Amicus Curiarum

VOLUME 28
ISSUE 5 MAY 2011

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

Thomas Peter Headen v. Motor Vehicle Admin., No. 42, September Term, 2009, Filed March 28, 2011, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2011/42a09.pdf

ADMINISTRATIVE LAW - MOTOR VEHICLE ADMINISTRATION

Facts: Petitioner Thomas Headen was convicted by Maryland courts in 1976, 1978, and 1982 of driving while impaired by or under the influence of alcohol. In 1993, he pleaded guilty to driving while intoxicated and received probation before judgment. In October 1994, Petitioner moved to Florida and was issued a Florida driver's license. Nine months later, Petitioner was arrested on suspicion of driving while under the influence of alcohol, for which he was subsequently convicted. Pursuant to Florida law, the court ordered the permanent revocation of Petitioner's Florida license.

Petitioner later returned to Maryland and, in 2001, applied for a Maryland driver's license. On November 1, 2001, the Motor Vehicle Administration ("MVA") summarily denied the application, in light of the permanent revocation of Petitioner's Florida driver's license. The MVA's action was based on Article V, subsection (2) of the Driver License Compact ("the Compact"), and Maryland Code (1977, 2009 Repl. Vol.) ("TR") § 16-103.1(1). The Compact, which is codified at TR § 16-703, provides in relevant part: "The licensing authority in the state where application is made shall not issue a license to drive to the applicant if: . . . (2) The applicant has held such a license, but the same has been revoked by reason, in whole or in part, of a violation and if such revocation has not terminated, except that after the expiration of 1 year from the date the license was revoked, such person may make application for a new license if permitted by law." TR § 16-103.1(1) prohibits the MVA from issuing a license "[d]uring any period for which the individual's license to drive is revoked . . . in this or any other state." Petitioner challenged successfully the MVA's denial of his application before an Administrative Law Judge and, on March 8, 2002, the MVA issued Petitioner a "Maryland Only" license.

On November 15, 2006, the day that Petitioner's "Maryland Only" driver's license was to expire, Petitioner applied for renewal of it. The MVA summarily denied the application. In subsequent correspondence, the MVA advised Petitioner that the permanent revocation of his Florida driver's license automatically

disqualified him from renewing his Maryland license, pursuant to TR § 16-103.1(1). The MVA further advised Petitioner that, because he was automatically disqualified, he was not entitled to a hearing to contest the MVA's denial of his application for license renewal.

Petitioner, evidently in an attempt to remove from his driving record the Maryland drunken driving convictions that precipitated the permanent revocation of his license in Florida, applied for expungement of his Maryland driving record, pursuant to TR § 16-117.1. By letter dated June 20, 2007, the MVA notified Petitioner that it had expunged certain of Petitioner's driving records by removing several motor vehicle violations and various other notations. The MVA, however, did not expunge any of Petitioner's 1976, 1978, and 1982 Maryland drunken driving convictions or his 1993 probation before judgment. In response to Petitioner's inquiries that followed, the MVA explained to Petitioner that, pursuant to TR § 12-111, the drunken driving convictions and probation before judgment dispositions remained only on Petitioner's "confidential" driving record and were not part of his "public driving record" and therefore not subject to expungement.

Petitioner initiated judicial review on May 22, 2008, by filing in the Circuit Court for Charles County a petition for judicial review of the MVA's actions, pursuant to Maryland Code (1984, 2009 Repl. Vol), § 10-222(h) of the State Government Article ("SG"). On June 20, 2008, he "amended" the petition to a complaint for issuance of a writ of administrative mandamus, pursuant to the provisions of Maryland Rules 7-401 through 7-403.

At the hearing on the complaint for issuance of the writ, Petitioner challenged both the MVA's summary denial of his application for renewal of the 2002 license and the MVA's refusal to expunge the "confidential" record of Petitioner's drunken driving convictions. The Circuit Court agreed with Petitioner that he was entitled to an administrative hearing to determine whether his license revocation in Florida precluded him from licensure in Maryland. The Circuit Court rejected Petitioner's contention regarding expungement, finding that the MVA complied with the law.

Held: Reversed in part and affirmed in part. The Court of Appeals held that, pursuant to TR § 103.1(1), the MVA properly denied Petitioner's application for a driver's license without an administrative hearing because his license was revoked in Florida, thereby reversing that part of the Circuit Court's order. The Court of Appeals also held that, pursuant to TR § 12-111, the MVA properly classified as "confidential" Petitioner's records of drunken driving convictions and probation before judgment disposition, thereby removing those records from the "public

driving record" and rendering them not subject to expungement.

With respect to the first question, TR § 103.1(1) provides that the MVA "may not" issue a driver's license to an individual whose privilege to drive is "revoked, suspended, refused, or canceled in this or any other state[.]" The Court determined that, based on the plain language of that provision and cases enforcing that plain language, the MVA properly denied Petitioner's application for a Maryland license without an administrative hearing, due to the revocation of Petitioner's Florida driving license at the time of his application.

In answering the second question, the Court began by noting that TR §§ 12-111 and 16-117.1 must be construed harmoniously and in a manner that renders no word or provision nugatory or surplusage. Guided by that principle, the Court focused on the phrase "public driving record"—employed in TR § 16-117.1(b)—the provision under which Petitioner sought expungement. The Court determined that, based on the legislative history of that provision, the General Assembly intended the term "public" to mean something other than simply any record made or received by the MVA, as contended by Petitioner. The Court noted that TR § 16-117.1(b) was the product of a 1972 amendment, which followed a 1970 amendment by which what is today TR § 12-111 was enacted. TR § 12-111 provided the MVA, for the first time, with discretion to classify as "confidential"and "not open to public inspection" driving records aged five years and older. The Court reasoned that, given this order of enactment, the General Assembly's use of the phrase "public driving record" in TR § 16-117.1(b), without reference to "confidential" records, indicates that "public driving record" does not include records made "confidential" by way of TR § 12-111. In other words, the Court concluded that the MVA had discretion, pursuant to TR § 12-111, to classify as "confidential" Petitioner's records of drunken driving convictions and probation before judgment disposition, such that the records were no longer part of Petitioner's "public driving record" and therefore not capable of expungement.

***

Thomas v. MVA, No. 31, September Term, 2010. Opinion filed on February 24, 2011 by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/31a10.pdf

ADMINISTRATIVE LAW - VIOLATION OF VEHICULAR LAWS - DRIVING UNDER THE INFLUENCE - REFUSAL OF ALCOHOL CONCENTRATION TEST

Facts: A police officer detained Thomas on suspicion of driving while intoxicated. The officer asked Thomas to submit to a preliminary breath test, and Thomas agreed. Yet, rather than administer a preliminary breath test, the officer began reading from an advice of rights form prepared by the Maryland Motor Vehicle Administration. This form advises a driver of his or her right to refuse a chemical breath test, a test wholly separate from a preliminary breath test. This time, Thomas refused to take any breath test and was arrested. Following an administrative hearing, Thomas's license was suspended pursuant to Section 16.205.1(b)(1) of the Transportation Article ("TA"), which allows a driver's license to be suspended promptly for suspected drunken driving if the person refused a test to determine alcohol concentration.

On appeal, Thomas contested his license suspension on the grounds that he never refused the chemical breath test. He asserted that the officer only offered a preliminary breath test, and Thomas could not refuse what he was never offered. Thomas also argued that, according to Section 16-205.1 of the Transportation Article ("TA"), an officer has not fully advised a person of the administrative sanctions associated with refusing a chemical breath test (as required for a license suspension) until the officer has charged that individual with a violation of the motor vehicle laws. Thus, a person cannot be penalized for any test refusal that occurs before he or she has been arrested for drunk driving. As evidence, Thomas pointed to 16-205.1(b)'s language setting forth the consequences for a test refusal:

> [A] person may not be compelled to take a test. However, the detaining officer shall advise the person that, on receipt of a sworn statement from the officer that **the person was so charged and refused to take a test** . . . the Administration shall [suspend the driver's license].

TA § 16-205.1(b) (emphasis added). Thomas claimed that this language supported an interpretation that TA Section 16-205.1 requires a formal charge before the advice of rights is

effective.

Held: The Court of Appeals affirmed the license suspension. Contrary to Thomas's contention, the advice of rights form contains a clear request that a driver submit to a chemical breath test. Thus, a reasoning mind could conclude that Thomas's blanket refusal to submit to a breath test pertained to the chemical breath test. Moreover, TA Section 16-205.1 did not require that the officer arrest Thomas before requesting that he submit to a chemical breath test. TA Section 16-205.1 was enacted to reduce the incidence of drunken driving and to protect public safety by encouraging drivers to take alcohol concentration tests. The statute was not meant to protect drivers. Examining the statute through this lens, it was clear that the "the so charged" language necessarily related to the prospective action that would be taken based on the officer's certification. Further evidence was supplied by TA Section 16-205.1's list of procedures for an officer who "stops or detains" a driver on suspicion of drunk driving. The list simply provides that the officer shall **detain** the driver and then request that he or she submit to a test; it mentions nothing of arrest. Here, the officer followed the procedures supplied by the statute, and fully advised Thomas of any possible administrative sanctions. Accordingly, suspension of Thomas's license was appropriate.

***

Attorney Grievance Commission of Maryland v. Andrew Gregory De La Paz - Miscellaneous Docket AG Nos. 50 and 65, September Term, 2009. Opinion filed March 24, 2011, by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/50a09ag.pdf

ATTORNEY DISCIPLINE - APPROPRIATE SANCTIONS - DISBARMENT

Facts: Respondent Andrew Gregory De La Paz violated the Maryland Rules of Professional Conduct ("MRPC") in his capacity as representative of Angelo Callaham and Danny L. Simons. Despite soliciting Mr. Callaham as a client and accepting his attorney's fee in advance, De La Paz ignored Mr. Callaham's numerous attempts to contact him to discuss an upcoming court proceeding. De La Paz never entered his appearance on behalf of his client and did not appear at Mr. Callaham's hearing, leaving Mr. Callaham to sign a Consent Judgment without the aid of counsel. Moreover, De La Paz never returned his unearned fee to Mr. Callaham. De La Paz's pattern of neglect continued with his representation of Mr. Simons, where De La Paz's failure to open an estate led to the dismissal of his client's complaint for failure to prosecute. Once again, De La Paz ignored his client's attempts to contact him, and when the Attorney Grievance Commission investigated the matter, De La Paz neglected to respond to its requests for information.

Held: Disbarment. The Court of Appeals held that, over the course of these two cases, De La Paz violated (1) MRPC 1.1 (Competence); (2) MRPC 1.3 (Diligence); (3) MRPC 1.4 (Communication); (4) MRPC 1.5 (Fees); (4) MRPC 1.6(d) (Declining or Terminating Representation); (5) MRPC 8.1(b) (Bar Admission and Disciplinary Matters); and (6) MRPC 8.4(d) (Misconduct). De La Paz had clearly neglected his clients, leaving one client to fend for himself at his own hearing and the other to lose his cause of action entirely for failure to prosecute. De La Paz also repeatedly ignored his clients' inquiries into the status of their cases, and then moved his practice without informing his clients of his new contact information. He then later declined to respond to Bar Counsel's requests for information. Moreover, De La Paz had not presented to the Court any mitigating factors that would justify a lighter sentence; indeed, he had not presented anything to the Court. In previous attorney grievance cases, the Court had held that disbarment was the appropriate sanction for attorneys who repeatedly neglect client affairs. Thus, De La Paz's violations and subsequent silence led the Court to conclude that disbarment was warranted.

***

Prince George's County, Maryland, et al. v. Keith Longtin, No. 35, September Term, 2010, filed on April 25, 2011. Opinion written by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/35a10.pdf

CIVIL PROCEDURE - LOCAL GOVERNMENT TORT CLAIMS ACT - NOTICE REQUIREMENTS

CIVIL PROCEDURE - LOCAL GOVERNMENT TORT CLAIMS ACT - STATUTORY CAP ON DAMAGES

CONSTITUTIONAL LAW - LOCAL GOVERNMENT LIABILITY - PATTERN OR PRACTICE

Facts: Keith Longtin was arrested, interrogated for over 36 hours, and charged with the rape and murder of his wife. He was held in prison for over eight months. During his stay in prison, the Prince George's County Police Department (the "Department") obtained exculpatory DNA evidence and evidence of a serial rapist in the area where Longtin's wife was killed, but failed to inform Longtin or release him. Only when the Department confirmed, through a DNA match, that the crime was committed by the other suspect, did it release Longtin from prison. Longtin sued the police officers involved in his arrest and interrogation, as well as Prince George's County, for false arrest, false imprisonment, constitutional violations, and other charges, and obtained a jury verdict totaling $6.2 million.

Held: Court of Special Appeals affirmed. When a person was arrested and held in prison for eight months, and released before trial, the 180-day notice period of Section 5-304 of the Courts and Proceedings Article for his false arrest and imprisonment claims commenced on the date the plaintiff was released from imprisonment, not the date of arrest. Thus, Longtin satisfied the statutory notice requirement.

The liability limitation of Section 5-303 of the Courts and Judicial Proceeding Article may not be applied retroactively to limit the recovery of a tort plaintiff whose cause of action accrued prior to April 20, 2001. An accrued cause of action is a vested right, and Longtin's cause of action accrued in this case before imposition of the statutory cap. Retroactive impairment or deprivation of a vested right violates the Maryland Declaration of Rights.

Maryland law recognizes a cause of action against a local government for a "pattern or practice" of unconstitutional

actions. A local government may be liable under a pattern or practice theory if its policies and procedures had the effect of "causing" its employees to engage in unconstitutional actions.

***

600 North Frederick Road, LLC v. Burlington Coat Factory of Maryland, LLC, No. 89, September Term 2010. Opinion filed on April 22, 2011 by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/89a10.pdf

CONTRACTS – MODIFICATIONS – VALIDITY OF BILATERAL MODIFICATION TO A TRIPARTITE AGREEMENT

CONSISTENT WITH LONG-STANDING MARYLAND JURISPRUDENCE REGARDING MODIFICATION OF CONTRACTS, A CONTRACT – EVEN A DECLARATION CONTAINING COVENANTS PERTAINING TO REAL PROPERTY – REQUIRING ALL OF THE PARTIES TO BE SIGNATORIES TO ANY WRITTEN MODIFICATION, MAY BE MODIFIED NONETHELESS, ABSENT AN ADEQUATE SHOWING OF PREJUDICE BY THE NON-CONSENTING PARCEL OWNER(S), WITH THE CONSENT OF LESS THAN ALL OF THE PARTIES.

Facts: Prior to 1976, the tract of land in Gaithersburg at issue in the present case was subdivided into three parcels ("Parcel One," "Parcel Two," and "Parcel Three"). In 1976, all of the Parcels were owned by Danac Real Estate Investment Corporation ("Danac"). On 22 April 1976, Danac entered into a thirty-year lease with Montgomery Ward & Co, Inc. ("Ward") involving Parcels One and Two. Pursuant to the lease, Ward constructed a retail store on Parcel One and the majority of its supporting surface parking on Parcel Two. The lease provided further that Danac was required to seek and obtain Ward's consent before commencing development on Parcels Two and/or Three, which consent was not to be withheld unreasonably. The lease was silent as to the precise location or types of any such future development.

In 1980, Danac entered into a contract with Realty Dealership Corporation ("RDC"),by which RDC was to acquire fee-simple title to Parcels One and Two, in the name of a wholly-owned subsidiary, Eretz Land Corporation ("Eretz"). Danac, prior to closing on the sale, agreed (and was permitted) to execute and record covenants reserving to itself development rights to Parcel Two. On 30 January 1981, Danac executed a "Declaration of Easement and Covenant" ("1981 Declaration"). The 1981 Declaration provided that, should Danac cease to be the fee simple owner of Parcel Two, Danac reserved the right, until 1 January 2001, to enter into a fifty-year ground lease with the owner, for an annual rent of $1,000.00. The proposed ground lease would grant Danac development rights on Parcel Two, provided that Danac would agree that "at the time [it] commences construction of any improvement on Parcel 2 . . . , then such construction shall not commence until the owner of Parcel [One]

shall have given its written consent to such construction, which consent shall not be unreasonably withheld." Finally, and of particular importance to the present case, the 1981 Declaration provided that "[t]his declaration may be modified or canceled only by written instrument signed by the owners of the Parcels." Danac conveyed Parcels One and Two to Eretz on 30 January 1981.

In October 1983, Danac sought Ward's consent under the Lease to develop Parcel Two with an office complex. Ward objected to Danac's plan, asserting that proposed buildings would destroy the line of sight of occupants of vehicles on Roue 355 to Ward's store entrance, as well as the majority of the surface parking in front of the store. Believing apparently that the development as proposed would interfere with its ability to negotiate a favorable assignment of the Lease, Ward filed a complaint, on 16 October 1984, for declaratory judgment in the Circuit Court for Montgomery County against Danac and Eretz, asking the Circuit Court to delineate Danac's development rights on Parcel Two under the 1981 Declaration.

During the pendency of that litigation, throughout 1987 and 1988, most of Parcel Three was conveyed to the State Highway Administration, Corner Limited Partnership, and Point Limited Partnership. Further, while the litigation was ongoing, Danac and Ward continued negotiations regarding the scope of Danac's proposed development of Parcel Two. These negotiations culminated in the execution of an "Amended and Restated Declaration of Easements and Covenants" ("1992 Declaration") – signed by representatives of Purcell Investment Corporation (Danac's new name) (the developer of Parcel Two) and Eretz (the owner of Parcels One and Two) – whose purpose was to "amend and restate the [1981] Declaration in its entirety . . . ." Importantly, the 1992 Declaration delineated (with somewhat greater specificity than the 1981 Declaration) restrictions on any future development on Parcel Two, limiting it to a specified "Restricted Development Area," and emphasizing that the 1992 Declaration's provisions "shall apply to and govern the construction of any Future Improvements on Parcel [Two], whether or not the same shall be undertaken pursuant to the ground lease described . . . . above."

At some point prior to 1998, Burlington Coat Factory ("BCF") began investigating whether the now largely vacant Ward store on Parcel One would be a suitable site in which to open one of its retail clothing stores. Ultimately, on 23 October 1998, Ward, in bankruptcy, assigned to BCF its interest as tenant under the 1976 Lease and, thereafter, BCF began operating a retail store in the building on Parcel One, while continuing the subleases of parts

of the building to Toys R' Us and a Ford automobile dealership.

In the Fall of 2003, Petitioner became interested in acquiring Parcels One and Two. After conducting a due diligence review, outside counsel for Petitioner determined that the 1992 Declaration, because (in part) it had not been signed by the owners of Parcel Three, was not binding on the owner of Parcel Two, but believed the covenants applied only to third-party developers of Parcel Two. Petitioner acquired Parcel Two. Soon thereafter, Petitioner engaged JPI Enterprises, Inc. ("JPI"), who would purchase and develop Parcel Two with a 300-unit apartment complex, retail stores, and a parking garage, with Petitioner remaining the owner of Parcel One. On 30 April 2007, counsel for BCF wrote to Petitioner to advise of its refusal to consent to the JPI project, explaining that the "construction would be in violation of numerous provisions of the [1992] Covenants and would substantially interfere with [BCF]'s operations at the site."

Petitioner thereafter filed a "Complaint for Declaratory Relief" in the Circuit Court for Montgomery County. Petitioner asked the Circuit Court to resolve whether the 1992 Declaration applies to the owner of Parcel Two, and whether the 1992 Declaration is valid and enforceable notwithstanding the fact that the owners of Parcel Three were not signatories to it. On 27 May 2009, the Circuit Court rejected Petitioner's claim that "the 1992 Declaration's restrictions on 'Developer' are not applicable to the Owner of Parcel [Two]," and the Circuit Court held that the 1992 Declaration was valid and enforceable notwithstanding the fact that the owners of Parcel Three were not signatories to it, relying on the California Supreme Court case of *Hotle v. Miller*, 334 P.2d 849 (Cal. 1959).

Petitioner appealed timely to the Court of Special Appeals (COSA). The COSA, in an unreported opinion, agreed with the Circuit Court regarding the missing-signatories argument, explaining that "[i]f the only two parties with an interest in Matter A later wish to modify their agreement as to that matter and their proposed modification would not adversely affect any other party, we see no reason why they should not be permitted to make that modification." Further, regarding the issue of whether the 1992 Declaration applied to Petitioner as the owner of Parcel Two, or applied merely to third-party developers of Parcel Two, the COSA explained that it saw "nothing in th[e 1992 Declaration] . . . limiting those restrictions and burdens to development carried on by third-party developers or in any way exempting the owner of Parcel [Two] from them."

600 North Frederick Road, LLC, filed timely a Petition for Writ of Certiorari, which we granted, *600 N. Frederick Road, LLC v. Burlington Coat Factory of MD, LLC*, 416 Md. 272, 6 A.3d 904 (2010), to consider:

> 1. Whether a recorded written instrument requiring the signatures of a defined set of property owners to cancel or modify it can be modified by fewer than all based on an allegation that extrinsic evidence shows that the nonsigning property owners are not adversely affected by the modification?
>
> 2. Whether potentially perpetual restrictions on the use of land may be imposed under the rule of reasonably strict construction without applying the traditional rule of contract interpretation that every provision in a written instrument must be given meaning, if possible?
>
> 3. Under the rule of reasonably strict construction, may a court imply restrictions on the use and development of land or must such restrictions be clearly stated in a document applicable to the property owner?

Held: Although agreeing largely with the COSA's reasoning and holdings, the case, for reasons explained, was vacated and remanded to the Circuit Court for Montgomery County for further proceedings. Regarding the missing-signatories argument, Petitioner contended that the 1992 Declaration could not modify or replace the 1981 Declaration without the signatures of the Parcel Three owners, considering that the 1981 Declaration provided expressly that it "may be modified or cancelled only by written instrument signed by the owners of [all] of the Parcels." In response, BCF argued that "the parties to a contract remain free to modify the contract or create a new agreement as long as the modification does not alter or affect the rights of a party who does not join in the modification," and that "so long as it does not affect the rights of a party that does not join, a contract modification is binding on those parties that join in the modification, but not on parties that fail to join in it."

The Court then analyzed the California Supreme Court's decision in *Hotle*, *supra*, where that court held that "two parties to a tripartite agreement cannot change it *to the prejudice of the third party*." (Emphasis added). In framing the issue before

this Court, we noted that the issue – chiefly, whether to apply the rule as applied in *Hotle* – appeared to be an issue of first impression in Maryland. The Court concluded that:

> Because we think the rule enunciated in *Hotle* and elsewhere – that two parties to a tripartite agreement may modify the original agreement, provided such modification in no way prejudices the interests of the third, non-consenting party – is consistent with this pragmatic policy favoring recognition of modification of contracts, we adopt it.

Further, the Court noted that such a holding was in line with nearly every jurisdiction that has decided the issue.

Adopting in Maryland the rule as announced in *Hotle*, however, did not end the Court's inquiry, considering *Hotle* held that "two parties to a tripartite agreement cannot change it *to the detriment of the third party*." (Emphasis added). Thus, the Court's task shifted to determining whether the Parcel Three owners are prejudiced by the 1992 Declaration, for, if they are, the 1992 Declaration may be nothing more than an unsuccessful attempt to modify and replace the 1981 Declaration. On this point, the Court held:

> [N]othing in the 1992 Declaration seems to affect, negatively and patently, the rights of the relevant owners of Parcel Three to develop Parcel Three, then-existing under the 1981 Declaration. That is not to say, however, that the only form of prejudice capable of defeating a bilateral modification of a tripartite agreement is hindrance of development rights. We think it would be unfair, without giving the relevant owners of Parcel Three an opportunity to be heard, to declare affirmatively at this point that, because the current record is devoid of any demonstrable evidence of prejudice to the owners of Parcel Three, they will suffer no prejudice from the 1992 Declaration.

Accordingly, the Court directed the case to be remanded to the Circuit Court, whereupon on remand, the owners of Parcel Three should be permitted to weigh-in, as parties or otherwise, if they wish, and the Circuit Court to offer and, if necessary, conduct an evidentiary hearing – allowing the owners of Parcel Three to

participate – with the goal of determining whether the owners of Parcel Three are prejudiced by the 1992 Declaration.

Finally, the Court dealt with Petitioner's contention that the restrictions in the 1992 Declaration were not intended to apply to the owners of Parcel Two, but rather merely to third-party developers of that Parcel. Rejecting Petitioner's argument, the Court explained that such restrictions were not limited to third-party developers, citing "at least five instances in the 1992 Declaration in which clarification is given that such restrictions apply "*whether or not the* [*Future Improvements*] *shall be undertaken pursuant to the ground lease* [entered into by the owner of Parcel Two]. . . ." (Emphasis added).

***

Blake v. State, No. 58, September Term, 2010, Opinion filed on March 22, 2011 by Murphy, J.

http://mdcourts.gov/opinions/coa/2011/58a10.pdf

CRIMINAL LAW - PETITIONS FOR DNA TESTING - PROCEDURE TO DETERMINE THE REASONABLENESS OF SEARCHES THAT DO NOT FIND EVIDENCE THAT PETITIONER WANTS TESTED: Title 4, Chapter 700 of the Maryland Rules of Procedure is applicable to petitions for DNA testing filed pursuant to § 8-201 of the Criminal Procedure Article. When a convicted defendant has filed a petition for DNA testing, and the State's answer asserts that the evidence sought to be tested cannot be located, the circuit court must (1) identify the most likely places where the evidence may be found, (2) require a thorough search of each place that should be searched, and (3) make an "on-the-record" determination of whether the search conformed to the requirements of CP § 8-201. The "clearly erroneous" standard of appellate review is applicable to the factual findings of the circuit court.

Facts: At 1:15 p.m. on January 7, 1982, a jury convicted Appellant of first degree rape and first degree sexual offense. The State's evidence was sufficient to establish that he committed those offenses on July 27, 1981. He filed his petition for DNA testing on December 1, 2004. As a result of his first petition, the Court of Appeals (1) held that the Circuit Court for Baltimore City erred in "summarily" dismissing Appellant's *pro se* petition for DNA testing, and (2) established "the procedures a circuit court must follow before it denies a petition for post-conviction DNA testing pursuant to § 8-201 [of the Criminal Procedure Article (CP § 8-201)] on grounds that the evidence the petitioner has asked to be tested no longer exists."

On remand, the record showed that the Circuit Court (1) identified the most likely places where the evidence might be found, (2) required a thorough search of each place that should be searched, and (3) provided for an "on-the-record" determination of whether the search conformed to the requirements of CP § 8-201. To resolve the issue of whether the State satisfied its ultimate burden of persuasion, the Circuit Court held four hearings, during which it received testimony, documentary evidence, affidavits, and proffered information about the State's efforts to locate the evidence sought to be tested. The Circuit Court ultimately concluded that the State had met its burden of proving that the evidence no longer exists, and "ORDERED that [Appellant's] Petition [for DNA testing be] DENIED."

Appellant noted a timely appeal from that ruling arguing that (1) the Search of the Evidence Control Unit (ECU)/Off- Site Storage Facility Conducted by the State to Locate DNA Evidence from [Appellant's] 1982 Rape Trial was Unreasonable Based on the Guidance Provided by this Court and the Good-Faith, Reasonableness Standard Adopted by the Circuit Court for Baltimore City and (2) the Search of the State's Attorney's Office was Unreasonable Based on this Court's Previous Guidance and the Good-Faith, Reasonableness Standard. The Court of Special Appeals Affirmed.

Held: On appeal the Court of Appeals affirmed stating that "the 'clearly erroneous' standard of review is applicable to the Circuit Court's finding that the search of the ECU and the Baltimore City State's Attorney's office was 'a reasonable search' under § 8-201 of Maryland's Criminal Procedure Article." Applying this standard to the facts and documentary evidence received in the case, the court held that Circuit Court was not erroneous - - "clearly," or otherwise - in finding that the search of ECU, and the State's Attorney's office was "a reasonable search under [CP] § 8-201[.]"

***

In Re: Shirley B., Jordan B., Davon B., and Cedric B. Case No. 61, September Term, 2010. Opinion filed April 25, 2011 by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/61a10.pdf

FAMILY LAW - CINA - (1) DOES THE DEPARTMENT OF SOCIAL SERVICES SATISFY THE STATUTORY REQUIREMENT THAT IT MUST MAKE REASONABLE EFFORTS TO FINALIZE THE PERMANENCY PLAN OF REUNIFICATION WHERE A PARENT WAS REFERRED TO SERVICES PERTAINING TO SPECIFIC IMPEDIMENTS TO REUNIFICATION BUT NEVER RECEIVED THOSE SERVICES DUE TO LACK OF FUNDING? (2) WHERE PETITIONER HAD CONCEDEDLY FOLLOWED THROUGH WITH THE DEPARTMENT'S REFERRALS TO SERVICES IDENTIFIED BY THE JUVENILE COURT AS "CRITICAL" FOR EFFORTS AT REUNIFICATION WITH HER CHILDREN, BUT DID NOT RECEIVE THOSE SERVICES SOLELY BECAUSE OF A LACK OF FUNDING DID THE DEPARTMENT SATISFY ITS STATUTORY OBLIGATION TO MAKE REASONABLE EFFORTS TOWARD REUNIFICATION? (3) DID THE JUVENILE COURT ABUSE ITS DISCRETION WHEN IT CHANGED THE PERMANENCY PLANS FOR THE FOUR CHILDREN FROM REUNIFICATION TO ADOPTION?

Facts: Ms. B. is the biological mother of Shirley B., Davon B., Jordan B., and Cedric B. (collectively "the Children"). The Children were referred to the Department of Social Services (the "Department") following reports of neglect and sexual abuse. A subsequent psychological evaluation revealed that Ms. B. was cognitively impaired, and it was observed that the Children had special needs of their own. Perhaps due to her cognitive limitations, Ms. B. was largely unresponsive to the Department's assistance and she allowed vital benefits to lapse. She also permitted unauthorized adults to move into her home and exposed the Children to drug use and sexual activity. Finally, a violent altercation between Ms. B., the Children's father, and Shirley prompted the Department to remove the Children from Ms. B.'s care.

As the Children sat in foster care, the Department continued to offer services to Ms. B. in the hopes that she would be able to develop the parenting skills necessary for reunification with her Children. In addition to general parenting classes, the Department attempted to connect Ms. B. with services specifically tailored to meet her special needs through various State agencies and outside institutions. Yet, due to economic constraints, funding for these services was non-existent, leaving Ms. B. ineligible to receive them. The Department remained determined, however, and it continued to search in vain for other sources of funding or funded services. The Department also continued to offer Ms. B. numerous other services, including:

(1) funding and obtaining a necessary neuropsychological evaluation of Ms. B. in an effort to provide an evaluation that would have been provided by other sources;
(2) obtaining a family clinical interview with regard to the children;
(3) discussing with Ms. B. her medical issues;
(4) assisting Ms. B. in reactivating her medical assistance;
(5) arranging for and transporting Ms. B. for medical appointments, including a gynecological examination, as well as an examination to address issues of high blood pressure
(6) transporting Ms. B. to educational meeting and appointments affecting her daughter and assisting Ms. B. in understanding what was occurring and assisting her in questioning; and
(7) transporting Ms. B. to visits with the children.

By the Children's 2009 permanency plan hearing, the funding and services had not materialized. At this time, the Children had been in foster care for 28 months, and there was no end in sight. The Children's case worker believed that it was not in the Children's best interests to be returned to Ms. B., and was unsure whether they could ever be safe in Ms. B.'s care. At the hearing's conclusion, the juvenile court, concerned with the Children's welfare and need for stability, changed the goal of the Children's permanency plans from reunification to adoption. The Court of Special Appeals affirmed the juvenile court's decision.

Held: The Court of Appeals affirmed the Court of Special Appeals. Tracing the history of the "reasonable efforts" requirement, including examining its impetus, the Adoption and Safe Families Act, the Court held that the reasonable efforts requirement is case-specific, and must be considered in light of the services at the Department's disposal. Though the Department was required to make a good faith effort towards reunification, both Maryland and out-of-state caselaw established limits as to what the Department was required to do. Here, the Department's inability to connect the mother with specialized services was due to forces outside its control, and not for its lack of trying. Thus, the juvenile court did not err in finding that the Department satisfied its "reasonable efforts" requirement.

Furthermore, as it was unlikely that the mother would be able to reunite with her children anytime in the foreseeable future, changing the permanency plans was in the children’s best interests.

***

Stephen Norman v. Scott Borison, et al., No. 70, September Term, 2010, filed 22 April 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/70a10.pdf

TORTS – DEFAMATION – ABSOLUTE PRIVILEGE – LAWYERS WHO: (1) PUBLISH TO THE PRESS COPIES OF A COMPLAINT TO BE FILED IN STATE COURT THAT SAME DAY, BUT BEFORE IT IS FILED ACTUALLY; (2) MAKE ORAL STATEMENTS TO THE PRESS IN CONNECTION THERETO; AND (3) REPUBLISH FILED VERSIONS OF A FEDERAL COMPLAINT ON THE INTERNET, ARE PROTECTED BY AN ABSOLUTE PRIVILEGE WHERE (a) THE REASONABLY CONTEMPLATED PROCEEDING SATISFIES THE TWO-PART TEST IN *GERSH V. AMBROSE*, 291 Md. 188, 434 A.2d 547 (1981), (b) THE LAWYERS MAKE THE STATEMENTS, AT LEAST IN PART, TO INCREASE AWARENESS OF THE PROPOSED CLASS ACTION SUIT AND, THEREFORE, MAKE THEM IN "THE COURSE OF THE PROCEEDING," AND (c) THE LAWYERS' STATEMENTS ARE RELATED REASONABLY AND RATIONALLY TO THE SUBJECT MATTER OF THE CONTEMPLATED PROCEEDING.

Facts: Alexander Chaudhry ("Chaudhry"), Ali Farahpour ("Farahpour"), and Petitioner, Stephen Norman ("Norman"), owned equal interests in the Maryland-registered limited liability company, Sussex Title ("Sussex"). Respondents here, all lawyers, filed on behalf of their clients a proposed class action lawsuit against multiple defendants-companies, including Sussex, for their alleged participation in "the single largest mortgage scam in Maryland history . . . ." The record indicates that Respondents provided a copy of their complaint to the press before filing it in the Circuit Court for Prince George's County on 18 June 2007. In this initial complaint, Respondents sought class action status.

Respondents dismissed voluntarily their state complaint and refiled in the United States District Court for the District of Maryland on 24 July 2007. Respondents did not name Norman *as a defendant* in any version of their original or amended complaints in any court. In their second amended complaint in the federal court, however, Respondents mentioned Norman by name in certain allegations, although he was not named as a defendant.

On 18 June 2008, Norman, among others, filed an action for defamation in the Circuit Court for Montgomery County. Norman claimed that Respondents defamed him by publishing the complaint to the press and on the internet and by making verbal comments about the lawsuit to the press, which later appeared in newspaper articles. In particular, Norman averred that the complaint attributes nefarious activities to the shared LLC, which is held so closely as to impact his reputation as an individual. Norman

observed also that the second amended complaint's references to him were defamatory, in that they implicated him in the mortgage fraud carried on by the other two owners, an employee of Sussex, and Sussex itself. For instance, the second amended complaint alleged that "payment to [a Sussex employee who was involved in the mortgage fraud] were items paid out of the share of monthly proceeds to Farahpour, Chaudhry, and Norman."

On February 20, 2009, the circuit court dismissed Norman's complaint because Norman neither had standing nor alleged falsity. On appeal, the Court of Special Appeals agreed that Norman did not have standing. Assuming otherwise, however, the intermediate appellate court concluded also that an absolute privilege applies to Respondents' statements. *See Norman v. Borison*, 192 Md. App. 405, 994 A.2d 1019 (2010).

Norman petitioned for writ of certiorari, which the Court of Appeals granted. *Norman v. Borison*, 415 Md. 337, 1 A.3d 467 (2010).

Held: Affirmed. Standing was assumed *arguendo*. In these particular circumstances, an absolute privilege adheres to Respondents' republication of the pleadings, as well as to their public comments about the case. Significantly, Respondents' statements (1) related to a proceeding, which satisfied the two-part test set forth in *Gersh v. Ambrose*, 291 Md. 188, 434 A.2d 547 (1981), (2) were made, at least in part, to increase awareness of the proposed class action and, therefore, were made in the course of the proceeding, and (3) were related reasonably and rationally to the proceeding's subject matter.

***

Ruffin Hotel Corporation of Maryland, Inc. v. Gasper, No. 24, September Term, 2009. Opinion filed on March 21, 2011 by Murphy, J.

http://mdcourts.gov/opinions/coa/2011/24a09.pdf

TORTS - "RETALIATORY DISCHARGE" ACTIONS; PLAINTIFF'S BURDEN OF PERSUASION: In a "retaliatory discharge" action in which the plaintiff is asserting that her employment was terminated by the defendant in retaliation for her opposition to a fellow employee's unlawful harassing conduct, because the plaintiff is required to prove that her opposition to the unlawful harassing conduct was a motivating factor in the decision to terminate her employment, the Circuit Court commits error if it instructs the jury that the plaintiff is required to prove that her opposition to the unlawful harassing conduct was a determining factor in the decision to terminate her employment.

TORTS - "NEGLIGENT HIRING AND RETENTION" ACTIONS; PREEMPTION: A "negligent hiring and retention" claim asserted against the plaintiff's former employer, based upon the plaintiff's allegation that she had been assaulted by a fellow employee, is not preempted by federal law, by Maryland anti-discrimination statutes, or by the Maryland Workers' Compensation Act.

EVIDENCE - MARYLAND RULES 5-401, 5-402, 5-403, 5-404(b): Maryland Rule 5 - 404(b) is applicable only to evidence offered by the State against the defendant in a criminal case. In civil cases, whether the evidence at issue is offered by a plaintiff or by a defendant,the trial court must apply Maryland Rule 5-403 to the issue of whether a particular item of marginally relevant evidence should be excluded on the ground that the probative value of that evidence is substantially outweighed by the danger of unfair prejudice to the objecting party.

Facts: This case stems from the Petitioner's decision to terminate the Petitioner's employment. In *Gasper v. Ruffin Hotel Corporation of Maryland, Inc.*, 183 Md. App. 211, 960 A.2d 1228 (2008), the Court of Special Appeals held that (1) the Respondent is entitled to a new trial on her "retaliatory discharge" claim on the ground that the Circuit Court delivered an erroneous jury instruction, and (2) the Circuit Court erred in dismissing the Respondent's "negligent hiring and retention" ("negligent hiring/retention") claim. Both parties requested that the Court of Appeals issue a Writ of Certiorari.

The Petitioner requested that the Court of Appeals answer

three questions: (1) In retaliatory discharge claims brought under Maryland law, should juries be instructed that the plaintiff must prove that retaliation was a "determining factor," as opposed to a "motivating factor," in her termination? (2) Is a negligent hiring and retention claim based upon alleged sexual harassment and a subsequent allegedly retaliatory discharge preempted by Maryland anti-discrimination statutes? (3) Does the Maryland Workers' Compensation Act preempt a negligent hiring and retention claim brought by an employee against her employer[?]

The Respondent's Cross-Petition presented the Court with a fourth question: Should evidence of the prior bad acts of a supervisor who assaulted, sexually harassed, and retaliated against other employees be admissible under Maryland Rule 5-404(b) in a civil case to show: (A) motive/intent, a necessary element of a retaliation/discrimination cause of action? or (B) knowledge/notice on the part of the employer, a necessary element of negligent hiring/retention cause of action?

Held: The Court answered the Petitioner's first question "yes," stating:

> ...[W]e are persuaded that the theoretical distinction between "single motive" and "mixed-motive" cases is of no consequence whatsoever when – as is the situation in the case at bar – the jurors (who are entitled to accept all, part, or none of the evidence presented, and who are entitled to draw reasonable inferences from evidence that they accept as true) could reasonably find that the employer's decision to terminate was based upon both the employee's deficient performance and the employee's opposition to unlawful harassing conduct, the employee is entitled to a verdict in his or her favor if the jurors are persuaded that the employee's opposition to unlawfully harassing conduct played a motivating part in the employer's decision to terminate the employee's employment. As to the Petitioner's second argument, our opinion in Molesworth v. Brandon [341 Md. 621, 672 A.2d 608, (1996)]does not include a holding that a "but for" (i.e. "determining factor") instruction is required in a retaliatory discharge case.

The Court held that on remand, "[Respondent] will be required to

persuade the jury that her opposition to harassing conduct was a *motivating* factor in the decision to terminate her employment."

The Court answered the Petitioner's second and third questions "no," therefore affirming:

> ...the holding of the Court of Special Appeals that the Respondent's negligent hiring/retention claim was not preempted by Title VII, by the Maryland Human Rights Act, by the Montgomery County Code, or by the MWCA. If the Petitioner is unable to persuade the Circuit Court that there is some other reason why it is entitled to a judgment as a matter of law, a jury shall determine whether there is any merit in the Respondent's negligent hiring/retention claim.

In light of the answers to the Petitioner's questions, the Court remanded the case with instructions as to how the "prior bad acts evidence" issues should be resolved during the new trial.

The Court traced the history of the Md. Rule 5-404(b) and explained that it is not applicable in civil cases. Maryland Rule 5-404(b) is applicable only to evidence offered by the State against the defendant in a criminal case. In civil cases, whether the evidence at issue is offered by a plaintiff or by a defendant, the trial court must apply Maryland Rule 5-403 to the issue of whether a particular item of marginally relevant evidence should be excluded on the ground that the probative value of that evidence is substantially outweighed by the danger of unfair prejudice to the objecting party.

***

COURT OF SPECIAL APPEALS

Alicia Gomez v. Jackson Hewitt, Inc. et. al., No. 1074, September Term, 2009, decided March 31, 2011. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2011/1074s09.pdf

COMMERCIAL LAW - STATUTORY CONSTRUCTION - CREDIT SERVICES BUSINESSES ACT (CSBA), Md. Code (2005 Rep. Vol., 2007 Supp.), Commercial Law, C.L. § 14-1901 *et seq.*; CONSUMER PROTECTION ACT, C.L. 13–301 *et seq*. (Section 14-1901 providing, in pertinent part:(c) Consumer. -- "Consumer" means any individual who is solicited to purchase or who purchases for personal, family, or household purposes the services of a credit services business. . . . (e) Credit services business. (1) "Credit services business" means any person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that such person can or will sell, provide, or perform, any of the following services in return for the payment of money or other valuable consideration: (i) Improving a consumer's credit record, history, or rating or establishing a new credit file or record; (ii) *Obtaining an extension of credit for a consumer*).

Facts: Appellant filed suit against appellee, alleging that appellee prepared her 2006 Federal Income Tax Return and assisted her in acquiring a Refund Anticipation Loan (RAL) from Santa Barbara Bank & Trust in anticipation of her income tax refund. Appellant's complaint asserted that she "indirectly paid" appellee for arranging the RAL "in that the credit that [appellee] obtained for her included in its principal amount the cost of obtaining this extension of credit." She further averred that appellee included in "its principal amount fees charged by [appellee] for the preparation and filing of her federal income tax return." Appellant elected to use part of her RAL to pay appellees' tax preparation fee of $284.

Appellant reasoned that the language of the statute supported her position, *i.e.*, the statute defines a "credit services business" as any business that, in exchange for a fee on behalf of others, promises to (1) improve a "consumer's credit record, history, or rating or establishing a new credit file or record," obtain "an extension of credit for a consumer" or (3) provide "advice or assistance to a consumer" regarding improving credit ***or*** *obtaining an extension of credit*. Because the provision is written in the disjunctive, according to appellant,

appellee, who obtains extensions of credit on behalf of its customers through RALs, falls within the purview of the CSBA.

Held: The intent of the General Assembly in passing the Consumer Services Businesses Act was to protect unsuspecting citizens of Maryland from credit repair agencies who offered to "fix" their credit rating, or to obtain loans for the credit impaired customer, in exchange for a fee. The CSBA simply was neither intended nor designed to cover firms engaged in the business of selling goods or services to their customers, when such goods or services are not aimed at improving one's credit rating. Nor was it intended to cover the extension of credit by a third-party, not privy to the primary transaction, which is ancillary to the customer's purchase of the goods or services provided by the merchant.

***

Uduak J. Ubom, et al. v. SunTrust Bank, No. 2862, September Term, 2009. Opinion filed on April 4, 2011 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/2862s09.pdf

CONTRACTS - INTERPRETATION - AMBIGUITY - PERSONAL GUARANTY - CORPORATE DESIGNATION AFTER SIGNATURE

Facts: On August 12, 2006, Ubom Law Group, PLLC ("ULG"), filled out a "FastAccess Line of Credit Application and Agreement" ("Agreement") to obtain a line of credit from SunTrust Bank in the amount of $100,000. The first page of the Agreement included information regarding the applicant, ULG. The second page of the Agreement included information regarding the guarantor. In the "Guarantor Information" section, Mr. Ubom included, among other things, his date of birth, address, phone number, Social Security number, driver's license number, employment, and financial information. He did not, however, include his name in the section marked "Legal Name of Guarantor." The last page of the Agreement contained signatures. Mr. Ubom signed his name twice; once on the signature line for "Applicant" and once on the signature line for "Guarantor." After both signatures, in the box marked "Title," Mr. Ubom wrote "Managing Attorney."

On May 29, 2009, SunTrust filed a Complaint in the Circuit Court for Montgomery County against ULG and Mr. Ubom, asserting: (1) that ULG had failed to make the scheduled monthly payments due on the account; and (2) that Mr. Ubom had personally guaranteed the payment to SunTrust of all obligations and liabilities arising under the Agreement. On October 14, 2009, SunTrust filed a motion for summary judgment. Mr. Ubom filed his opposition to the motion for summary judgment, asserting that he signed the Agreement in his official capacity as Managing Partner of ULG, not as a personal guarantor of the loan. After a hearing, the court granted summary judgment in favor of SunTrust and against ULG and Mr. Ubom.

Held: Judgment affirmed. The language of the Agreement was unambiguous, and therefore, parol evidence was inadmissible to contradict the clear terms of the Agreement. The circuit court properly granted SunTrust's motion for summary judgment against the law firm and Mr. Ubom.

Maryland courts adhere to the principle of the objective interpretation of contracts. Pursuant to this principle, unless a contract's language is ambiguous, we give effect to that language as written without concern for the subjective intent of

the parties at the time of formation. When language in a contract is unambiguous, and absent fraud, duress, or mistake, parol evidence is not admissible to show the intention of the parties or to vary, alter, or contradict the terms of that contract.

Here, the clear language of the Agreement as a whole, shows that Mr. Ubom's signature as guarantor was in a personal capacity, resulting in personal liability when the law firm defaulted on its obligations. The form of the signature, where Mr. Ubom signed his name on two signature lines, one for "Applicant," the law firm, and one for "Guarantor," indicates that Mr. Ubom was signing in his personal capacity. A finding that Mr. Ubom signed the guaranty in a representative capacity would render the guaranty inconsequential; it would add nothing to SunTrust's security to have the law firm, through its Managing Partner, guaranty an obligation to which the law firm already was bound. The listing of his title, Managing Attorney, next to his signature as guarantor does not show that his signature was in a representative capacity. A corporate officer is not relieved of personal liability by the mere addition of his corporate title.

Moreover, the language of the guaranty was clear and unambiguous. It specifically identifies the applicant, the law firm, as the entity primarily responsible for the line of credit, and the individual signing as guarantor, as jointly liable for the obligations of the law firm. This language clearly contemplates that Mr. Ubom was signing as guarantor in his personal capacity. And in the section of the Agreement identified as "Guarantor Information," Mr. Ubom added his personal information, including his date of birth, address, phone number, Social Security number, and driver's license number.

***

William Leslie Harrison v. State of Maryland, No. 2247, September Term 2009, filed April 4, 2011. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2011/2247s09.pdf

CRIMINAL LAW - CRIMES AGAINST PERSONS - DOMESTIC OFFENSES

CRIMINAL LAW & PROCEDURE - JURY INSTRUCTIONS - PARTICULAR OFFENSES - LESSER INCLUDED OFFENSES

Facts: In the summer of 2006, appellant, William Leslie Harrison, approached a neighbor and inquired whether his son, S.B., who was thirteen at the time, wanted to work part-time. S.B. started to work for appellant, but quit during the summer of 2007 when he notified his mother that appellant had touched him inappropriately.

On January 2, 2008, appellant was indicted on one count of sexual abuse of a minor, one count of child abuse in the second-degree, and 216 counts of sexual offense in the third-degree. On August 25, 2009, the day of trial, the State entered, without objection, *nolle prosequi* for the charges of child abuse in the second-degree, and the 216 counts of sexual offense in the third-degree.

At the close of the State's case-in-chief, appellant moved for judgment of acquittal. Appellant argued that State failed to establish that he was responsible for the supervision of S.B., because he was free to come and go as he pleased. The Circuit Court for Harford County denied the motion. At the close of the evidence, appellant renewed the motion and presented the same argument. The circuit court denied the motion again.

Appellant requested an instruction for fourth-degree sexual offense. The court denied the request because it believed appellant wanted the instruction to illustrate the State incorrectly charged appellant. The case proceeded to the jury and appellant was convicted of sexual abuse of a minor. On appeal, appellant argued that there was insufficient evidence to establish that he was responsible for the supervision of S.B. He further asserted that the circuit court should have provided instructions for third and fourth-degree sexual offense, because each offense was a lesser included offense of sexual abuse of a minor.

Held: Judgment affirmed. *Pope v. State*, 284 Md. 309 (1979), the seminal case with regard sexual abuse of a minor, explains that a person may have the responsibility for the supervision of

a minor even though that person does not stand *in loco parentis*. The Court noted that "responsibility of a minor may be obtained upon the mutual consent, express or implied, by the one legally charged with the care of the child and by the one assuming the responsibility." *Id.* at 323. The Court then concluded that appellant had responsibility for the supervision of S.B., because the record suggested S.B.'s parent's believed appellant would watch over S.B. when he worked on appellant's property; S.B.'s parents provided appellant with the opportunity to accept responsibility for the supervision of S.B.; and appellant accepted that responsibility.

Appellant next argued, relying on *Hook v. State*, 315 Md. 25 (1989) and *Hagans v. State*, 316 Md. 429 (1989), that instructions for third and fourth-degree sexual offense should have been provided. The Court noted that it was fundamentally unfair to decline instructions for lesser included offenses when there was sufficient evidence to warrant the instruction, and a court entered *nolle prosequi* over the defendant's objection. *Hook*, 315 Md. at 43-44. The Court then held that the principles of fundamental fairness espoused in *Hook* did not apply because appellant did not object to the entering of *nolle prosequi*. The Court further determined that although sexual offense in the third-degree was a necessary element of sexual abuse of a minor, it merely illustrated had appellant objected to the court entering *nolle prosequi,* sexual offense in third-degree could have merged into sexual abuse of a minor.

***

Henry P. Angulo-Gil v. State of Maryland, No. 1204, September Term, 2009, decided March 31, 2011. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2011/1204s09.pdf

CRIMINAL LAW - FIRST DEGREE MURDER

UNITED STATES CONSTITUTION, AMENDMENT V; *Miranda v. Arizona,* 384 U.S. 436 (1966); *Lee v. State*, __ Md. ___ , No.115, September Term, 2009 (filed January 31, 2011); Promise of Confidentiality During Custodial Interrogation in violation of *Miranda* Warning that "Anything You Say Can Be Used Against You in a Court of Law."

Facts: Appellant, charged with first-degree murder, conspiracy to commit robbery with a deadly weapon and related offenses, was convicted, *inter alia*, of first-degree felony murder and conspiracy to commit robbery with a deadly weapon. At the hearing on appellant's Motion to Suppress his inculpatory statement made during the custodial interrogation, the interrogating officer, at pages 40-41 of the interrogation transcript, in an attempt to elicit gang-related information, responded to appellant's declination to reveal "secrets of ours" by stating, "*Why? Everything we talk about is going to stay here in this room*." Subsequently, at page 53 of the interrogation transcript, appellant implicated himself in the offenses at issue. Appellant contends, "All admissions *following* [the interrogating officer's] statement that 'Everything we talk about is going to stay here in this room' should have been suppressed by the trial court as the product of unconstitutional inducements."

Held: Judgment Reversed. Rationale offered by the State that interrogating officer's statement related only to discussions regarding gang-related activities and that the officer's statement referenced the inability of the "gringos" (the other officers) outside of the interview room who did not understand Spanish is no more availing than the State's rationale, in *Lee*, that the intent of the promise of confidentiality was merely to deflect [Lee's] suggestion that he was aware that the interrogation was being recorded.

***

State of Maryland, et. al. v. Jones, No. 2178, September Term, 2009, Opinion filed on Mar. 1, 2011 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/2178s09.pdf

CRIMINAL LAW - NEGLIGENT RETENTION, SUPERVISION, AND TRAINING - PUBLIC DUTY DOCTRINE - EXPERT TESTIMONY

Facts: On September 15, 2006, at approximately 11:30 a.m., Deputies Billy Falby and Gerald Henderson went to an apartment building in Greenbelt, Maryland, to serve a domestic violence arrest warrant on Lamarr Wallace. The deputies knocked on the door and announced that it was the Prince George's County Sheriff's Office. When Ms. Jones answered the door, she informed Deputy Falby that Mr. Wallace did not live there. A confrontation occurred between the deputies and Ms. Jones, first inside her apartment, and later, in the parking lot of the apartment complex. Ms. Jones ultimately was arrested and charged with hindering an investigation, assault on an officer, escape, and resisting arrest, charges that the State subsequently nolle prossed.

On November 27, 2007, Ms. Jones filed a Complaint against Deputy Falby, Deputy Henderson, and the State of Maryland. On March 16, 2009, a trial on counts I through X of Ms. Jones' Complaint commenced in the Circuit Court for Prince George's County. At the conclusion of the six-day trial, the jury found in favor of Deputy Henderson and the State on all counts, and in favor of Deputy Falby on all counts except the battery claim. On the battery claim, the jury found in favor of Ms. Jones, awarding no economic damages, but $5,000 in non-economic damages.

On September 14, 2009, a second trial commenced before a different jury on the claims of negligent retention, training, and supervision. The jury returned a verdict in favor of Ms. Jones, awarding $261,000 in damages, which the court reduced to $200,000. Both Ms. Jones and the State of Maryland appealed this judgment.

Held: Judgment Reversed. In a negligence action, a plaintiff must show that the defendant had a duty to protect the plaintiff from injury and that the defendant breached that duty. In this case, even if the State had a duty to Ms. Jones, judgment should have been entered in favor of the State because Ms. Jones did not establish any breach of duty.

To establish a claim for negligent hiring and retention, the plaintiff must prove the following five elements: (1) the existence of an employment relationship; (2) the employee's incompetence; (3)

the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. There is a rebuttable presumption that an employer has used due care in hiring an employee.

Evidence of one single incident where a deputy punched a prisoner, for which the deputy was cleared by an internal investigation, was insufficient to support a finding that the deputy was unfit or incompetent. The evidence, therefore, was insufficient to support a claim that the State was negligent in retaining the deputy.

With respect to a claim for negligent supervision and training of a police officer, in most cases, expert testimony regarding the standard of care regarding police training will be necessary to support such a claim. Ms. Jones failed to introduce any testimony, expert or otherwise, indicating that the training of the deputies was deficient. Accordingly, the circuit court erred in submitting the issue to the jury and failing to enter judgment in favor of the State.

***

Arnell Fair v. State of Maryland, No. 2741, September Term, 2008. Opinion filed on March 30, 2011 by Kenney, J. (retired, specially assigned).

http://mdcourts.gov/opinions/cosa/2011/2741s08.pdf

CRIMINAL LAW – SEARCH AND SEIZURE – SEARCH INCIDENT TO ARREST – WARRANT – AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT – EVIDENCE – HEARSAY – VERBAL ACT EVIDENCE – CRIME SCENE EVIDENCE

Facts: A Baltimore City Police Department detective, while working security off-duty in a parking garage, arrested appellant and another man for possession of marijuana. He conducted a search incident to arrest and recovered a remote and a set of keys to a Cadillac from appellant and a remote and a set of keys to a Lexus from the other man. The other man told the detective that he had driven the Lexus to the garage; appellant stated that he rode to the garage with the other man. At some point, the other man told the detective that appellant had driven separately to the garage. After advising both men of their Miranda rights, the detective drove both men to locate the Lexus in the garage because the detective would be responsible for having it towed. After the other man identified his vehicle, the detective noticed what appeared to be marijuana in plain view inside a Cadillac parked next to the Lexus. The detective hit a button on the remote which he had removed from appellant during the earlier search incident to arrest, and the Cadillac horn sounded. The detective searched the Cadillac and found a handgun in the center console next to a paycheck and pay stub in appellant's name, dated the day before the search.

Appellant moved to suppress the marijuana found inside the vehicle, the handgun, and the remote and the keys to the vehicle, arguing that the detective's use of the remote and keys was a violation of his rights under the Fourth Amendment to the U.S. Constitution and Article 26 of the Maryland Declaration of Rights. Appellant seperately moved to exclude the paycheck from evidence based on hearsay, arguing that it would be offered to prove the truth of its contents. The circuit court denied both motions.

Held: Judgment Affirmed. Use of a vehicle key and remote removed from appellant's person during an earlier search incident to arrest to confirm that a vehicle had been driven by appellant and to gain access to the vehicle was not a violation of appellant's rights under the Fourth Amendment to the U.S. Constitution or Article 26 of the Maryland Declaration of Rights. After observing suspected marijuana in plain view inside a vehicle that the officer had probable cause to believe was appellant's, the

police officer could use the keys and remote already in his possession from the earlier search incident to arrest to gain entry to the vehicle under the automobile exception to the warrant requirement.

Admission, over a hearsay objection, of a paycheck in appellant's name dated the day before the incident found next to a gun in the center-console of a vehicle driven by appellant was not error because the check represented a "verbal act" and was appropriately admitted as non-hearsay circumstantial crime scene evidence.

***

Herring v. State, No. 460, Sept. Term, 2009, filed March 31, 2011. Opinion by Sharer, J.

http://mdcourts.gov/opinions/cosa/2011/460s09.pdf

CRIMINAL LAW – SUPPRESSION – APPLICATION OF *WHREN V. UNITED STATES*, 517 U.S. 806 (1996), TO POLICE INVESTIGATION ARISING FROM PARKING VIOLATION – VERDICT SHEET – NUMBERING OF COUNTS – CLOSING ARGUMENT – PROSECUTOR'S MISSTATEMENT OF THE LAW DID NOT GIVE RISE TO PLAIN ERROR

Facts: Alton Herring, appellant, was in the driver's seat of his vehicle, which was illegally parked approximately two feet from the curb with its hazard lights flashing. There were also three passengers in the vehicle. Police officers approached the driver's and passenger's side of the vehicle. The side windows were tinted. An officer tapped on the driver's side window and told appellant to roll down the window. When appellant put down both the driver's and passenger's side windows, the police officers observed a handgun in the center console between the driver and front seat passenger. Appellant was convicted of possession of a regulated firearm after having been previously convicted of a disqualifying crime.

Held: Affirmed. The trial court credited testimony concerning position of the vehicle in the street. The officers thus observed a violation of Maryland's motor vehicle laws, which requires vehicles to be parked within 12 inches of the curb. A parking violation is the functional equivalent of a traffic stop; therefore, the rationale of *Whren* applied. The trial court did not err in denying appellant's motion to suppress.

The two-count verdict sheet given to the jury listed the counts as "Count 1" and "Count 4." The non-sequential numbering of the verdict sheet did not violate Md. Rule 4-326(b), which requires only that dead counts be removed from the charging document when the charging document is taken into the jury room. In addition, the record revealed no prejudice to appellant based on the way the counts were numbered.

In closing argument, the prosecutor, on at least 15 occasions, told the jurors that the defendants constructively possessed the gun because they *could* have exercised dominion or control over it. The misstatements did not give rise to plain error because: (1) there was no indication that the prosecutor was intentionally trying to mislead the jury; (2) the trial court correctly instructed the jury on possession; (3) the trial court instructed the jury that the arguments of counsel were not evidence; and (4) appellant was not denied a fair trial in light of the overwhelming evidence of his guilt.

***

Corbett v. Mulligan, No. 1033, September Term, 2010, Filed March 30, 2010. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2011/1033s10.pdf

FAMILY LAW - ESTABLISHING PATERNITY

Facts: Mr. and Ms. Mulligan separated in April 2009. During the separation, Ms. Mulligan entered into a relationship with Mr. Corbett, and she became pregnant. Her relationship with Mr. Corbett ended before the child was born, and Ms. Mulligan reconciled with Mr. Mulligan. Gracelyn, the child conceived while Mr. and Ms. Mulligan were married, but separated, was born on January 25, 2010. Although Mr. and Ms. Mulligan were living together at the time of Gracelyn's birth, they were no longer married; they were divorced on September 25, 2009.

On February 25, 2010, Mr. Corbett filed a Complaint for Paternity, Child Support and Visitation Schedule. He asked the court to hold a hearing to determine whether DNA testing should be ordered "to determine the parentage of the child," to establish a visitation schedule, and to determine appropriate child support payments.

After a hearing, the court ruled that paternity testing was mandated only where paternity was void. In this case, paternity was not void because, pursuant to E.T. § 1-206, there was a rebuttable presumption that Gracelyn was the legitimate child of Mr. Mulligan because she was conceived during the Mulligan's marriage. The court stated that the Family Law Article was not "intended to disestablish [] paternity where paternity is statutorily established." The court determined that, pursuant to E.T. § 1-206, analysis of the best interests of the child was the standard to determine whether to order genetic testing. Applying the best interests standard, the court found that it was not in Gracelyn's best interests to have a paternity test and denied Mr. Corbett's request.

Held: Reversed and remanded. There are two methods or proceedings for establishing paternity, one found in the Estates and Trusts Article and the other in Family Law Article. Under the Estates and Trusts Article, the court may consider the best interests of the child in determining whether to grant a motion for genetic testing. Under the Family Law Article, a trial court has no discretion regarding whether to order a blood test; genetic testing is mandatory if requested by a party.

When a child is born during a marriage and two men acknowledge

paternity of the child, the provisions of the Estates and Trusts Article apply. When a child is born out of wedlock, however, the Family Law paternity provisions apply. The General Assembly has provided that a "putative father," a man alleged to be the biological father of a child born out of wedlock, has the right to bring a paternity action under the Md. Code, (2006 Repl. Vol.), § 5-1002(c) of the Family Law Article ("F.L.").

Because the child here was born out of wedlock, the Family Law Article was the proper statutory scheme to address appellant's request for genetic testing to determine the child's paternity. Pursuant to F.L. § 5-1029, which provides that the court "shall order" genetic tests upon a motion by a party, the court was required to order genetic testing upon appellant's request.

***

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated March 15, 2011, the following attorney has been suspended for ninety (90) days, effective April 1, 2011 from the further practice of law in this State:

JOHN A. MATTINGLY, JR.

*

By an Order of the Court of Appeals of Maryland dated April 20, 2011, the following attorney has been suspended for six ((6) months, effective immediately from the further practice of law in this State:

JOHN VENUTI

*

The following attorney has been replaced upon the register of attorneys in the State of Maryland effective April 22, 2011:

JENNIFER LYNN LEATHERMAN

*

By an Opinion and Order of the Court of Appeals of Maryland dated April 27, 2010, the following attorney has been disbarred from the further practice of law in this State:

JOHN JOSEPH ZODROW

*

RULES ORDER AND REPORT

A Rules Order pertaining to the One Hundred and Sixty-Ninth Report of the Standing Committee on Rules of Practice and Practice and Procedure was filed on April 21, 2011:

http://www.mdcourts.gov/rules/rodocs/ro169.pdf