through 1991, Respondent made payments on three cars and paid his children's private schools' tuition. *See id.*

654. *See id.* at 604, 667 A.2d at 666-67.

*D. Disbarment in Maryland is an appropriate sanction for an attorney convicted in the District of Columbia of unlawful solicitation of money from an indigent client when the attorney was appointed as counsel under the Criminal Justice Act. Attorney Grievance Commission v. Willcher*⁶⁵⁵

1. Facts

In the District of Columbia, in 1982, Arthur L. Willcher was appointed to represent an indigent client pursuant to the Criminal Justice Act. At two different times, Willcher unlawfully demanded money from his client and his client's parents.⁶⁵⁶ Willcher was convicted in the Superior Court of the District of Columbia for "unlawful solicitation of money from an indigent whom he had been appointed to represent under the criminal justice act."⁶⁵⁷ Willcher had already been indefinitely suspended from the practice of law in Maryland on February 11, 1980 by an order of the Court of Appeals of Maryland.⁶⁵⁸

2. Analysis

The only issue on appeal was whether disbarment was an appropriate sanction for the unlawful acts Willcher committed in Washington D.C., which occurred after his suspension in Maryland.⁶⁵⁹ When Maryland and the District of Columbia have addressed the same issues of misconduct, Maryland frequently imposes the same sanction.⁶⁶⁰ When cases of similar misconduct arise in Maryland and another jurisdiction, Maryland considers the unique facts and circumstances of the case, as well as the sanction imposed by the other jurisdiction, with the goal of consistency.⁶⁶¹

The respondent's conviction was based upon fraud, deceit, and dishonesty.⁶⁶² The Court of Appeals of Maryland has consistently

655. 340 Md. 217, 665 A.2d 1059 (1995).

656. *See id.* at 220, 665 A.2d at 1060. The practice of soliciting money from indigent clients is unlawful when one is appointed as counsel under the Criminal Justice Act. *See id.* (citing D.C. CODE ANN. § 11-2606(b) (1981)).

657. *Willcher*, 340 Md. at 220, 665 A.2d at 1060. The conviction was affirmed on appeal. *See In re Willcher*, 408 A.2d 67 (D.C. App. 1979).

658. *See Attorney Grievance Comm'n v. Willcher*, 287 Md. 74, 411 A.2d 83 (1980). Willcher's crimes did not involve fraud or dishonesty. *See id.* at 79, 411 A.2d at 85.

659. *See Willcher*, 340 Md. at 221, 665 A.2d at 1061.

660. *See id.*

661. *See id.* at 222, 665 A.2d at 1061 (quoting *Attorney Grievance Comm'n v. Parsons*, 310 Md. 132, 142, 527 A.2d 325, 330 (1987)).

662. *See id.*

held that absent compelling circumstances, crimes involving fraud, deceit and dishonesty will warrant disbarment.⁶⁶³ Because there was no evidence of compelling reasons not to disbar the petitioner, the court held that disbarment was the appropriate sanction.⁶⁶⁴

Laura L. Chester

*E. Indefinite suspension of attorney for misappropriation of client funds caused by alcoholism was appropriate under prior Maryland law; however, in the future, when an attorney faces disbarment, alcoholism will no longer be a mitigating factor absent truly compelling circumstances. Attorney Grievance Commission v. Kenney*⁶⁶⁵

1. Facts

The Attorney Grievance Commission filed a petition for disciplinary action against Respondent Samuel F. Kenney alleging violations of the Rules of Professional Conduct. The Court of Appeals of Maryland referred the case to the Honorable Dana M. Levitz of the Circuit Court of Maryland for Baltimore County "to make findings of fact and conclusions of law."⁶⁶⁶ Judge Levitz found that Respondent violated several of the Rules of Professional Conduct when Kenney misappropriated at least two different clients' funds. Judge Levitz also found that Kenney commingled clients' funds with his law practice and personal funds.⁶⁶⁷ Judge Levitz concluded that "the Respondent's alcoholism, was to a substantial extent, 'the

663. *See id.* (citing Attorney Grievance Comm'n v. Powell, 328 Md. 276, 292, 614 A.2d 102, 110 (1992)).

664. *See id.* at 223, 665 A.2d at 1061-62.

665. 339 Md. 578, 664 A.2d 854 (1995).

666. *Id.* at 579, 664 A.2d at 854.

667. The Respondent was found to have violated the following Rules of Professional Conduct: Rule 1.1 — Competence; Rule 1.3 — Diligence; Rule 1.4 — Communication; Rule 1.15 — Safekeeping Property; and Rule 8.4 — Misconduct. It was also concluded that Respondent violated Section 10-306 of the Business Occupations and Professions Article of the Annotated Code of Maryland for using money for a purpose other than that for which the money was entrusted to him. In addition it was concluded that the Respondent did not comply with the Tax-General Article of the Annotated Code of Maryland because he failed to withhold income taxes from his employees' wages. *See id.* at 582, 664 A.2d at 855-56. Kenney was convicted of theft in a separate proceeding for withdrawing \$38,800.00 from a client's account for his personal use. *See id.* at 582, 664 A.2d at 856.

responsible, the precipitating, the root cause' of the Respondent's misappropriation of trust and client funds.'⁶⁶⁸ The Court of Appeals of Maryland adopted Judge Levitz's findings of facts and conclusions of law and suspended Kenney indefinitely from the practice of law.

2. Analysis

An attorney who misappropriates a client's funds will generally be disbarred absent compelling extenuating circumstances.⁶⁶⁹ The court acknowledged that alcoholism had been considered to be a mitigating factor warranting a sanction less severe than disbarment when an attorney had misappropriated funds provided that "the alcoholism, to a substantial extent, was the responsible, the precipitating, the root cause of the misappropriation."⁶⁷⁰ Because Judge Levitz specifically concluded this causal connection between the alcoholism and the misconduct, the Respondent was indefinitely suspended from the practice of law rather than disbarred.⁶⁷¹ The court of appeals warned, however, that it will no longer consider alcoholism as a mitigating factor when determining sanctions for professional misconduct, absent truly compelling circumstances.⁶⁷²

Laura L. Chester

*F. After an attorney has been suspended from the practice of law for a stated period, he may be readmitted to the bar only if he has complied with all the terms of the suspension, which includes not engaging in the practice of law. Attorney Grievance Commission v. James*⁶⁷³

1. Facts

Petitioner Richard Allen James was suspended from the Maryland Bar for one year.⁶⁷⁴ During his year suspension, James claimed

668. *Id.* at 586, 664 A.2d at 858.

669. *See id.* at 587, 664 A.2d at 858 (citing *Attorney Grievance Comm'n v. Bakas*, 323 Md. 395, 403, 593 A.2d 1087, 1091 (1991)). When facing disbarment a compelling circumstance will be found only as the result of intensely strained circumstances. *See id.* at 588, 664 A.2d at 859 (quoting *Bar Ass'n of Baltimore City v. Siegel*, 275 Md. 521, 527, 340 A.2d 712, 713 (1975)).

670. *Id.* at 588-89, 664 A.2d at 859 (quoting *Attorney Grievance Comm'n v. White*, 328 Md. 412, 418, 614 A.2d 955, 959 (1992)).

671. *See id.* at 595, 664 A.2d at 862.

672. *See id.* at 591, 664 A.2d at 860.

673. 340 Md. 318, 666 A.2d 1246 (1995).

674. *See id.* at 320, 666 A.2d at 1246.

that he arranged for Eugene M. Brennan to come to his office and take over his practice while he merely continued to work there as a paralegal or as a law clerk for Brennan. However, James's actions were inconsistent with his claims. The building directory continued to list James's name as the only attorney working from the office, and two different phone directories continued to list James as an attorney. Brennan did not enter into separate fee agreements with James's former clients, nor was there any evidence James was compensated for any work he did for Brennan. Although Brennan entered his appearance in James's cases pending in court, James did not strike his appearance. Further, James signed Brennan's name on papers to be filed with the court and, at least on one occasion, signed a motion in his own name. Lastly, James held negotiations on a client's behalf with an insurance representative. Due to these facts, Judge McKee of the Circuit Court for Prince George's County found that James continued to practice law during his period of suspension.

2. Analysis

An attorney who has been suspended from the bar may only be readmitted if he files a verified statement saying that he has fully complied with all the terms of the suspension, and the Bar Counsel informs the court that the attorney has satisfactorily complied with the terms of the suspension.⁶⁷⁵ An attorney may not practice law during his suspension.⁶⁷⁶

Ultimately, the court of appeals determines whether a person has engaged in the practice of law.⁶⁷⁷ The factors the court considers when determining whether a person has engaged in the practice of law include "[u]tilizing legal education, training, and experience [to apply] the special analysis of the profession to a client's problem."⁶⁷⁸ Due to the acts in which James continued to engage, the court held that Judge McKee was not clearly erroneous in finding that James continued to practice law.⁶⁷⁹ Consequently, James was ordered to serve a one year suspension.⁶⁸⁰

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675. *See id.* at 320, 666 A.2d at 1248 (quoting Md. R. BV13a.2).

676. *See id.* at 320, 666 A.2d at 1247 (quoting Md. R. BV13a.2).

677. *See id.* at 323, 666 A.2d at 1248 (citing Public Serv. Comm'n v. Hahn Transp., Inc., 253 Md. 571, 583, 253 A.2d 845, 852 (1969)).

678. *Id.* (quoting Kenney v. Bar Ass'n of Montgomery County, Inc., 316 Md. 646, 662, 561 A.2d 200, 208 (1989)).

679. *See id.* at 333, 666 Md. at 1253.

680. *See id.*

VIII. PROPERTY LAW

*A. The vendor's failure to provide a disclosure or disclaimer statement to the purchaser does not make a contract of sale void thereby immunizing the vendor from the purchaser's suit for specific performance. Romm v. Flax*⁶⁸¹

1. Facts

On February 19, 1994, Lawrence and Elaine Flax (the Flaxes) entered into a contract to sell their home to Barry and Marcy Romm (the Romms). The Flaxes did not provide, and the Romms did not request, a disclosure statement before signing the contract. On March 4, 1994, the Flaxes informed the Romms that the contract was void due to their own failure to provide a disclosure or disclaimer statement. The Romms filed a compliant for specific performance on March 17, 1994.⁶⁸²

2. Analysis

Section 10-702 of the Real Property Article of the Annotated Code of Maryland provides that if a written residential property disclosure statement is "delivered by the Seller later than three (3) days after the Seller enters into a contract with the Purchaser, the contract is void."⁶⁸³ The Court of Appeals of Maryland was called upon to define the term void, when the seller claims that his failure to provide the disclosure statement renders the contract of sale void, although the contract is otherwise valid.⁶⁸⁴ The court declined to allow the statute to be interpreted so as to allow the seller to create, in essence, an option contract, exercisable by the seller only, every time a disclosure statement is not given.⁶⁸⁵

The court stated that to read the term "void" literally is inconsistent with the legislative intent to grant rescission rights to the

681. 340 Md. 690, 668 A.2d 1 (1995).

682. A suit praying for specific performance is an equitable proceeding, granted by the court's discretion only when there is not an adequate remedy at law. See GEORGE W. THOMPSON, REAL PROPERTY § 4479 (1963). However, when a contract for the sale of real estate is entered into, specific performance is granted as a matter of right because real estate is considered unique, making all other remedies inadequate. See *id.*

683. MD. CODE ANN., REAL PROP. § 10-702 (1995).

684. See *Romm*, 340 Md. at 693, 668 A.2d at 2.

685. See *id.* at 695, 668 A.2d at 3.

purchaser only when a disclosure statement is not provided.⁶⁸⁶ Additionally, the court referred to prior decisions in which it refused to interpret "null and void" provisions of contracts literally where to do so would allow one party to frustrate enforcement of a contract by preventing a condition precedent.⁶⁸⁷

The holding prohibits a seller from having a three day period in which they would have unilateral control over whether the contract of sale would be fully executed, when the seller fails to provide a disclosure statement. The term "void" in Section 10-702(g)(1) of the Real Property Article of the Annotated Code of Maryland means a contract of sale is "voidable at the option of the purchaser" when the purchaser fails to provide the required disclosure statement.⁶⁸⁸

Christopher J. Marchand

*B. Failure to foreclose an equity of redemption constitutes an encumbrance created by the purchaser, thereby violating a special covenant against encumbrances given to a purchaser. Magraw v. Dillow*⁶⁸⁹

1. Facts

James S. Magraw owned an undivided 5/6 interest in 5.09 acres located in Cecil County. The owner of the remaining 1/6 was Helen Squires, who died intestate in 1947. In 1983, in an attempt to acquire the 1/6 interest, Magraw allowed his property tax payments to fall into arrears until a tax sale proceeding was instituted. Magraw and his wife bought the property at the tax sale and then attempted to foreclose the equity of redemption. Due to an inaccurate search of the record's of the Orphan's Court, however, they failed to properly notify the heirs of Squires. Consequently, the attempt to foreclose the equity of redemption on the 1/6 interest was ineffective and "[t]he right of redemption in the tax sale exist[ed] in perpetuity until such time as that right of redemption [was] foreclosed by proper legal proceedings."⁶⁹⁰

In 1988, the Magraws sold the property to Robert M. Dillow. The deeds contained a special covenant against encumbrances. Dillow

686. *See id.*

687. *See id.* at 696, 668 A.2d at 4 (citing *Brewer v. Sowers*, 118 Md. 681, 86 A. 228 (1912)).

688. *Id.* at 697, 668 A.2d at 4.

689. 341 Md. 492, 671 A.2d 485 (1996).

690. *Id.* at 507, 671 A.2d at 492 (citing *Brashears v. Collison*, 207 Md. 339, 351-54, 115 A.2d 289, 295-96 (1955)).

proceeded to improve the property. When he applied for a loan, however, he was told that he did not have good and marketable title due to the deficient attempt to foreclose the equity of redemption belonging to the heirs of Squire.

Dillow brought suit in the Circuit Court of Maryland for Cecil County claiming that the Magraws: breached the special warranty contained in the deeds; breached the covenant against encumbrances; breached express and implied covenants of merchantable title; and that they were negligent in their handling of the foreclosure sale. The circuit court dismissed the complaint for failure to state a claim and Dillow appealed to the Court of Special Appeals of Maryland. The court of special appeals reversed with respect to the breach of the special covenant against encumbrances and remanded to the circuit court. The Court of Appeals of Maryland granted certiorari. The court of appeals affirmed the court of special appeals and remanded to the circuit court.

2. Analysis

The court of appeals focused on the issue of whether the property was actually encumbered, and if so, whether the Magraws created the encumbrance and thereby violated the special covenant against encumbrances.⁶⁹¹

The court weighed six factors to determine if the equity of redemption constituted an encumbrance:⁶⁹²

- (1) A right or interest in land;
- (2) subsisting in a third party;
- (3) diminishing the value of the property purchased;
- (4) but not so much that the grantee received no title at all;
- (5) but must have preexisted the contract of sale and be breached, if at all, at the time of conveyance; and
- (6) the subject property must be in the hands of the covenantee and not a remote purchaser.⁶⁹³

The court found all six factors to be present in the case at bar.⁶⁹⁴ Additionally, the court held that the Magraws created the encumbrance because they created the defect in the foreclosure proceeding.⁶⁹⁵

The court held that the unencumbered equity of redemption constituted an encumbrance and that the Magraws created the encum-

691. *See id.* at 504, 671 A.2d at 490-91.

692. *See id.* at 509, 671 A.2d at 493.

693. *Id.*

694. *See id.* at 510-11, 671 A.2d at 494.

695. *See id.* at 512, 671 A.2d at 495.

brance because they created the defect in the foreclosure proceedings.⁶⁹⁶ By creating the encumbrance through their own actions, the Magraws violated the special covenant against encumbrances that they conveyed to Dillow.⁶⁹⁷ The court remanded the case to the circuit court for further proceedings.⁶⁹⁸

Christopher J. Marchand

*C. A sheriff's failure to execute a warrant of restitution because the tenant has vacated the premises or is no longer in default does not constitute grounds for refund of the required fee under Section 7-402(d) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland. Schuman, Kane, Felts & Everngam v. Aluisi*⁶⁹⁹

1. Facts

The law firm of Schuman, Kane, Felts & Everngam (the Firm) advanced on behalf of its client the fees collected by the Prince George's County sheriff in connection with summary ejection proceedings. The Firm paid the five-dollar required fee for the service of summary ejection papers, which were served by the sheriff.⁷⁰⁰ Additionally, the Firm paid the thirty-dollar fee for the execution of the warrant after judgment had been entered granting a warrant of restitution.⁷⁰¹ The Firm argued that this provision required the sheriff to refund the thirty-dollar fee charged for execution of the warrant of restitution because it was never executed.⁷⁰²

2. Analysis

The court first looked at Section 7-402(d) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland to

696. *See id.* at 511, 671 A.2d at 494.

697. *See id.* A special covenant against encumbrances does not run with the land, however, it is enforceable between the coventor and the coventee and, therefore, it was enforceable between Magraw and Dillon. *See id.*

698. *See id.* at 512, 671 A.2d at 495.

699. 341 Md. 115, 668 A.2d 929 (1995).

700. *See* MD. CODE ANN., CTS. & JUD. PROC. § 7-402(a)(1) (1995) (prescribing five-dollar fee for service of summary ejection papers).

701. *See* MD. CODE ANN., CTS. & JUD. PROC. § 7-402(a)(3) (1995) (prescribing thirty-dollar fee for execution of warrant of restitution).

702. The opinion seemed to indicate that the tenant vacated the premises. *See Aluisi*, 341 Md. at 124, 668 A.2d at 934.

determine the plain meaning of the language and the purpose of the statute.⁷⁰³ Section 7-402(d) provides that “[i]f the sheriff is unable to serve a paper, the fee shall be refunded to the party requesting the service.”⁷⁰⁴ A warrant of restitution is not a document to be served upon the tenant, but commands the sheriff to remove the tenant and all of his belongings and to put the landlord in possession of the premises.⁷⁰⁵ According to the plain meaning of section 7-402(d), the warrant is not a paper to be served, and thus, falls outside of the scope for a refund under section 7-402(d).⁷⁰⁶ Additionally, the purpose of the warrant, which is to eject the tenant and put the landlord in possession, can be fulfilled even when the sheriff does not execute the warrant.⁷⁰⁷ The court stated that the mere issuance of the warrant “coupled with the sheriff’s availability and duty to execute it” may be enough to prompt the tenant to vacate the premises, fulfilling the goal of the warrant.⁷⁰⁸ Therefore, the court held that the thirty-dollar fee paid for a warrant of restitution is not refundable under section 7-402(d) when the sheriff does not have to eject a tenant from the premises because the tenant has vacated before the sheriff executes the warrant.⁷⁰⁹

Christopher J. Marchand

D. The status of a confessed judgment is not affected when the state court “opens” the judgment for a hearing on the merits without affirmatively stating that the judgment lien is preserved. Schlossberg v. Citizens Bank⁷¹⁰

1. Facts

On March 22, 1991, Citizens Bank of Maryland (Citizens Bank) obtained confessed judgments against G. David Broyles and Emily E. Broyles (The Broyleses), based on the Broyleses’ guarantees of certain corporate debts. Citizens Bank recorded the judgments in the Circuit Court of Maryland for Worcester County, thereby obtaining a lien on the Broyleses’ condominium in Ocean City. Subsequently,

703. *See id.* at 119, 668 A.2d at 931-32.

704. MD. CODE ANN., CTS. & JUD. PROC. § 7-402(d) (1995).

705. *See Aluisi*, 341 Md. at 123, 668 A.2d at 934; *see also* MD. CODE ANN., REAL PROP. § 8-401(d)(1) (1995).

706. *See Aluisi*, 341 Md. at 123, 668 A.2d at 933.

707. *See id.* at 127, 668 A.2d at 935-36.

708. *Id.*

709. *See id.* at 127-28, 668 A.2d at 936.

710. 341 Md. 650, 672 A.2d 625 (1996).

the clerk of courts for Prince George's County served the Broyles with notice of the entry of judgment by confession.⁷¹¹ In the Circuit Court of Maryland for Prince George's County, the Broyles moved to vacate the confessed judgment.⁷¹² On November 12, 1992, pursuant to the Broyles' motion, the circuit court opened the confessed judgments for a hearing on the merits without affirmatively stating that the judgment lien would be preserved.⁷¹³ However, prior to the opening of the confessed judgment, the Broyles filed for chapter seven bankruptcy. Citizens Bank sought to proceed with its confessed judgment in the Circuit Court of Maryland for Prince George's County, in order to execute upon its judgment lien in Worcester County, and asked the bankruptcy court for relief from the automatic stay imposed by the Bankruptcy Code.⁷¹⁴ The Broyles argued that the stay should not be lifted because the lien was no longer enforceable due to the fact that the judgment had been opened. Citizens Bank argued that the stay should be granted to allow them to enforce the judgment and that the opening of the confessed judgment had no effect on the lien.⁷¹⁵ The bankruptcy court ordered the stay lifted and the Broyles appealed to the United States District Court for the District of Maryland which affirmed the ruling. The Broyles then appealed to the United States Court of Appeals for the Fourth Circuit. On appeal, the Fourth Circuit certified, *inter alia*, the following question to the Court of Appeals of Maryland: "Pursuant to Maryland Rule 2-611(d), what is the effect on the lien status of a confessed judgment when the state court 'opens' the judgment for a hearing on the merits without affirmatively stating that the judgment lien is preserved?"⁷¹⁶

711. *See id.* at 655, 672 A.2d at 627 (noting that, pursuant to Maryland Rule 2-621(b), recording a judgment in a county constitutes a lien on a defendant's interest in land located in that county).

712. The motion was first denied by the circuit court. On appeal to the Court of Special Appeals of Maryland, the court reversed and remanded the case to the circuit court to open the confessed judgment for a hearing on the merits. *See id.*

713. *See id.* at 653-54, 672 A.2d at 626. The defendant may move to open, modify, or vacate the confessed judgment. *See* MD. R. 2-611(b) (1995). The court may order the confessed judgment opened, modified, or vacated. *See* MD. R. 2-611(d) (1995).

714. *See* 11 U.S.C. § 362 (1994).

715. "The automatic stay imposed by 11 U.S.C. § 362 (1994) bars creditors from enforcing judgments against debtors who have filed for bankruptcy protection. . . . [However] a creditor may file a motion seeking relief from the automatic stay to allow the creditor to enforce the judgment." *Schlossberg*, 341 Md. at 654, 672 A.2d at 627.

716. *Id.* at 654-55, 672 A.2d at 627.

2. Analysis

The Court of Appeals of Maryland noted that under Maryland Rule 2-611 the court can open, modify, or vacate the confessed judgment and that each option “has a different effect on the status of the judgment.”⁷¹⁷ The court held that when a confessed judgment is opened the judgment is not destroyed; rather, the judgment is set aside to be examined, even if the judgment is not expressly preserved by the court.⁷¹⁸ Conversely, the court stated that when a confessed judgment is vacated the lien is destroyed.⁷¹⁹ However, in the case at bar, the confessed judgment was not vacated. It was opened only for a hearing on the merits and the court’s answer to the certified question was that “a judgment lien remains valid when a court ‘opens’ a confessed judgment for a hearing on the merits . . . and the priority of the lien is not affected by the opening. Further, [the court held] . . . no affirmative language is necessary to preserve the lien when a confessed judgment is opened.”⁷²⁰

Christopher J. Marchand

*E. Unpaid subcontractors did not state a claim for unjust enrichment or a claim to set aside foreclosure sale on fraud grounds when the developer/mortgagor never fully paid the general contractor and subsequently the bank foreclosed and partially financed the purchase the property, thereby extinguishing the subcontractors mechanics’ liens. Bennett Heating & Air Conditioning Inc. v. NationsBank*⁷²¹

1. Facts

In a construction contract, the developer did not fully pay the general contractor for work done, and the general contractor, in turn, did not pay the subcontractors (Bennett) for the work they did. Subsequently, the developer defaulted on the mortgage and Nations Bank, the mortgagee, foreclosed. The mechanics’ liens that were established before the foreclosure sale were extinguished due to lack of any surplus over the senior mortgage debt. Bennett argued that since the developer “did not pay [the general contractor] in full . . .

717. *Id.* at 657, 672 A.2d at 628.

718. *See id.* at 659, 672 A.2d at 629.

719. *See id.* The court did not address what happens when the confessed judgment is modified.

720. *Id.* at 660, 672 A.2d at 630.

721. 342 Md. 169, 674 A.2d 534 (1996).

it is unjust for the [developer] and its successors or alter egos in title to retain the benefits without having paid their value."⁷²² Additionally, Bennett argued that the foreclosure sale was "a sham" and should be set aside because "[a] subsidiary of the Bank bought in at the sale and assigned its rights as purchaser to a new entity which acquired the Property by utilizing . . . funds borrowed from the Bank on the security of a new mortgage on the Property."⁷²³

2. Analysis

The Court of Appeals of Maryland held that since the subcontractor was not a party to the original developer-general contractor agreement, they do not have a claim for unjust enrichment against the developer.⁷²⁴ The court stated that the proper action in this situation is one using garnishment or subrogation to enforce Bennett's claim against the general contractor and against any funds retained by the original landowner.⁷²⁵ Additionally, the court held that the foreclosure sale could not be set aside. It is legal for the secured party to buy in at the foreclosure sale,⁷²⁶ even if the public sale was intended by the mortgagee to wipe out junior liens.⁷²⁷ "[T]he motives of the mortgagee or of his assigns in acquiring and in foreclosing a mortgage cannot set up as a defense to a foreclosure . . ."⁷²⁸ The complaint must allege improper conduct by the mortgagee to set aside a foreclosure sale.⁷²⁹ Thus, the court held that Bennett's complaint failed to state a claim upon which restitution could be granted.

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722. *Id.* at 180, 674 A.2d at 539.

723. *Id.* at 175, 674 A.2d at 537.

724. *See id.* at 182, 674 A.2d at 540.

725. *See id.* at 184, 674 A.2d at 541 (quoting 1 DOBBS, LAW OF REMEDIES 698 (1993)).

726. *See id.* at 186, 674 A.2d at 542 (citing MD. CODE ANN., REAL PROP. § 7-105(e) (1996)).

727. *See id.* (citing MD. CODE ANN., REAL PROP. § 9-108 (1996)).

728. *Id.* at 187, 674 A.2d at 543 (quoting *Southern Md. Oil, Inc. v. Kaminetz*, 260 Md. 443, 453, 272 A.2d 641, 646 (1971)). The court's concern with these parties is that there was not an intent to suppress bidding at the sale. *See id.* at 191, 674 A.2d at 541.

729. *See id.*

*F. When deciding whether an appeal to the circuit court is to be heard de novo or on the record in a rent escrow case, the court must determine the amount in controversy by the amount in escrow when an appeal is not based on a right to, or obligation for, continued possession by the tenant. Ro v. Heredia*⁷³⁰

1. Facts

On August 24, 1993, Duk Hee Ro entered into a one year lease with Raymond Heredia, Sean Murphy, and William Hines (the Tenants).⁷³¹ The Tenants paid the rent through November, but because the property was in disrepair, the Tenants deposited the two following months rent, totalling \$1700, in an escrow account pursuant to Section 8-211 of the Real Property Article of the Annotated Code of Maryland. The district court found that Ro was entitled to the \$1700 in the escrow. However, on appeal, the circuit court conducted a *de novo* hearing and reversed the district court. The circuit court entered judgment in favor of the Tenants in the amount of \$4,476.67; \$2,776.67 for rent paid from August through November plus the \$1,700.00 in the escrow account. Ro appealed to the Court of Appeals of Maryland, arguing that the appeal should have been dismissed because the amount in controversy exceeded \$2500 which would have required the appeal to be heard on the record. Thus, the appellants were required to order a transcript and they did not.⁷³²

2. Analysis

The Court of Appeals of Maryland agreed with the circuit court and held that the appeal was properly heard *de novo* because the amount in controversy, in a rent escrow case which is not based upon the right to possession, is determined by the amount in escrow. The court applied the "Purvis test," which states that the amount in controversy should be determined by "look[ing] to the demand in the pleading setting forth the plaintiff's claim, including any amendments in the trial court."⁷³³ However, the court of appeals held that the circuit court erred in entering judgment in the amount exceeding

730. 341 Md. 302, 670 A.2d 459 (1996).

731. *See id.* at 304, 670 A.2d at 460.

732. If an appeal is heard on the record a transcript must be filed with the circuit court. *See* MD. R. 7-113(b). Generally, if an appeal is heard *de novo* it proceeds in accordance with the rules governing cases instituted in the circuit court which does not require a transcript to be filed. *See* MD. R. 7-112(3).

733. *Heredia*, 341 Md. at 308, 670 A.2d at 462 (quoting *Purvis v. Forrest Street Apartments*, 286 Md. 398, 402, 408 A.2d 388, 390 (1979)).

that which was in escrow. The circuit court erred when it granted the Tenant's motion to amend the complaint to include the security deposit claim which was not claimed at trial.⁷³⁴ The court of appeals explained that a tenant should not be permitted to "exclude existing claims from the computation of the amount in controversy at the time of appeal, in order to proceed *de novo* in the circuit court, and then add those previously existing claims to the controversy once the matter is in the circuit court."⁷³⁵

Christopher J. Marchand

*G. Maryland forfeiture statute mandates that a complaint application to institute a forfeiture action must contain an executed show cause order and be submitted within 90 days after the final disposition of the criminal proceeding. Prince George's County v. Vieira*⁷³⁶

1. Facts

Prince George's County Police seized \$7850 from Anthony Wilfred Vieira when they arrested him for possession of drug paraphernalia. Eighty-nine days after sentencing, Prince George's County filed a Complaint for Forfeiture of Currency, however, a show cause order was not filed until 104 days after the final disposition of the criminal case. Vieira argued that the requirement of Section 297(d)(2)(i) of Article 27 of the Annotated Code of Maryland, that an executed show cause order be filed within ninety days following final disposition of a criminal proceeding, was not fulfilled by Prince George's County. Therefore, Vieira concluded, his due process rights were violated, and the forfeiture action should be dismissed. Prince George's County argued that section 297(d)(2)(i) only requires a proposed show cause order to be filed within ninety days, not an executed show cause order.

2. Analysis

In order to institute a proceeding for forfeiture of money, under Maryland's forfeiture statute, an application must be by complaint, affidavit, and show cause order.⁷³⁷ The function of a show cause

734. See *id.* at 304, 670 A.2d at 460.

735. *Id.* at 310, 670 A.2d at 463.

736. 340 Md. 651, 667 A.2d 898 (1995).

737. See *id.* at 657, 667 A.2d at 901 (citing MD. CODE ANN. art. 27, § 297(d)(2)(i) (1996)).

order is to notify a person that a forfeiture action has been instituted and that failure to answer the complaint may result in forfeiting property.⁷³⁸ The Court of Appeals of Maryland stated, on the other hand, that a proposed show cause order does not properly notify the defendant; therefore, the legislature intended an executed show cause order and not a proposed one be filed along with the complaint.⁷³⁹ Additionally, the language of the statute mandates that the a complaint application be made within ninety days of the final disposition of the criminal proceeding and if one is not submitted within the time constraints the defendant's property must be returned upon defendant's petition.⁷⁴⁰

The court held that because a proposed show cause order and not an executed order was filed within ninety days of the final disposition of Vieira's criminal proceeding, Vieira's petition for return of currency should have been granted.⁷⁴¹

Christopher J. Marchand

*H. An action in trover, not an action in replevin or detinue, is the proper action when goods have been converted and not returned by a tort-feasor. Wallander v. Barnes*⁷⁴²

1. Facts

Thomas R. Wallander purchased a Mercedes Benz from Domino Motors for \$15,500. Chesapeake Industrial Leasing Company, Inc. (Chesapeake) financed the purchase under an agreement to lease the Mercedes to Wallander for three years with an option to purchase. Domino Motors held the Mercedes Benz on consignment from Barnes Used Cars (Barnes). Domino Motors never fully paid Barnes for the car, and Barnes had the car repossessed. Two months later Wallander sued to recover the car in an action of replevin in the District Court of Maryland in Montgomery County. Barnes subsequently transferred the title to the car to a dealer in North Carolina. The district court ruled that the proceedings no longer were to issue a writ of replevin, but that the proceeding was *in detinue* and entered a judgment for

738. *See id.* at 662, 667 A.2d at 903.

739. *See id.*

740. Section 297(d)(2) mandates that "all proceedings relating to money or currency . . . shall be instituted within 90 days from the date of final disposition of criminal proceedings that arise out of Article 27, §§ 276 through 302, inclusive." *Id.* at 657, 667 A.2d at 901.

741. *See id.* at 666-67, 667 A.2d at 546.

742. 341 Md. 553, 671 A.2d 962 (1996).

Wallander in the amount of \$3752.25. Wallander appealed asserting that he had the right to recover direct and consequential damages in a replevin action. The circuit court affirmed the decision of the district court. The Court of Appeals of Maryland disagreed with both lower courts and Wallander. It held that since Wallander did not seek return of the car and only sought damages, the action was in trover. The court of appeals vacated the judgment below and remanded to the district court.

2. Analysis

An action in replevin is proper when the object of the suit is to recover possession of goods and chattel.⁷⁴³ Here, however, Wallander requested the market value of the Mercedes Benz and consequential damages.⁷⁴⁴ Additionally, the court held that the action was not *in detinue* because the trial judge did not specify the value of the property in the judgment.⁷⁴⁵ The court stated that, “[w]here goods have been converted and not returned by the tortfeasor, an action in trover lies.”⁷⁴⁶ The court also granted certiorari to determine the proper measure of compensatory damages under the circumstances. The court stated that Maryland follows the general rule that when goods have been converted compensation should be the fair market value at the time of the conversion with interest.⁷⁴⁷ The fact that Wallander was leasing the car did not affect his right to sue for full value.⁷⁴⁸ However, because the action is no longer in replevin, “the damages are subject to the monetary jurisdictional limitation of the District Court which, for the subject action, is \$10,000.”⁷⁴⁹

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743. *See id.* at 561, 671 A.2d at 966 (citing 2 JOHN PRENTISS POE, PLEADING AND PRACTICE 417 (1925)).

744. *See id.* at 573, 672 A.2d at 971.

745. *See id.*

746. *Id.* at 573, 671 A.2d at 971-72 (citing 1 POE, *supra* note 743, at 44).

747. *See id.* at 573-74, 671 A.2d at 972 (citations omitted).

748. *See id.* at 575, 671 A.2d at 973 (stating that the lease explicitly places the risk of loss on Wallander therefore he had the right to sue for full value of the car).

749. *Id.* at 578, 671 A.2d at 974. The action became one in tort after being converted and, at the time of this action, the monetary limitation was \$10,000. It has since been changed to \$20,000. *See id.* at 553, 671 A.2d at 965 (citing MD. CODE ANN., CTS. & JUD. PROC. § 4-401(1) (Supp. 1996)).

IX. STATE LAW, CODE AND REGULATION

*A. Collective bargaining agreement between the county executive and a union containing an arbitration provision and a prohibition on reduction in force does not constitute an impermissible delegation of the County's budget and appropriation functions. Fraternal Order of Police, Inc. v. Baltimore County*⁷⁵⁰

1. Facts

On January 25, 1991, Baltimore County (County) and the Fraternal Order of Police, Lodge No. 4 (Union) entered into a new collective bargaining agreement effective for the 1992 fiscal year. The Union agreed to a freeze on cost-of-living adjustments for 1992 in return for a clause prohibiting a reduction in force by furlough or lay-off during that year. The County appropriated funds pursuant to the agreement. In January 1992, however, facing a revenue shortfall, the County enacted a furlough plan for all county employees, including the police officers covered by the agreement. The Union filed a grievance which was submitted to arbitration. The arbitrator found that the County had breached the collective bargaining agreement and ordered that all employees covered by the agreement be compensated for wages and benefits lost as a result of the furloughs.

The Circuit Court of Maryland for Baltimore County vacated the award, holding that the county executive had no authority to contract away the County's power to regulate compensation of county employees.⁷⁵¹ The Union appealed the circuit court's decision to the court of special appeals. The Court of Appeals of Maryland granted certiorari prior to intermediate appellate review on their own motion and reversed.

2. Analysis

The Court of Appeals of Maryland affirmed the arbitrator's award holding that the agreement to arbitrate and the provision prohibiting a reduction in force did not constitute an impermissible delegation of the County's budget and appropriation functions.⁷⁵² The court noted that the county executive and the county council

750. 340 Md. 157, 665 A.2d 1029 (1995).

751. The court viewed the reduction-in-force prohibition in the collective bargaining agreement as "affecting" compensation. *See id.* at 163, 665 A.2d at 1032.

752. *See id.* at 170-72, 665 A.2d at 1035-36.

fully exercised their budget and appropriation functions prior to the dispute and arbitration.⁷⁵³ Had the council budgeted and appropriated less funds pursuant to a furlough plan, the court continued, "the budget provisions, and not the collective bargaining agreement's terms, would [have] prevail[ed]."⁷⁵⁴ The court concluded that because the arbitrator only ordered the County to pay the police officers the wages and benefits that had already been appropriated, the arbitrator's award did not constitute an usurpation of the county executive and county council legislative discretion.⁷⁵⁵

Gabriel A. Terrasa

*B. Contracting the final stages of the manufacturing process does not preclude a company from benefiting from the manufacturing equipment tax exemption. Comptroller of Treasury v. Disclosure, Inc.*⁷⁵⁶

1. Facts

Disclosure, Inc. (Disclosure) is a company in the business of compiling and selling financial information obtained from various public sources. Disclosure makes the information available to its customers in a variety of media, including CD-ROM.⁷⁵⁷ In its CD-ROM production process, Disclosure contracts an outside supplier to perform the last stage of the manufacturing process: the physical creation of the CD-ROMs.⁷⁵⁸

The Sales and Use Tax Division of the Comptroller of the Treasury (Comptroller) attempted to levy an assessment against Disclosure for failure to pay taxes on the purchase of computer equipment used in its CD-ROM production process. Disclosure appealed the assessment to the Maryland Tax Court, claiming that the equipment was exempt from taxation as manufacturing equipment used to

753. *See id.* at 171, 665 A.2d at 1035-36.

754. *Id.*

755. *See id.* at 170-71, 665 A.2d at 1035-36.

756. 340 Md. 675, 667 A.2d 910 (1995).

757. Compact Disk — Read Only Memory.

758. The production of the CD-ROMs is a multi-step process consisting of: (1) optical-scanning the public documents; (2) verifying of the scanned information; (3) "stapling" or collating the electronic documents; (4) formatting the electronic pages into CD-ROM form and encoding them in a magnetic tape; (5) creating a "master" CD; and (6) replicating CD-ROMs from the original master. Disclosure contracted 3M to perform stages (5)-(6) of the production process. *See Disclosure*, 340 Md. at 679-80, 667 A.2d at 912.

produce "tangible personal property for resale."⁷⁵⁹ The tax court held that most of the equipment was exempt from taxation. The Comptroller appealed to the circuit court claiming that Disclosure's activities must be separated from the activities performed by the outside supplier and that, when so separated, Disclosure's activities only yield an intermediate product which is not "tangible personal property for resale." The circuit court affirmed the tax court and the Comptroller noted an appeal to the court of special appeals. The Court of Appeals of Maryland granted certiorari on its own motion prior to review by the court of special appeals and affirmed.

2. Analysis

The court of appeals held that work performed by an outside contractor cannot be considered in determining whether a company's activities are substantial enough to be considered "manufacturing."⁷⁶⁰ The court noted, however, that once it is determined that a company's activities constitute "manufacturing" within the meaning of the Tax-General Article of the Annotated Code of Maryland, the fact that the company contracts out the last stages of the process resulting in the final product for sale does not preclude the company from benefiting from the manufacturing equipment tax exemption.⁷⁶¹

Gabriel A. Terrasa

*C. Where a candidate for the House of Delegates took appropriate steps to evidence domicile in a specific area, that candidate fulfilled constitutional residency requirements. Roberts v. Lakin*⁷⁶²

1. Facts

Steven S. Lakin and Anthony Roberts were candidates in the 1994 primary election for the Republican nomination for the delegate

759. The manufacturing equipment tax exemption is currently found in Section 11-210(b) of the Tax-General Article of the Annotated Code of Maryland. MD. CODE ANN., TAX-GEN. § 11-210(b) (1994); see also *id.* § 11-101(d) (defining "production activity" as "assembling, manufacturing, processing or refining tangible personal property for resale").

760. See *Disclosure*, 340 Md. at 684-85, 667 A.2d at 914-15. An activity can be described as "manufacturing" when "a product has gone through a substantial transformation in form and uses from its original state." *Id.* at 684, 667 A.2d at 914 (citing *Perdue Foods v. State Dep't of Assessment & Taxation*, 264 Md. 228, 237, 286 A.2d 165 (1972)).

761. See *id.* at 685-87, 667 A.2d at 915-16.

762. 340 Md. 147, 665 A.2d 1024 (1995).

in District 14A. Lakin believed that Roberts had not satisfied the residency requirements to run for office. Consequently, Lakin sought an order to ban Roberts from the election in the Circuit Court of Maryland for Montgomery County. The court determined that Roberts had not met the residency requirements and issued a writ of mandamus ordering his name to be stricken from the election ballots. Roberts appealed to the court of special appeals, but before the court could hear the appeal the Court of Appeals of Maryland issued a writ of certiorari. The court of appeals ordered a stay of the judgment directing that Roberts be included on the election ballot.

2. Analysis

According to Maryland's Constitution, a person is eligible to be a delegate if he has resided in the district for six months prior to the date of the election.⁷⁶³ Thus, Roberts must have resided in District 14A since last May 8, 1994 to have been eligible for the November 8, 1994 election.

Before the critical date of May 8, 1994, Roberts availed himself to District 14A.⁷⁶⁴ He began living at his girlfriend's house, in District 14A, in January 1993.⁷⁶⁵ However, Roberts' lease on his apartment, outside the district, lasted into mid-1994.⁷⁶⁶ He continued to use his apartment as a business address, and for its pool and racquetball court.⁷⁶⁷ He changed his voter registration to District 14A.⁷⁶⁸ In August 1994, Roberts moved into his own apartment in the district.⁷⁶⁹

The Court of Appeals of Maryland previously held that "re-sided" in Article III, section 9, means "domiciled."⁷⁷⁰ The controlling factor in determining a person's domicile is his intent.⁷⁷¹ In the present case, the court again considered voter registration the strongest evidence of domicile.⁷⁷² Thus, the court held that Roberts was

763. *See id.*; *see also* MD. CONST. art. III, § 9.

764. *See id.* at 151-52, 665 A.2d at 1026.

765. *See id.* at 151, 665 A.2d at 1026.

766. *See id.* at 152, 665 A.2d at 1026.

767. *See id.*

768. *See id.* at 151, 665 A.2d at 1026.

769. *See id.* at 152, 665 A.2d at 1026.

770. *See id.* at 153, 665 A.2d at 1027; *see also* *Bainum v. Kalen*, 272 Md. 490, 496-97, 325 A.2d 392, 396 (1947).

771. *Roberts*, 340 Md. at 153-54, 665 A.2d at 1027 (citing *Dorf v. Skolnik*, 280 Md. 101, 116-17, 371 A.2d 1094, 1102-03 (1973)).

772. *See id.* at 155, 665 A.2d at 1027 (citing *Bainum*, 272 Md. at 498, 325 A.2d at 397).

domiciled in the district prior to May 8, 1994 and therefore, he satisfied the residency requirements for the election.⁷⁷³

Dan Curry

*D. A Governor's Early Retirement System benefits were properly suspended during his tenure as governor. Board of Trustees of the Maryland State Retirement and Pension Systems v. Hughes*⁷⁷⁴

1. Facts

Governor Harry Hughes retired from twenty-two years of state service in 1977. He began receiving a pension under the Governor's Early Retirement System (ERS) and pursuant to Maryland law.⁷⁷⁵ Section 11(12) of Article 73B of the Annotated Code of Maryland provides: "Should such beneficiary be appointed or elected to any office, the salary or compensation of which is paid by the State, his retirement allowance shall cease"⁷⁷⁶ Subsequently, Hughes was elected and began serving as governor of Maryland in 1979. Once he began to receive a state salary, the Board suspended his retirement allowance in accordance with section 11(12). Hughes appealed the Board's decision to the Circuit Court of Maryland for Baltimore City. The circuit court remanded the case to the Maryland State Retirement Agency to establish more evidence. Hughes filed a motion to alter, amend, and revise judgment and requested the circuit court rule in his favor based upon the record, agency practice, and legislative history. The motion was denied and the Agency appealed to the court of special appeals. The Court of Appeals of Maryland issue certiorari prior to intermediate appellate review to determine whether Hughes was entitled to receive both his ERS benefits and salary while he served as governor.

2. Analysis

Hughes contended that he was entitled to retirement benefits and a salary simultaneously because his gubernatorial pension was covered under a separate retirement system than the ERS.⁷⁷⁷ Hughes argued that section 11(12) would apply to him only if he were both

773. *See id.* at 155-56, 665 A.2d at 1028.

774. 340 Md. 1, 664 A.2d 1250 (1995).

775. *See* MD. ANN. CODE art. 73B, § 11(12) (1988).

776. *Hughes*, 340 Md. at 4, 664 A.2d at 1251.

777. *See id.* at 5, 664 A.2d at 1252.

a beneficiary and a member of the ERS.⁷⁷⁸ Once he assumed the office of governor, Hughes became a member of the Gubernatorial Retirement Plan (GRP).⁷⁷⁹ Therefore, he asserted that he was no longer a member of the ERS and thus, not subject to section 11(12).⁷⁸⁰

The court disagreed. The plain language of section 11(12) indicates that "membership" is irrelevant.⁷⁸¹ The inquiry turns on whether Hughes was a "beneficiary" of the ERS.⁷⁸² Furthermore, the court concluded that the GRP is not separate from the ERS.⁷⁸³ Rather, it is a system that is under the ERS.⁷⁸⁴

In addition, Hughes asserted that the provisions of the ERS do not apply to governors because governors are not considered "employees" under the ERS definition in Section 1(3) of Article 73B of the Annotated Code of Maryland.⁷⁸⁵ The court disagreed with this proposition as well.⁷⁸⁶ Section 1(3) includes as an employee "any appointed or elected employee of the State."⁷⁸⁷ Thus, the court held that Governor Hughes was not entitled to simultaneously receive a salary and retirement compensation from the State during his tenure as governor.⁷⁸⁸

Dan Curry

*E. Insurance Commissioner has authority to decide the constitutionality of insurance code provisions; the statutes deemed unconstitutional by the Commissioner, however, were inapplicable to the controversy before the court. Insurance Commissioner v. Equitable Life Assurance Society*⁷⁸⁹

1. Facts

The Insurance Commissioner determined that statutes authorizing differentials based on gender, even though actuarially justified, violated the Equal Rights Amendment (ERA). The life insurer, Equitable, the Human Relations Commission, and the National Or-

778. *See id.* at 9, 664 A.2d at 1253-54.

779. *See id.* at 9, 664 A.2d at 1254.

780. *See id.*

781. *See id.*

782. *See id.*

783. *See id.* at 10, 664 A.2d at 1254.

784. *See id.*

785. *See id.*; *see also* MD. ANN. CODE art. 73B, § 1(3) (1988).

786. *See Hughes*, 340 Md. at 10-11, 664 A.2d at 1254-55.

787. *Id.* at 11, 664 A.2d at 1254-55.

788. *See id.* at 17-18, 664 A.2d at 1257.

789. 339 Md. 596, 664 A.2d 862 (1995).

ganization of Women sought judicial review of the Commissioner's determination in the Circuit Court of Maryland for Baltimore City. The Court of Appeals of Maryland issued a writ of certiorari to review the commissioner's determination.

2. Analysis

Portions of Article 48A of the Annotated Code of Maryland authorize differentials for certain insurance rates and underwriting based on gender if the differentials are actuarially justified.⁷⁹⁰ The Insurance Commissioner held that the statutes were unenforceable because of Article 46 of the Maryland Declaration of Rights — Maryland's Equal Rights Amendment.⁷⁹¹ Upon review of the Insurance Commissioner's and the circuit court's decisions, the Court of Appeals of Maryland held the statutes did not apply to the controversy at bar.⁷⁹² Consequently, the court did not reach the constitutional issues.⁷⁹³

The court reviewed the constitutional authority vested in the Insurance Commissioner.⁷⁹⁴ As an administrative official, the court concluded, the Insurance Commissioner had jurisdiction to rule on the constitutionality of insurance statutes.⁷⁹⁵ Moreover, the court noted that the Commissioner, like any other elected or appointed state official, had taken an oath to uphold the Maryland Constitution.⁷⁹⁶

The court then addressed to the statutory sections at issue, which included sections 223, 226 and 234A of Article 48A of the Annotated Code of Maryland.⁷⁹⁷ Section 223(b)(2) is applicable only to health insurance, as opposed to life insurance which was at issue here.⁷⁹⁸ Section 226(c)(2) relates to property and casualty insurance.⁷⁹⁹ More-

790. *See id.* at 600-01, 664 A.2d at 865; *see also* MD. ANN. CODE art. 48A, §§ 223(b)(2), 226(c)(2), 234A(b) (1988).

791. *See Equitable Life*, 339 Md. at 601, 664 A.2d at 865.

792. *See id.* at 625, 664 A.2d at 877.

793. *See id.*

794. *See id.* at 615-24, 664 A.2d at 872-76.

795. *See id.* at 624, 664 A.2d at 876.

796. *See id.* at 617, 664 A.2d at 873.

797. *See id.* at 625-34, 664 A.2d at 877-82.

798. *See id.* at 627, 664 A.2d at 878. Section 223(b)(2) states in full: "Notwithstanding any other provisions in this section, an insurer may not make or permit any differential in ratings premium payments or dividends for any reason based on the sex of an applicant or policyholder unless there is actuarial justification for the differential." MD. ANN. CODE art. 48A, § 223(b)(2) (1988).

799. *See Equitable Life*, 339 Md. at 626-27, 664 A.2d at 871-78. Section 226(c)(2) states in full: "Notwithstanding any other provisions in this section, an insurer may not make or permit any differential in ratings premium payments or dividends for any reason based on the sex or physical handicap or disability of an applicant or policyholder unless there is actuarial justification for the differential." MD. ANN. CODE art. 48A, § 226(c)(2) (1988).

over, subsection (e) of section 226 states that the section does not apply to life insurance.⁸⁰⁰ Finally, section 234A(b) applies to underwriting whereas the controversy in the instant case involved rate setting, to which section 234 does not apply.⁸⁰¹ Because the statutes were inapplicable, the court vacated the Insurance Commissioner's order and the circuit court's judgment and remanded the case to the Insurance Commissioner for further deliberations.⁸⁰²

Dan Curry

*F. Informing a jury of collateral aspects of a health care arbitration panel's decision generally undermines the statutory presumption of correctness; however, such information is appropriate to cure a counsel's prejudicial statement. Carrion v. Linzey*⁸⁰³

1. Facts

Robert P. Linzey filed a dental malpractice claim against Dr. Timothy J. Carrion, Dr. Donald B. Lurie and their employer, Donald B. Lurie, D.D.S., P.A. In accordance with the Section 3-2A-01 of the Health Claims Arbitration Act, an arbitration panel heard the case and awarded Linzey \$167,600. Carrion appealed to the Circuit Court of Maryland for Baltimore City and requested a jury trial. The trial judge told the jury both of the arbitration panel's composition (one health care professional, one lawyer, and one lay person) and that its decision was not unanimous (the health care professional dissented). The jury found Carrion not liable to Linzey for his injuries.⁸⁰⁴ Linzey appealed to the Court of Special Appeals of Maryland,⁸⁰⁵ which found that the jury instruction weakened the

800. See *Equitable Life*, 339 Md. at 626, 664 A.2d at 877.

801. See *id.* at 626, 664 A.2d at 877. Section 234A(b) states in full:

No insurer shall require the existence of special conditions, facts, or situations as a condition to its acceptance or renewal of, a particular insurance risk or class of risks in an arbitrary, capricious, unfair, or discriminatory manner based in whole or part upon race, creed, color, sex, religion, national origin, place of residency, or blindness or other physical handicap or disability. Actuarial justification may be considered with respect to sex.

MD. ANN. CODE art. 48A, § 234A(b) (1988).

802. See *Equitable Life*, 339 Md. at 635, 664 A.2d at 882.

803. 342 Md. 266, 675 A.2d 527 (1996).

804. See *id.* at 272-73, 675 A.2d at 529-30. Dr. Carrion performed oral surgery on Linzey to correct an "open bite" and reposition the lower jaw. See *id.* at 270, 675 A.2d at 528-29. The lower jaw did not properly heal. See *id.*

805. See *Linzey v. Carrion*, 103 Md. App. 116, 652 A.2d 1154 (1995).

statutory presumption of correctness. The court of special appeals reversed the judgment of the circuit court and remanded for a new trial. The Court of Appeals of Maryland granted certiorari and reversed the judgment of the court of special appeals.

2. Analysis

a. *Presumption of Correctness*

Under Rule 5-301 of the Maryland Rules of Evidence a presumption "satisfies the burden of production on the fact presumed and, in absence of rebutting evidence, may satisfy the burden of persuasion."⁸⁰⁶ The Health Claims Arbitration Act allows for the decisions of arbitration panels to be admissible because of their presumption of correctness.⁸⁰⁷ Therefore, when a party rejects the arbitration panel's award, that award is admissible as evidence at trial and is given a presumption of correctness.⁸⁰⁸

b. *Instant Case*

The controversy in the instant case was over the trial judge's instruction to the jury on the membership of the arbitration panel.⁸⁰⁹ The trial judge told the jury that the panel consisted of one lay person, one lawyer, and one health care professional.⁸¹⁰ Furthermore, the judge told the jury that the panel found in favor of Linzey by a two-to-one vote.⁸¹¹

The court of appeals held that under most circumstances such information would be grounds for reversible error because it gives too much case-specific information to a jury.⁸¹² A jury could infer too much from the instruction and consequently, abdicate its role of fact-finder and defer to the panel's decision.⁸¹³ However, the instruction was necessary in this case because of a violation of a motion *in limine*.⁸¹⁴ A motion *in limine* was granted to prohibit the attorneys

806. *Carrion*, 342 Md. at 279, 675 A.2d at 533 (quoting Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 MD. L. REV. 1032, 1049 (1995)).

807. *See id.* at 280, 675 A.2d at 534.

808. *See id.*

809. *See id.* at 290, 675 A.2d at 538.

810. *See id.*

811. *See id.*

812. *See id.* at 291, 675 A.2d at 539.

813. *See id.* at 284, 675 A.2d at 536.

814. *See id.* at 292-93, 675 A.2d at 540.

from mentioning the panel's membership.⁸¹⁵ Linzey's attorney violated the motion by mentioning that a question from the panel was asked by "Dr. Oppenheim."⁸¹⁶ Therefore, the court held that the trial judge's instruction was necessary to cure the attorney's prejudicial statement.⁸¹⁷

Dan Curry

*G. The Police Department's decision to add a new charge against an officer after the officer rejects the Department's initial offer of punishment is not a violation of the Law Enforcement Officers' Bill of Rights (LEOBR). Blondell v. Baltimore City Police Department*⁸¹⁸

1. Facts

In December 1990, Captain Charles Blondell of the Baltimore City Police Department was charged with filing a meritless complaint of sexual harassment against one of his subordinates. The Investigation Department and Blondell's commanding officer recommended a severe letter of reprimand as punishment. The punishment also included a three-day loss of vacation. Blondell declined the offer of punishment and asserted his right to a hearing under LEOBR. In preparation for the hearing, Blondell made false statements to the review board. Consequently, the department added a false statements charge.

Before the hearing, Blondell filed a complaint in the Circuit Court of Maryland for Baltimore City against the police department. He charged that the addition of the false statement charge, after he rejected a "summary punishment" offer, was a violation of sections 727(d)(3).⁸¹⁹ He requested permanent injunctive relief to prevent the police department from proceeding with the hearing. The police department argued that its initial offer did not constitute summary punishment and that the hearing should proceed with no punishment restrictions. The circuit court denied Blondell's request and on appeal

815. *See id.*

816. *See id.* at 270, 675 A.2d at 529. Linzey's counsel did not directly state that Dr. Oppenheim was a member of the panel or that he was a dentist. *See id.*

817. *See id.* at 293, 675 A.2d at 540.

818. 341 Md. 680, 672 A.2d 639 (1996).

819. *See id.* at 688, 672 A.2d at 643. Section 727(d)(3) restricts the punishment that can be imposed by the board to nothing more severe than those which the summary judgment imposed. MD. ANN. CODE art. 27, §§ 727-734D (1991).

the court of special appeals affirmed the decision. The court of appeals granted certiorari and affirmed.

2. Analysis

The court noted that purpose of the LEOBR is to provide police officers accused of misconduct with procedural safeguards.⁸²⁰ For example, section 727(d)(3) provides that an officer who refuses summary punishment will have a hearing board recommend a punishment not more severe than the rejected punishment.⁸²¹ Accordingly, Blondell asserted that the additional charge and penalty violated the "summary punishment" provision. The court first considered whether the offer to Blondell was for "summary punishment," and then addressed whether adding a charge was a violation of the LEOBR.⁸²²

The court ruled that the initial offer of punishment to Blondell was not "summary punishment."⁸²³ Thus, section 727(d)(3) did not apply.⁸²⁴ Summary punishment is only available for minor offenses and the department may not offer summary punishment if an offense is not minor.⁸²⁵ The court held that the fabrication of a sexual harassment charge was not a minor offense.⁸²⁶ Therefore, summary punishment was not available to Blondell.⁸²⁷

Even assuming for argument's sake that this was a summary punishment, the police department added the second charge before the police chief chose the hearing board mechanism under which to proceed.⁸²⁸ The court stated that the police chief has discretion in choosing which hearing board "mechanism" under which to proceed.⁸²⁹ The chief may choose to proceed via section 727(d)(1) which, contrary to section 727(d)(3), does not impose any limitation on the penalty.⁸³⁰ Because the police chief had not yet selected a hearing

820. *See Blondell*, 341 Md. at 691, 672 A.2d at 645.

821. *See id.* at 689, 672 A.2d at 644.

822. *See id.* at 687-701, 672 A.2d at 643-50.

823. *See id.* at 698, 672 A.2d at 648-49.

824. *See id.*

825. *See id.* at 698, 672 A.2d at 648.

826. *See id.* Although the LEOBR does not define minor offenses, the court noted some examples: lateness, personal appearance infractions, and minor omissions of assigned duties. *See id.* at 699 n.15, 672 A.2d at 649 n.15.

827. *See id.* Additionally, the court held that the punishment exceeded the maximum penalty available for summary punishment, further supporting the assertion that the initial offer was not summary punishment. *See id.*

828. *See id.* at 701, 672 A.2d at 650.

829. *See id.*

830. *See id.* at 690, 672 A.2d at 644. Essentially, section 727(d)(1) requires a hearing board of three or more members and no punishment restrictions. *See id.* Section 727(d)(3) allows for a one-member or more board that may not authorize sanctions more severe than those which the summary punishment imposed. *See id.*

board mechanism by which to proceed when Blondell instituted the action, section 727(d)(3) was not violated.⁸³¹ The police department had not taken any action that could limit the hearing board's permissible penalty.⁸³² Consequently, the court found that the police procedures did not violate the LEOBR.⁸³³

Dan Curry

*H. A contractor is not entitled to attorney's fees, when it prevails, in an action for mandamus relief from wrongful rescission of a competitive bid project. Hess Construction Co. v. Board of Education of Prince George's County*⁸³⁴

1. Facts

In 1993, the Board of Education of Prince George's County (Board) requested bids for construction of an elementary school. The contract was awarded to the lowest bidder, Hess Construction Company (Hess). Subsequently, the Board revoked the offer and Hess instituted an action for a writ of mandamus and attorney's fees. The circuit court granted the writ but declined to award attorney fees. Hess, however, insisted that attorney's fees can be granted under Maryland Rule BE 44. Hess asserted that "damages" in Rule BE 44 included attorney's fees and based its position on the equitable nature of an action for mandamus relief and because Rule BE 44 explicitly provides for damages. Hess appealed to the court of special appeals, which affirmed the circuit court. The court of appeals granted certiorari and affirmed.

2. Analysis

The court stated that Maryland follows the American Rule that a prevailing party may not ordinarily recover attorney's fees.⁸³⁵ The

831. *See id.* at 701, 672 A.2d at 650.

832. *See id.*

833. *See id.* at 702, 672 A.2d at 650.

834. 341 Md. 155, 669 A.2d 1352 (1996).

835. *See id.* at 159, 669 A.2d at 1354 (citing *Collier v. Maryland Individual Practice Ass'n*, 327 Md. 1, 11, 607 A.2d 537, 542 (1992)). Exceptions to the American Rule include: (1) where a statute or contract allows for the fees; (2) where a defendant's wrongful conduct forces plaintiff to sue a third party, plaintiff may recover fees from defendant; (3) where a criminal defendant prevails in a malicious prosecution action, the fees from the criminal suit may be awarded as damages in the civil suit. *See id.* at 160, 669 A.2d at 1354.

court disagreed with Hess's contention that Rule BE 44 contains an exception to the American rule, and based its conclusion on several grounds.⁸³⁶ First, historically, attorney's fees were not recoverable in a mandamus action merely because the party against whom the fees are sought is the unsuccessful litigant.⁸³⁷ Second, substantive law, not equitable principals, governs damages claims under the Maryland Rules.⁸³⁸ The court stated "[t]he American Rule applies to actions 'in equity' as well as to actions 'at law,'"⁸³⁹ and the American Rule, as a matter of substantive law, does not award attorney's fees as damages.⁸⁴⁰ Accordingly, the court held that simply mentioning "damages" in Rule BE 44 is not enough to qualify as an exception to the American Rule.⁸⁴¹

Dan Curry

*I. Attorney's fees and costs imposed on an employer and insurer for bringing a frivolous proceeding do not constitute compensation for the purpose of tolling a statute of limitations to modify a workers' compensation award. Stevens v. Rite-Aid Corp.*⁸⁴²

1. Facts

The claimant Viola M. Stevens injured herself in March 1981 while on the job for Rite-Aid Corporation (Rite-Aid). She received payments of either temporary or permanent partial disability benefits for several years thereafter. In October 1991, she sought to reopen her case before the Workers' Compensation Commission (WCC) in order to receive additional compensation. Approximately six years had passed since her last compensation payment. However, due to appeals taken by Rite-Aid, attorney's fees were awarded to Stevens's counsel, the last fee being awarded on October 4, 1988. The reopening provision of the Workers' Compensation Act, section 9-736 of the Labor and Employment Article of the Annotated Code of Maryland, states that the WCC may not modify any award unless the modification was applied for within five years of the last compensation payment. The question before the court was whether attorney's fees

836. See *id.* at 164-71, 669 A.2d at 1356-59.

837. See *id.* at 164, 669 A.2d at 1356 (quoting *Hess Constr. Co. v. Board of Educ.*, 102 Md. App. 736, 750, 651 A.2d 446, 453 (1995)).

838. See *id.* at 165-66, 669 A.2d at 1357.

839. *Id.* at 166, 669 A.2d at 1357.

840. See *id.* at 165, 669 A.2d at 1357.

841. See *id.*

842. 340 Md. 555, 667 A.2d 642 (1995).

and costs, which had been charged to the employer and insurer as sanctions for frivolous proceedings, constituted compensation as described in section 9-736. Stevens argued that the attorney's fees and costs awarded constituted compensation. Consequently, having been awarded the last payment of fees and costs in 1988, claimant's 1991 application for modification would have been within the five-year time limit. Rite-Aid argued that the fees and costs were not compensation, therefore, section 9-736 would bar the claimant from additional compensation since she had not applied for benefits within five years after the last compensation payment. The circuit court held that the claim was barred by the statute of limitations because attorney's fees and costs imposed for bringing frivolous proceedings was not compensation under section 9-736.

2. Analysis

The court of appeals granted certiorari to consider the meaning of the word "compensation" within section 9-736 of the Workers' Compensation Act.⁸⁴³ The court stated that compensation is money payable to the covered employee or the employee's dependents.⁸⁴⁴ In *Chanticleer Skyline Room, Inc. v. Greer*⁸⁴⁵ the court posed three questions to determine the meaning of "compensation": (1) Is the payment a money allowance?; (2) Is the payment provided for in the title?; (3) Is it payable directly to the employee?⁸⁴⁶

In the instant case, the payments were money and section 9-734 of the title provides for payments of fees and costs as a result of frivolous proceedings.⁸⁴⁷ The court held, however, that the payments were not payable to the employee-claimant.⁸⁴⁸ The *Chanticleer* model deems fees "payable to the employee" if the claimant owes the fees to the attorney.⁸⁴⁹ Since the fees and costs represented a sanction against Rite-Aid for its frivolous proceedings, they purposely did not reduce the claimant's award.⁸⁵⁰ The fees were paid directly by Rite-Aid to claimant's counsel.⁸⁵¹ Thus, the fees and costs were not "payable to the employee" and therefore, were not compensation.⁸⁵²

843. *See id.* at 565, 667 A.2d at 647.

844. *See id.*

845. 271 Md. 693, 319 A.2d 802 (1974).

846. *See Stevens*, 340 Md. at 565-66, 667 A.2d at 647.

847. *See id.* at 566, 667 A.2d at 648.

848. *See id.* at 567, 667 A.2d at 648.

849. *See id.* In *Chanticleer*, the court held that attorney's fees were compensation because the WCC approved the fees, and the fees were a lien against the compensation award. *See id.*

850. *See id.*

851. *See id.*

852. *See id.*

Accordingly, the court affirmed the circuit court and denied Stevens additional compensation because five years had elapsed since her last compensation payment.⁸⁵³

Dan Curry

*J. A defendant suffers "injury," which starts the running of the 180-day period for provision of notice under the Maryland Tort Claims Act (MTCA) for third-party claims against the state, when the defendant is served with the plaintiff's complaint. Haupt v. State*⁸⁵⁴

1. Facts

Sandra Lee Haupt was involved in an accident with Margaret Lynn Keehan, the plaintiff, on August 1, 1989. Three years later, Keehan filed suit alleging that Haupt's negligence caused the accident. Haupt filed an answer and a third-party complaint against Anne Arundel County (the County) alleging that trees and brush on the County's property obstructed her view. However, the State of Maryland (the State), not the County, owned the property in question. The action against the County was dismissed, and on March 5, 1993, Haupt filed a third-party complaint against the State.⁸⁵⁵ The State filed a motion to dismiss arguing that Haupt failed to give the State notice within 180 days of the accident. The State construed the injury as the injury to the plaintiff, or those injuries resulting from the accident. Haupt construed the injury requirement in the statute to mean as the time when final judgment is awarded against her. The circuit court granted the State's motion to dismiss, adopting the State's position. The court of appeals issued a writ of certiorari on its own motion.

2. Analysis

The question for the court to decide was whether the injury referred to in the statute is that arising out of the car accident, or the injury to the defendant when the defendant is served with suit papers.⁸⁵⁶ The court noted that the State's assertion that the injury

853. *See id.* at 568, 667 A.2d at 649.

854. 340 Md. 462, 667 A.2d 179 (1995).

855. Maryland requires written notice to the state "within 180 days after the injury to the person or property that is the basis of the claim." MD. CODE ANN., STATE GOV'T § 12-106(b)(1) (1993).

856. *Haupt*, 340 Md. at 472, 667 A.2d at 184.

requirement is the injury resulting from the accident is illogical and contrary to common sense when the notice provision is considered in light of third-party claims.⁸⁵⁷

The statute has a different meaning in the context of a third-party claim.⁸⁵⁸ Since the purpose of the third-party complaint is to protect the defendant from the plaintiff's demands, the term "injury" carries a different meaning than it has in the first party claim.⁸⁵⁹ Consequently, the running of the 180-day notice provision begins when the defendant is served with the plaintiff's complaint.⁸⁶⁰ This is the first point in time that the defendant is exposed to liability.⁸⁶¹ Likewise, since the defendant has been put on notice, once it has been served with a complaint, the defendant is now in a position to notify the State in accordance with section 12-106(b).⁸⁶²

Nevertheless, Haupt, the third-party plaintiff in this case was unable to benefit from the court's broad reading of the statute.⁸⁶³ Keehan served Haupt with the complaint on August 30, 1992.⁸⁶⁴ Therefore, Haupt had until February 26, 1993 to provide the State with written notice of the action.⁸⁶⁵ She failed to do so and the court dismissed her action against the State because it was untimely.⁸⁶⁶

Dan Curry

X. TORT LAW

*A. In actions for civil conspiracy to commit a tort and for aiding and abetting the commission of a tort, the plaintiff must allege that the underlying tort has been committed. Alleco, Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*⁸⁶⁷

1. Facts

Lawrence I. Weisman served as attorney for Alleco, Inc. (Alleco) from September 1986 to July 1988. During that time, Weisman shared

857. *See id.* at 472-74, 667 A.2d at 184-85.

858. *See id.* at 474, 667 A.2d at 185.

859. *See id.* at 475, 667 A.2d at 185.

860. *See id.* at 476, 667 A.2d at 186.

861. *See id.*

862. *See id.*

863. *See id.* at 479, 667 A.2d at 187.

864. *See id.*

865. *See id.*

866. *See id.*

867. 340 Md. 176, 665 A.2d 1038 (1995).

confidential information regarding Alleco's intent to sell a subsidiary with various personal business associates. Based on this information, Weisman and his associates coordinated substantial purchases of Alleco's debentures and stock and eventually attempted to force the corporation to pay par value for the securities.

Alleco filed suit against Weisman's associates⁸⁶⁸ alleging liability under four counts: (1) aiding and abetting breach of fiduciary duty; (2) civil conspiracy to breach fiduciary duty; (3) aiding and abetting fraud; and (4) civil conspiracy to commit fraud. The circuit court dismissed counts one and three holding that Maryland had not recognized "aiding and abetting" the commission of a tort as an independent tort. The court also dismissed counts two and four holding that Alleco did not sufficiently allege that any of the defendants had committed an overt act in furtherance of the conspiracy. The court of special appeals affirmed. The Court of Appeals of Maryland granted certiorari. The court of appeals affirmed as to counts two and four and affirmed, on different grounds, as to counts one and three.

2. Analysis

Addressing the civil conspiracy counts, the court first noted that "'conspiracy' is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff."⁸⁶⁹ The court maintained that to prevail in a civil conspiracy claim, a plaintiff must first establish that the underlying tort was committed.⁸⁷⁰ The court thus held that counts two and four were appropriately dismissed because the plaintiffs did not adequately allege that Weisman had committed the underlying torts — breach of fiduciary duty⁸⁷¹ and fraud.⁸⁷²

With regards to counts one and three, the court held that the circuit court and the court of special appeals erred in holding that Maryland did not recognize liability for aiding and abetting the commission of a tort.⁸⁷³ The court noted, however, that, as with the

868. Weisman died prior to the commencement of the action, and his estate was not made a party to the litigation. *See id.* at 179, 665 A.2d at 1040.

869. *Id.* at 189, 665 A.2d at 1045 (quoting *Alexander v. Evander*, 336 Md. 635, 645 n.8, 650 A.2d 260, 265 n.8 (1994)).

870. *See id.* at 189-91, 665 A.2d at 1044-45.

871. The court specifically reserved the question of whether Maryland law recognizes a tort of breach of fiduciary duty. The court assumed for the purpose of discussion that it did, and thus, applied the elements of the tort as set forth in Section 874 of the Restatement (Second) of Torts. *See id.* at 191-92, 665 A.2d at 1045-46.

872. *See id.* at 196, 199, 665 A.2d at 1048, 1049.

873. *See id.* at 199, 665 A.2d at 1049.

civil conspiracy counts, "civil aider and abettor liability . . . requires that there exist underlying tortious activity in order for the alleged aider and abettor to be held liable."⁸⁷⁴ The court thus held that because the plaintiffs did not adequately allege that the underlying torts had been committed, their claims for aiding and abetting were properly dismissed.⁸⁷⁵

Gabriel A. Terrasa

*B. When police officer performs arrest pursuant to a facially valid arrest warrant, false imprisonment does not lie against arresting officer or third party instigating the arrest. Montgomery Ward v. Wilson*⁸⁷⁶

1. Facts

Several customers of the Montgomery Ward store at Temple Hills complained of unauthorized credit card charges made against their credit cards at that store. Montgomery Ward's loss prevention manager, Jeffrey Bresnahan, investigated the charges. During the investigation, two employees told Bresnahan that a co-worker, Frances Wilson, had made credit purchases charging them to an account number she had written on a piece of paper. Bresnahan verified through personnel records that Wilson had been working at the time the unauthorized charges were made. Bresnahan interviewed Wilson, who denied the allegations. Bresnahan did not examine the charge slips to ascertain whether the authorizing signature resembled Wilson's handwriting. Bresnahan filed charges against Wilson. Prince George's County Police arrested Wilson at Montgomery Ward, where she was handcuffed and taken away in front of her peers and customers. The charges against Wilson were eventually dismissed because witnesses failed to appear for trial.

Wilson filed a complaint against Montgomery Ward and Bresnahan claiming false imprisonment and malicious prosecution, and seeking compensatory and punitive damages. Wilson claimed that Bresnahan had not sufficiently investigated the allegations against her before bringing criminal charges. A jury found the defendants liable on both torts and awarded Wilson compensatory and punitive damages. The defendants appealed to the Court of Special Appeals of Maryland, claiming that, as a matter of law, Bresnahan had

874. *Id.* at 201, 665 A.2d at 1050.

875. *See id.* at 200-01, 665 A.2d at 1050.

876. 339 Md. 701, 664 A.2d 916 (1995).

probable cause to file the charges against Wilson, and thus, the evidence did not support a verdict against them for false imprisonment and malicious prosecution. The defendants also claimed that the trial judge erred in instructing the jury that punitive damages could be awarded on either tort on the basis of implied malice. The court of special appeals affirmed. The Court of Appeals of Maryland granted certiorari and affirmed in part and reversed in part.

2. Analysis

a. Probable Cause

The court noted that the trial judge gave the jury too much authority to decide whether there had been probable cause.⁸⁷⁷ Rather than allowing the jury to apply a legally correct definition of probable cause to the facts of the case, the trial judge should have "explain[ed] to the jury whether or not probable cause exist[ed] under the various factual scenarios which [might have been] generated by the evidence."⁸⁷⁸ The court held, however, that because the defendants did not object to the jury instruction on probable cause, and in light of the conflicting testimony regarding Wilson's actions, the verdict would not be overturned on the ground that there was insufficient evidence of lack of probable cause.⁸⁷⁹

b. Malicious Prosecution

Turning to the tort of malicious prosecution, the court addressed the defendants' contention that the plaintiff had not proven the element of malice.⁸⁸⁰ The court asserted that in malicious prosecution cases, the jury is allowed to infer malice from lack of probable cause.⁸⁸¹ The court explained, however, that malice in this context means "wrongful or improper motive in initiating legal proceedings

877. *See Wilson*, 339 Md. at 716, 664 A.2d at 923.

878. *Id.* (citing *Palmer Ford, Inc. v. Wood*, 298 Md. 484, 471 A.2d 297 (1984)).

879. *See id.* at 716-17, 664 A.2d at 923-24.

880. The elements of the tort of malicious prosecution are:

(a) a criminal proceeding instituted or continued by the defendant against the plaintiff, (b) termination of the proceeding in favor of the accused, (c) absence of probable cause for the proceeding, and (d) 'malice,' or a primary purpose in instituting the proceeding other than that of bringing an offender to justice.

Id. at 714, 664 A.2d at 922 (quoting *Durante v. Braun*, 263 Md. 685, 688, 284 A.2d 241, 243 (1971)).

881. *See id.* at 717-18, 664 A.2d at 924.

against the plaintiff," and that an inference of "negligence in instituting unjustified criminal proceedings . . . cannot satisfy the malice element."⁸⁸² The court held that while the trial judge's instruction on malice might have "invited" the jury to infer malice from negligence, the defendants failed to object to the trial court's instruction, and thus affirmed the award of compensatory damages under the malicious prosecution count.⁸⁸³

c. False Imprisonment

Addressing the false imprisonment count, the court held that when a police officer performs an arrest pursuant to a facially valid arrest warrant, the tort of false imprisonment does not lie against the arresting officer or the third party instigating the arrest.⁸⁸⁴ Overruling numerous court of special appeals's decisions, the court noted that once an arrest warrant is issued and the proceedings against the plaintiff have commenced, the tort of malicious prosecution provides the appropriate remedy for any damage done.⁸⁸⁵

d. Punitive Damages

The court held that to recover punitive damages in an action for either false imprisonment or malicious prosecution, "a plaintiff must establish by clear and convincing evidence the defendant's wrongful or improper motive for instigating the prosecution."⁸⁸⁶ Furthermore, the court noted that although the jury may infer malice from lack of probable cause when awarding compensatory damages in a malicious prosecution case, the inference cannot be made in an award of punitive damages.⁸⁸⁷

Gabriel A. Terrasa

*C. Manufacturers and distributor-installers of asbestos-containing products may be liable to bystander workers harmed by asbestos dust. ACandS, Inc. v. Godwin*⁸⁸⁸

1. Facts

An April 1990 order of the Circuit Court of Maryland for Baltimore City consolidated 8555 actions involving claims for per-

882. *Id.* at 718-19, 664 A.2d at 924-25.

883. *See id.* at 719-20, 664 A.2d at 925.

884. *See id.* at 720-21, 664 A.2d at 925.

885. *See id.* at 723, 664 A.2d at 927.

886. *Id.* at 730-35, 664 A.2d at 930-33.

887. *See id.* at 735-36, 664 A.2d at 933.

888. 340 Md. 334, 667 A.2d 116 (1995).

sonal injuries or wrongful death allegedly resulting from exposure to asbestos. By agreements of counsel, six representative plaintiffs were selected, three by plaintiffs' counsel and three by defendants' counsel, for the consolidated actions known as Abate I. All issues between the six representative plaintiffs and six nonsettling trial defendants were decided at the Abate I trial.

For the three representative plaintiffs selected by defendants' counsel, the court found each had not contracted an asbestos-related disease, and judgments in favor of the six trial defendants were entered as to these plaintiffs. For the three Abate I plaintiffs, selected by plaintiffs' counsel, the jury found that: (1) the plaintiffs were foreseeable bystanders;⁸⁸⁹ (2) the plaintiffs had contracted an asbestos-related disease; and (3) the amount of time the plaintiffs had been exposed to defendants' products was a substantial contributing factor in causing the asbestos-related disease and/or death. Three defendants, ACandS, Inc. (ACandS), a manufacturer, and Pittsburgh Corning Corporation (PCC) and Porter Hayden Company (PH), both distributor-installers were found liable for compensatory damages. Additionally, PCC and PH were found liable for punitive damages. All three defendants appealed.

The common issues of defendants' negligence and strict liability as to specific products were decided by the Abate I court in favor of plaintiffs. Defendants appealed, questioning the legality of applying these findings to the cases of the 8,549 plaintiffs not tried in Abate I.

The Court of Appeals of Maryland granted a writ of certiorari on their own motion prior to consideration by the Court of Special Appeals of Maryland.

2. Analysis

ACandS, PCC, and PH challenged the constitutionality of the consolidation on the grounds that it produced proceedings so complex and overwhelming that it was beyond the capacity of the jury to resolve fairly.⁸⁹⁰ The court of appeals reviewed decisions nationwide affirming the legality of consolidation actions in other asbestos cases and concluded that the Abate I proceedings fit well within acceptable parameters of numbers of parties litigated, number of work site

889. A bystander was defined as an individual who did not directly handle an asbestos-containing product, but was near enough to an asbestos-containing product's fibers to come in contact with those fibers. Bystanders were distinguished from users, who were those who came in contact with asbestos fibers by directly handling an asbestos-containing product. *Id.* at 358, 667 A.2d at 127.

890. *See id.* at 397-98, 667 A.2d at 147.

situations introduced into evidence, and types of workers affected.⁸⁹¹ The court held that findings on common issues of these defendants' negligence and strict liability as to all products submitted were thus binding on cases against these defendants by the 8549 plaintiffs pending mini-trials.⁸⁹²

The court also addressed the appropriateness of the punitive damage awards.⁸⁹³ The court reversed the lower court's judgment, holding that actual malice, not merely implied malice, was required to support an award of punitive damages in this non-intentional tort action.⁸⁹⁴ The court held there was insufficient evidence to prove that the defendants acted in bad faith towards any class action plaintiff.⁸⁹⁵

Addressing the specific claims of the three bystander plaintiffs awarded compensatory damages, the court held that the majority rule: the "frequency, regularity and proximity" test,⁸⁹⁶ was the law in Maryland, and was appropriately applied by the trial court in awarding compensatory damages to these plaintiffs.⁸⁹⁷ The court, however, reversed the judgment in favor of one plaintiff, finding that there was insufficient evidence of proximity of the plaintiff to the asbestos-containing product.⁸⁹⁸

Thus, the court of appeals upheld compensatory damages as to two of the plaintiffs, but denied the awards of punitive damages.

Lucy Moran

*D. Maryland's exception to the economic loss rule applies only when a defective product creates imminent, serious, and unreasonable risk of death or personal injury. Morris v. Osmose Wood Preserving*⁸⁹⁹

1. Facts

Homeowners (Morris) brought a class action suit⁹⁰⁰ against manufacturers of fire retardant treated plywood (FRT Plywood) used in

891. *See id.* at 397-403, 667 A.2d at 146-49.

892. *See id.* at 404, 667 A.2d at 150.

893. *See id.* at 358-92, 667 A.2d at 127-44.

894. *See id.* at 358-61, 667 A.2d at 127-29.

895. *See id.* at 362-92, 667 A.2d at 129-44.

896. *See id.* at 349, 667 A.2d at 123 (questioning *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445 (1992)). The analysis of the frequency, regularity, and proximity test takes into account physical characteristics of the workplaces and the relationship between activities of the direct users of the product and the bystander plaintiff. It is within this context that the frequency of product use, proximity of plaintiff to use, and regularity of exposure are assessed.

897. *See id.* at 349, 667 A.2d at 349-50.

898. *See id.* at 356-58, 667 A.2d at 126-27.

899. 340 Md. 519, 667 A.2d 624 (1995).

900. The plaintiffs' amended complaint contained five counts: strict liability, neg-

the construction of roofs. Morris alleged that FRT Plywood was defective in design because it was unduly susceptible to thermal degradation and deterioration. Morris further alleged that the FRT Plywood's defect affected the structural integrity of their homes, creating unreasonable risk of death or personal injury from the roofs collapsing. The circuit court dismissed the complaint, and Morris appealed. The Court of Special Appeals of Maryland reversed the dismissal of the breach of implied warranty count,⁹⁰¹ and affirmed the other dismissals.

Plaintiffs appealed and defendants cross-appealed. The Court of Appeals of Maryland affirmed the trial court's initial ruling⁹⁰² dismissing all claims.⁹⁰³

2. Analysis

Under Maryland's economic loss rule, purely economic losses in product liability claims cannot be recovered in tort actions.⁹⁰⁴ The Court of Appeals of Maryland has held that an exception to the

900. The plaintiffs' amended complaint contained five counts: strict liability, negligence, breach of implied warranties, negligent misrepresentation, and violations of the Maryland Consumer Protection Act. *See Osmose*, 340 Md. at 528, 667 A.2d at 629 (citing MD. CODE ANN., COMM. LAW II §§ 13-101 to -411 (1990 & Supp. 1996)).

901. The intermediate appellate court pointed out that the apparent error in the circuit court's ruling was that the warranty claims were not filed within the applicable limitations periods, and determined that *Osmose* was a "seller" under the UCC, thus potentially liable. These claims were remanded for trial. *See Morris v. Osmose Wood Preserving*, 99 Md. App. 646, 664, 639 A.2d 147, 156 (1994).

902. In a dissenting opinion, Judge Eldridge criticized the majority's decision to affirm the dismissal of the plaintiffs' tort claims. The dissenter noted that the rationale underlying Maryland's exception to the economic loss rule is that correction of dangerous conditions should be encouraged, and that one should not have to wait for serious physical injury to recover costs of remedying or repairing defects. *See Osmose*, 340 Md. at 549, 667 A.2d at 634 (Eldridge, J., dissenting). Judge Eldridge concluded that the majority's analysis, which consisted of drawing a negative inference from the absence of an injury, was inappropriate. *See id.* at 549-52, 667 A.2d at 639-41 (Eldridge, J., dissenting).

903. For the tort claims, the economic loss rule barred recovery. *See id.* at 531-36, 667 A.2d at 631-33. With respect to the other claims, the court stated that the UCC warranty claims were not cognizable under Maryland's version of the UCC, primarily because no dates of "sale" between manufacturer and consumer could be ascertained from the record. *See id.* at 540-44, 667 A.2d at 635-37. The court affirmed the dismissal of the count under the Maryland Consumer Protection Act, because the connection was too remote between the alleged deceptive trade practices of the manufacturers and the sale of the homes to the consumers. *See id.*

904. *See id.* at 531, 667 A.2d at 631 (citing *U.S. Gypsum v. Baltimore*, 336 Md. 145, 156, 647 A.2d 405 (1994)).

economic loss rule exists only when the negligent conduct creates an unreasonable risk of death or serious personal injury.⁹⁰⁵ The court concluded that the alleged defects in the FRT Plywood did not present a substantial risk.⁹⁰⁶ It reiterated the court of special appeals' holding that mere possibilities are legally insufficient to allege the existence of a clear danger of death or serious personal injury.⁹⁰⁷

The majority explained that to determine the degree of risk required to apply the exception to the economic loss rule, the reviewing court must assess the seriousness of the possible harm with the probability of the damage occurring.⁹⁰⁸ In the instant case, these factors viewed together pointed to absence of clear, serious, and unreasonable risk of death or personal injury.⁹⁰⁹

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905. *See id.* at 532, 667 A.2d at 631 (citing *Council of Co-owners v. Whiting-Turner*, 308 Md. 18, 32-35, 517 A.2d 336 (1986)).

906. *See id.* at 536, 667 A.2d at 633.

907. *See id.*

908. *See id.* at 533-35, 667 A.2d at 631-33.

909. *See id.* at 535-36, 667 A.2d at 633.

