Amicus Curiarum

VOLUME 24
ISSUE 11 November 2007

A Publication of the Office of the State Reporter

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Facts: The estate of Walter L. Green has been pending 14 years in the Orphans' Court for Prince George's County. The Orphans' Court conducted a hearing on the petition of Helen G. Nassif, Walter L. Green's surviving widow, regarding the election of her statutory share. At the conclusion of the hearing, the Orphans' Court, sua sponte, announced that another hearing would be held regarding the removal of Carlton M. Green, Walter L. Green's son, as Personal Representative of the estate. In response, Carlton M. Green filed a Petition for a Writ of Prohibition in the Circuit Court for Prince George's County seeking to prohibit the Orphans' Court from removing him as Personal Representative. The Petition contained several allegations of bias on the part of two of the three Orphans' Court judges. The Circuit Court, in an ex parte proceeding, granted the Writ of Prohibition, prohibiting the Orphans' Court from conducting further proceedings in the estate case. The following day, a different judge of the Circuit Court, on a motion brought by Nassif, signed an ex parte Order vacating the Writ of Prohibition. Carlton M. Green appealed to the Court of Special Appeals. The Court of Appeals, on its initiative, granted certiorari before the intermediate court decided the appeal.

At oral argument, the Court was informed of further relevant proceedings that had occurred. After the Writ of Prohibition was vacated, the Orphans' Court held a hearing and removed Carlton M. Green as Personal Representative of the estate. Carlton M. Green appealed this ruling, among others, to the Circuit Court. The Circuit Court initially stayed the Orphans' Court order removing him as Personal Representative, but limited his powers in the interim to those of a Special Administrator. The Circuit Court later reached the merits of Carlton M. Green's appeals and reversed the decision of the Orphans' Court. Carlton M. Green is currently in place as Personal Representative of the Estate, and the litigation continues in the Circuit Court.

Held: Appeal dismissed as moot. Carlton M. Green's main purpose in seeking the Writ of Prohibition appears to have been to avoid a hearing in the Orphans' Court regarding his removal. That hearing has been held. After the hearing was held, the Writ of Prohibition lost any remedial benefit to Carlton M. Green. The Court stated that there is no effective remedy in the instant appeal to prevent a hearing that has been held. As a result of his subsequent appeal to the Circuit Court, Carlton M. Green appears now to be in place as the Personal Representative of the estate and is litigating further in the Circuit Court the various disputes he has with the Orphans' Court, at least two of its judges, and Nassif. The Court ruled that an opinion disposing of the issues in this appeal would be a mere advisory opinion, and, at that, one based on a less than fully or adversarially developed factual record. Therefore, the appeal is dismissed as moot.

Carlton M. Green, Personal Representative of the Estate of Walter L. Green v. Helen G. Nassif, No. 11, September Term 2007, filed October 15, 2007. Opinion by Harrell, J.

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CONTRACTS – DAMAGES – LIQUIDATED DAMAGES AND PENALTIES

CONTRACTS – CONTRACTS OF ADHESION – UNCONSCIONABILITY

Facts: Respondents, Andrew and Pamela Patch, entered into an enrollment agreement for their daughter to attend The Barrie School, a non-profit private school, for the 2004-2005 academic year. The enrollment agreement contained a provision that permitted respondents to cancel the contract as long as respondents sent written notice to the head of The Barrie School by May 31, 2004. The agreement provided that respondents were required to pay the entire year's tuition if they failed to withdraw from the agreement by that date. On July 14, 2004, forty-four days after the withdrawal deadline, respondents sent a cancellation notice to

The Barrie School's admissions office. Respondents refused to pay the outstanding tuition balance and demanded the return of their initial deposit. The Barrie School responded by filing a breach of contract action in the District Court of Maryland, sitting in Montgomery County, seeking the outstanding tuition for the 2004-2005 academic year. Respondents filed a counterclaim seeking return of the deposit.

The District Court found that the enrollment agreement was a valid contract, that it included a valid liquidated damages clause, that there was no fraud in the inducement to enter the agreement, and that the agreement was not a contract of adhesion. The court denied respondents' counterclaim. The District Court concluded, however, that The Barrie School was required to mitigate damages despite the existence of the liquidated damages clause and entered judgment in favor of respondents on The Barrie School's claim. The Barrie School appealed to the Circuit Court for Montgomery County. Respondents noted a cross-appeal arguing that the District Court erred when it denied portions of their discovery request, ruled that there was no fraudulent inducement, and found that the liquidated damages clause was valid. The Circuit Court agreed with the District Court that the Barrie School was required to mitigate damages, and affirmed the holding of the District Court. The Barrie School petitioned for a writ of certiorari to the Court of Appeals, which the Court granted. Respondents noted a cross-petition which the Court of Appeals also granted. *Barrie School v. Patch*, 392 Md. 724, 898 A.2d 1004 (2006).

Held: Reversed. The Court of Appeals agreed that the liquidated sum in the agreement was a valid liquidated damages clause and reasoned that it was a reasonable estimate of potential harm that would result from a breach and actual damages would have been difficult to estimate at the time of the agreement's formation. The Court of Appeals held, however, that because the liquidated damages clause was valid, The Barrie School possessed no duty to mitigate damages. The Court noted that liquidated damages are a remedy the parties to a contract have agreed upon in the event of breach. Accordingly, where the parties to a contract have included a valid liquidated damages clause, that sum replaces any determination of actual loss and therefore there is no duty to mitigate damages. The Court rejected respondents' claim that The Barrie School suffered no actual harm due to breach because such a defense would negate the benefit of a valid liquidated damages clause.

Barrie School v. Andrew Patch, et al., No. 12, September Term, 2006, filed October 5, 2007. Opinion by Raker, J.

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CRIMINAL LAW – WRIT OF ERROR CORAM NOBIS

Facts: In 1992, petitioner, Darrell Holmes a/k/a Lendro Thomas, pled guilty to robbery with a deadly weapon at a hearing in the Circuit Court for Baltimore City, during which the court informed him that he had the right to file an application for leave to appeal his conviction and sentence to the Court of Special Appeals. After the court found that Thomas's plea was entered knowingly and voluntarily and sentenced him to three years imprisonment, with all but one year suspended, and two years probation, Thomas did not file an application for leave to appeal. Thomas has completed his sentence.

In 2004, Thomas was convicted of various drug and weapon offenses in the United States District Court for the District of Maryland. Because of his 1992 conviction for robbery with a deadly weapon, he was classified as a "career offender" under the Federal Sentencing Guidelines. Prior to being sentenced in federal court, in an effort to avoid the enhanced recidivist sentencing guideline, Thomas filed, in the Circuit Court for Baltimore City, a Petition for Writ of Error Coram Nobis challenging the validity of his 1992 conviction and sentence. The circuit court held three hearings during which Thomas argued that his 1992 guilty plea was neither knowing nor voluntary and thereby the resulting conviction should be vacated because (1) he was given a group plea with four other defendants at the same time; (2) he was never told what the charges against him were; (3) he was not informed of the maximum penalty he faced; (4) he was not asked if he wanted to plead guilty – instead he was told that was what he was doing; and (5) he was not told of his right to a speedy and public trial. The circuit court rejected four of Thomas's arguments, finding that Thomas did not establish that his counsel's performance was affected by the "group plea"; that Thomas did not have to be told of the maximum sentence he faced because he acquiesced in the plea agreement and agreed-upon sentence; that the record reflected that Thomas was asked if he was pleading guilty and that he responded affirmatively, and that Thomas was not required to be advised of his right to a speedy and public trial. The court determined, however, that the record was not sufficient to show that Thomas understood the nature of the charges against him, but denied Thomas's petition, concluding that Thomas had not rebutted the statutory presumption under Section 7-106 (c) of the Criminal Procedure Article, Maryland Code (2001) that he intelligently and knowingly waived his right to challenge his conviction in an error coram nobis proceeding by not filing an application for leave to appeal his original conviction and sentence.

The Court of Special Appeals agreed with the circuit court

that it was not required that Thomas be informed of the maximum penalty he faced for pleading guilty, but disagreed with the circuit court that Thomas had to be informed of the "identification" of the charge to which he was pleading guilty, concluding that Thomas's 1992 guilty plea was knowing and voluntary. In dicta, the court opined that Thomas waived his right to challenge whether his guilty plea was intelligent and knowing because he failed to raise the allegation of error in an application for leave to appeal his original conviction.

Held: The Court of Appeals affirmed and held that if an individual who pleads guilty, having been informed of his right to file an application for leave to appeal from his conviction and sentence, does not file such an application for leave to appeal, a rebuttable presumption arises that he has waived the right to challenge his conviction in a subsequent coram nobis proceeding. In *Skok v. State*, 361 Md. 52, 760 A.2d 647 (2000), the Court held that the writ of error coram nobis is available not only to correct errors of fact that affect the validity or regularity of a judgment, but also to correct constitutional or fundamental legal errors for a petitioner who is not incarcerated and not on parole or probation and who is faced with serious collateral consequences of his conviction. However, the Court noted an important qualification on the ability to secure coram nobis relief, that being that the "[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings"; in defining those principles, the Court adopted those provisions pertaining to waiver contained in the Maryland Post Conviction Procedure Act currently codified at Section 7-106 of the Criminal Procedure Article. The Court concluded that as in *Skok*, the waiver provisions applied even when an application for leave to appeal is not filed. Additionally, the Court explicated that it would be illogical to permit a defendant who fails to file an application for leave to appeal to be able to seek coram nobis relief without confronting the waiver provisions, while a similarly situated defendant who diligently files an application for leave to appeal would confront a presumption that he intelligently and knowingly waived any allegation of error not raised earlier. The Court rejected Thomas's arguments that he did not knowingly and intelligently fail to file an application for leave to appeal, concluding that Thomas was clearly advised about his right to file an application for leave to appeal to challenge whether his guilty plea was entered freely and voluntarily, and he affirmatively indicated that he understood his appellate rights. Moreover, the Court stated that Thomas was represented by counsel during his coram nobis proceeding; he had a hearing and presented evidence as to why his failure to file his application for leave to appeal was not intelligent and knowing, which the hearing judge rejected. The

Court also concluded that under the *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), standard, Thomas had intentionally relinquished a known right or privilege when he did not file his application for leave to appeal. The Court also remarked that "special circumstances" did not exist because Thomas received a sentence below the maximum authorized sentence by law for the crime he was convicted, or because he did not know in 1992 that he could be sentenced in 2005 under the federal sentencing guidelines. Because Thomas did not rebut the presumption of waiver, nor demonstrate "special circumstances" to excuse his failure to file an application for leave to appeal, the Court held that his right to challenge his conviction and sentence through a writ of error coram nobis petition was waived

Darrell Holmes a/ka Lendro Thomas v. State of Maryland, No. 140, September Term, 2006, filed September 21, 2007. Opinion by Battaglia, J.

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REAL PROPERTY - PROPERTY LAW - BUILDING PERMITS - THE ISSUANCE OF BUILDING PERMITS IS A PURELY MINISTERIAL ACT

PROPERTY LAW - BUILDING PERMITS - THE ISSUANCE OF A BUILDING PERMIT DOES NOT CREATE PROPERTY RIGHTS IN NEIGHBORING OR ADJACENT PROPERTY OWNERS

PROPERTY LAW - ZONING - NOTICE - WHERE AN ORDINANCE DOES NOT REQUIRE THE SERVICE OF ACTUAL, PERSONAL NOTICE TO NEIGHBORING OR ADJACENT PROPERTY OWNERS, IN RESPECT TO THE ISSUANCE OF BUILDING PERMITS THE FAILURE TO GIVE THOSE NEIGHBORING OR ADJACENT PROPERTY OWNERS ACTUAL, PERSONAL NOTICE IS NOT A DENIAL OF DUE PROCESS

Facts: John Evans received building permits to construct four amateur radio towers on his property. When his neighbors, the Burrusses and Gaunoux, saw construction being done on Evans' property, and upon inquiry, discovered Evans' intent to build the radio towers, and the issuance of the permits for the same. The

Burrusses and Gaunoux then requested a stop work order, which was denied. They then noted two appeals to the Board of Appeals in respect to the construction permits for the towers. When both Evans and Montgomery County moved to dismiss the appeals, those motions were granted by the Board. The Board dismissed one appeal for untimeliness and the other because there was no basis to appeal the issuance of the sediment permit, and the Board had no authority to hear the appeal.

The Burrusses and Gaunoux then filed a petition for judicial review with the Circuit Court for Montgomery County, which upheld the Board's finding that one appeal was untimely. The Circuit Court, however, also found that the issuance of a sediment control permit had the effect of renewing the original permit, and on that basis, remanded the case to the Board for it to entertain the appeal on that building permit.

Evans then noted an appeal to the Court of Special Appeals, which reversed the findings of the Circuit Court, and reinstated the Board's original decision that the appeal of the second building permit had been untimely. The intermediate appellate court, however, then remanded the case to the Board of Appeals for it to determine whether the Burrusses and Gaunoux had a general due process right to actual personal notice for the issuance of the building permit and/or a property right that was affected adversely by the issuance of the building permit. The Court of Appeals granted a writ of certiorari.

Held: The Court of Appeals held that the issuance of building permits is generally a ministerial act. Evans complied with the statutory requirements and as a result, was issued a building permit in the ordinary course of business. That building permit, issued to Evans, did not give rise to any property rights to the Burrusses or Gaunoux as neighboring and adjacent landowners. As a ministerial act, the issuance of the permit did not require the service of actual, personal notice to the Burrusses or Gaunoux. The failure to give them such notice, when it was not required, was not a denial of due process.

Evans v. Burruss, No. 1, September Term, 2007, filed October 12, 2007. Opinion by Cathell, J.

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TORTS - ASSUMPTION OF THE RISK - WHERE A VOLUNTARY PARTICIPANT IN A SPORTS ACTIVITY SUFFERS AN INJURY THAT IS A FORESEEABLE RISK, HE HAS ASSUMED THE RISK.

TORTS - ASSUMPTION OF THE RISK - WHETHER OR NOT A SPORTS ORGANIZER IS NEGLIGENT IN FAILING TO PREVENT INJURY IS IRRELEVANT TO THE ASSUMPTION OF THE RISK ANALYSIS.

TORTS - ASSUMPTION OF THE RISK - ENHANCED RISK - MERE NEGLIGENCE, WITHOUT RECKLESS OR INTENTIONAL CONDUCT, IS INSUFFICIENT TO SUPPORT A CLAIM OF ENHANCED RISK THAT WILL NEGATE A PLAINTIFF'S ASSUMPTION OF THE RISK.

Facts: On November 3, 2003, Christopher Cotillo, a powerlifter with ten years experience, was injured during a powerlifting competition, when he attempted to lift 530 pounds. During the lift, spotters were positioned on either side of the bar. Cotillo brought the bar down without any trouble, but had some difficulty as he began to lift it. As the spotters closed in to assist him, the bar came down, striking Cotillo in the jaw. Cotillo suffered a shattered jaw and damage to several teeth. This happened within a matter of seconds.

On January 15, 2004, Cotillo filed a complaint in the Circuit Court for Calvert County and asserted various claims of negligence against the American Powerlifting Association ("APA"), APA president Scott Taylor, the Board of Education of Calvert County, and William Duncan, one of the competition's organizers. The court granted the defendants' motions for summary judgment on the grounds that Cotillo assumed the risk of his injuries.

Cotillo filed an appeal with the Court of Special Appeals, which affirmed in part and reversed in part. The Court of Special Appeals held that summary judgment was properly entered on all claims except the negligence claim grounded in allegations that the spotters were improperly instructed. The court reasoned that because Cotillo did not know the spotters were improperly trained, and because their improper training presented an enhanced risk not normally incident to the sport, Cotillo could not have assumed the risk. The APA and the Board filed petitions for writ of certiorari in this Court.

Held: Affirmed in part and reversed in part. The Court of Appeals held that where a voluntary participant in a sports activity suffers an injury that is a foreseeable risk of participation in that activity, his claim is barred by assumption of risk. Whether the competition organizers were negligent in failing to prevent injury to the respondent is irrelevant with

respect to the issue of the participant's assumption of risk. The organizers' mere negligence, without any indication of reckless or intentional conduct, will not support a claim of enhanced risk sufficient to negate the participant's assumption of the risk.

American Powerlifting Association et al. v. Cotillo, No. 6, September Term, 2007. Opinion filed on October 16, 2007 by Greene, J.

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COURT OF SPECIAL APPEALS

INSURANCE - AUTOMOBILE COVERAGE — An insured has "disclaimed on a policy" as that term is used in section 20-603(a)(2)(ii) of the Insurance Article of the Maryland Code (2006 Repl. Vol.) when the insurer takes the position that, although a valid policy is in effect at the time of the accident, the company is nevertheless withdrawing or withholding liability insurance coverage for the accident because, for some reason, the policy does not encompass the accident. That reason can be due to post-accident action or inaction on the part of the insured (e.g., non-cooperation with the insurer) or it can be due to a policy provision that excludes a driver from coverage due to his or her pre-accident behavior, such as driving an insured automobile involved in an accident while carrying persons or property for a fee (if such uses are excluded from liability coverage), or driving the insured's vehicle without the consent of the named insured

Facts: Irish McNeill, on July 17, 2002, was a passenger on a bus when a vehicle driven by Damon Dodd struck the bus and caused her bodily injuries. McNeill and her husband filed a negligence complaint in the Circuit Court for Baltimore City against Dodd and the owners of the vehicle Dodd was driving, Katherine and Michael Curran.

In early January 2004, counsel for the McNeills first learned that the vehicle driven by Dodd was not covered under the owners' Allstate Insurance policy because at the time of the accident Dodd did not have the owners' permission to operate the vehicle. Within thirty days of learning of Dodd's uninsured status, the McNeills notified the Maryland Automobile Insurance Fund ("MAIF") that they planned to bring an action against it for any judgment rendered in their favor against Dodd.

Subsequently, summary judgment was granted by the circuit court in favor of Katherine and Michael Curran and against the McNeills. A bench trial was held at which neither Dodd nor a representative of MAIF appeared. Judgment was entered in favor of McNeill against Dodd in the amount of $10,480.90.

McNeill brought a claim for $10,480.90 against MAIF in the circuit court in which she relied on section 20-603(a)(2)(ii) of the Insurance Article. This section provides an exception to the 180-day notice requirement when notification is given to MAIF within thirty days after the injured party "received notice that an

insured had disclaimed on a policy and thus removed or withdrew liability coverage." MAIF claimed this exception did not apply to the subject case because Allstate never "disclaimed" coverage. The circuit court agreed and ruled that the McNeills' notice was untimely. McNeill filed an appeal to the Maryland Court of Special Appeals.

Held: Reversed and remanded. Allstate's policy was effective when McNeill was injured, as demonstrated by the fact that Allstate provided a defense to Katherine and Michael Curran. If Allstate had not disclaimed coverage, a valid insurance policy would have continued in effect. McNeill had no way of knowing within 180 days of the accident that Dodd was uninsured, making it impossible to meet the 180-day deadline. In reaching its holding, the Court distinguished *Unsatisfied Fund v. Holland*, 241 Md. 294 (1966), which was relied upon by MAIF, on the grounds that the insurer alleged to have "disclaimed coverage" in *Holland* never had a policy that covered the car driven by the negligent operator in effect on the date of the accident. Thus, in *Holland*, unlike McNeill's case, the insurer could not disclaim coverage that never existed.

Irish McNeill, et al. v. Maryland Automobile Insurance Fund, No. 1056, September Term, 2005, filed July 5, 2007. Opinion by Salmon, J.

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PUBLIC SAFETY - LAW ENFORCEMENT OFFICERS BILL OF RIGHTS - MD. CODE, PUBLIC SAFETY ARTICLE, § 3-301, ET. SEQ. LAW-ENFORCEMENT OFFICERS' BILL OF RIGHTS; *OCEAN CITY POLICE DEPT. v. MARSHALL*, 158 MD. APP. 115, 122-23 (2004); WHERE MONTGOMERY COUNTY POLICE DEPARTMENT (MCPD) PERMITTED OFFICERS TO MAINTAIN DUPLICATE FILES IN THEIR RESIDENCES AND POLICE CRUISERS, MOTIONS COURT PROPERLY CONCLUDED THAT INQUIRY AS TO LOCATION OF APPELLANT'S FILES DID NOT CONSTITUTE "INTERROGATION" UNDER THE LEOBR; BECAUSE APPELLANT FAILED TO ASSERT THAT ACTIONS OF THE MCPD VIOLATED THE LEOBR REGARDING MANDATORY SAFEGUARDS AFTER THE INCEPTION OF AN INVESTIGATION WHEN MOTIONS

COURT EXPRESSED ITS ASSUMPTION THAT THERE HAD BEEN COMPLIANCE WITH THE LEOBR, THE MOTIONS COURT DID NOT ERR IN FINDING THAT THE LEOBR WAS NOT APPLICABLE ON THE BASIS THAT ASKING FOR THE OFFICER'S FILES DID NOT CONSTITUTE INTERROGATION; FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION; *SCHNECKLOTH v. BUSTAMONTE*, 412 U.S. 218, 227, 93 S. CT. 2041, 2047-48, 36 L. ED. 2D 854 (1973); *LESHER v. REED*, 12 F.3D 148, 150 (1994); BECAUSE THE MCPD COULD HAVE PROPERLY SEIZED APPELLANT'S POLICE FILES IN THE OFFICE, APPELLANT'S COMPLIANCE WITH ORDER REQUIRING HIM TO RETRIEVE FILES OR BE SUBJECT TO DISCIPLINARY MEASURES DID NOT CONSTITUTE UNREASONABLE SEIZURE OF FILES BECAUSE ORDER MERELY COMMANDED PRODUCTION OF FILES, IRRESPECTIVE OF WHERE THEY WERE MAINTAINED, AND DID NOT THREATEN DISCIPLINARY ACTION NOT ALREADY IMPLICIT WHENEVER A DEPARTMENTAL ORDER IS ISSUED AND, THUS, WAS NO MORE COERCIVE THAN THE ORDER WITHOUT THE WARNING OF DISCIPLINARY ACTION UPON FAILURE TO COMPLY; APPELLANT'S INVITATION TO SUPERIOR OFFICERS TO ENTER HIS RESIDENCE FOR THE SOLE PURPOSE OF ASSISTING IN THE CARRYING OF THE BOXES OF FILES DID NOT CONSTITUTE AN UNREASONABLE SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT.

Facts: Appellant was a sworn police officer facing a five-count administrative charge to be heard by an alternative administrative hearing board (BOARD) pursuant to the Law Enforcement Officer's Bill of Rights (LEOBR). The Board refused motions to suppress evidence and to sever the charges stating that it lacked authority to rule. The motions court issued a show cause order and denied summary judgment and thereafter the trial court ruled that the show cause order was moot.

Appellant was initially accused of taking photographs of a defendant's upper and lower body following her arrest. Internal Affairs Investigators (IAD) and Montgomery County Police Department (MCPD) unsuccessfully searched appellant's work area for files relating to the arrest. At the direction of appellant's commander, an administrative order was issued to appellant demanding the files and indicating that disciplinary procedures would follow if appellant was uncooperative. Appellant's immediate supervisor, the commander, along with two IAD officers accompanied appellant to his home to retrieve the files. The commander accompanied appellant into his home to help carry the boxes of files and IAD investigators searched the files for evidence of wrongdoing resulting in the seven incidents that were the bases for the charges, none of which were the result of the original complaint against appellant.

Held: No *nisi prius* judge must accept as final and conclusive the decisions of law before the court of another judge or court.

The trial judge had the discretion to consider the matter *de novo* unless prohibited by statute or rule. Although not moot, the motions court's findings could be adopted by the trial judge. The motions judge could not have considered the evidence presented by appellants before denying the motion for summary judgment. The motions judge, by his order, granted summary judgment to appellees. Although the facts were susceptible to more than one inference, that had no bearing on the proper application of the LEOBR; the voluntariness of appellant's compliance and reasonableness of the seizure of the files should have been decided by the motions court.

Although rights under the LEOBR may only be asserted upon the commencement of an investigation, merely asking appellant the location of his files and demanding that he surrender them did not implicate the LEOBR because the inquiry did not constitute an investigation. The motions judge correctly found the LEOBR inapplicable.

MCPD had an ownership right in and, thus, right to demand the files. No illegal order was given to appellant and all police officers are aware that disciplinary procedures can follow a failure to comply with a direct order. Appellees merely assisted appellant in removing the files from his home and appellant was neither aware of the nature of the charges nor under arrest. The order was simply to return police property wherever located. Given the circumstance where the employer was also a government actor, the acquisition of the files was reasonable, in light of the imperative that a police department be able to perform its public duty consistent with Constitutional safeguards.

Appellant's charges differ from charges in a criminal matter and reliance on Maryland Rule 5-404 was misplaced. There was no "other crimes" evidence because all of the charges stemmed from alleged misconduct in job performance. The court based its decision on the argument of appellant's counsel which failed to articulate her legal premise, thus, precluding the Court from reviewing the basis for counsel's request that the hearing be *ex parte*. The trial judge did not abuse his discretion.

Fraternal Order of Police Montgomery County Lodge 35, Inc. et al. v. J. Thomas Manger et al., No. 1280, September Term, 2006, decided May 25, 2007. Opinion by Davis, J.

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TORTS - NEGLIGENCE - DETERMINATION OF FORESEEABILITY - MOTION TO DISMISS: *Balt. Gas & Elec. Co. v. Lane*, 338 Md. 34, 52 (1995); *Lashley v. Dawson*, 162 Md. 549, 563 (1932); *Little v. Woodall*, 244 Md. 620, 626 (1966); a foreseeability inquiry [and proximate cause of an injury] is ordinarily a question of fact to be decided by the finder of fact; it is only when the facts are undisputed, and are susceptible of but one inference, that the question is one of law for the court; in determining liability for the cause of a house fire, the circuit court erred in ruling on a motion to dismiss that the allegations contained in Re-Filed Omnibus Amended Complaint were sufficient to determine the issue of foreseeability as to builder, electrical contractor, manufacturer and landlord.

Negligence, Proximate Cause, Intervening Negligent Acts as Superseding Causes: *Hartford Ins. Co. v. Manor Inn of Bethesda, Inc.*, 335 Md. 135 (1994); circuit court erred in ruling, as a matter of law, that the allegations that negligence of landlord in permitting tenants to use basement area without emergency egress as bedrooms, in violation of housing code, and tenants' negligence in allowing a candle used for lighting during a power outage were not causes of house fire which superseded the negligence of manufacturers of smoke detector without battery back-up, homebuilder and its electrical contractor who installed smoke detector and repairman hired to repair water damage resulting from broken water pipe;

General Field of Danger: *Restatement*, § 435 (2); *Stone v. Chi. Title Ins. Co. of Md.*, 330 Md. 329, 337-40 (1993); the circuit court erred in finding, as a matter of law that the negligence of landlord, who is alleged to have renovated basement without obtaining the proper permits, to have used the basement for chiropractic practice in violation of the applicable zoning, assured tenants that they could use enclosed rooms without emergency egress in basement for bedrooms and failed to install dual powered smoke detectors upon recall by manufacturer, subsequent to enactment by City of Gaithersburg requiring that smoke detectors have alternative source of power, was not a concurrent or superseding cause.

Passive, Active and Concurrent Negligence: *Bloom v. Good Humor Ice Cream Co. of Baltimore*, 179 Md. 384 (1941); *Matthews v. Amberwood Associates Ltd. Partnership, Inc.*, 351 Md. 544, 577 (1998); allegations of negligence of landlord were sufficient to establish that it was active and continuing up to and including the occurrence of fire rendering such negligence a concurrent rather than a superseding cause.

Facts: After severe thunderstorms caused an area-wide

electrical power outage in the City of Gaithersburg, the three Chapman sons and their two overnight guests, played Monopoly in bedrooms located in the basement lit by candlelight. After retiring, the children were awakened by a fire ignited by a candle which had been left burning. Because the smoke detector did not have a back-up power source, the smoke detector failed to alert the young boys; the two overnight guests perished in the fire and the three Chapman children suffered severe burns and injuries.

The Lis, the owners of the subject property who previously resided there, rented the property to the Chapmans. The Lis had renovated the basement for use as a medical office, prior to renting the property to the Chapmans, without obtaining the requisite building permits. They, also failed, as did the contractor that they hired in 1994, to obtain the requisite permits when they had repairs done because of significant water damage to the premises from a broken water pipe.

In the Circuit Court for Montgomery County, appellants, the Chapmans and the parents of the two overnight guests, sued the Lis for negligence and violation of the building code prohibiting the use of basements, without emergency egress for bedrooms, the manufacturers of the smoke detector for placing in the stream of commerce a defective product, *i.e.*, a smoke detector which would not operate during a power outage, the Ryland Group – the builder of the residence and Summit Electric – the electrical subcontractor for selecting and installing the alleged defective smoke detector and the repairmen whose failure to obtain required permits prevented municipal authorities from learning of the prohibited use of the basement without emergency egress which use resulted in the inability to escape the fire.

On appeal, the theory of the manufacturer defendants, Ryland Homes, Summit Electric and the Lis is that the allegations of the numerous intervening negligent acts of the Chapmans and each of the other appellees within the four corners of the Complaint operated as superseding causes rendering the injuries and deaths unforeseeable to appellees under the decision of the Court of Appeals in *Hartford Ins. Co. v. Manor Inn of Bethesda, Inc.*, 335 Md. 135 (1994).

Held: Judgment affirmed in part and reversed in part. The facts determinative of whether the alleged negligent acts of the manufacturer defendants, Ryland Homes and Summit Electric were substantial factors in causing the deaths and injuries and whether those deaths and injuries were foreseeable, could not be adjudged on appellees' motions to dismiss because they are susceptible of more than one inference. Accordingly, the grant of the motions to

dismiss of the manufacturer defendants must be reversed and the case remanded for further consideration.

The issue of whether the Lis and the Chapmans' acts constituted a superseding cause could not be properly adjudicated without an examination of the User's Manual, a determination of whether the failure to deliver the User's Manual was of any consequence and a consideration of whether procuring and installing a product, which did not meet industry standards was a substantial factor that caused the deaths and injuries. The grant of the motion to dismiss in favor of Ryland and Summit must be reversed and the case remanded for further consideration.

A determination of whether the Chapmans' conduct was "highly extraordinary" in light of the Lis' negligent acts, including that the Lis knew the Chapmans were using the enclosed basement rooms as sleeping areas, knew that the use of the enclosed rooms as sleeping areas violated the City of Gaithersburg's codes, made material misrepresentations that the enclosed rooms could be so used and reaffirmed their approval of such use upon renewal of the lease, are not determinations that could have been made on a motion to dismiss. Reversed and remanded.

Because the facts undergirding the counts alleging design defect, strict liability and failure to warn against the manufacturer defendants, Ryland and Summit are susceptible to more than one inference, disposition of those counts by way of motions to dismiss was error requiring reversal and remand. Likewise the counts of breach of implied warranties for merchantability and fitness for a particular purpose and express warranty against the manufacturer defendants were improperly disposed of via motions to dismiss requiring reversal and remand.

The circuit court's grant of the motions for summary judgment of the contractor who performed repairs, Dieffenbach and Hightower, were proper, appellants having failed to set forth facts, which if proven, would establish that Dieffenbach and Hightower had any legal duty with respect to replacing the hardwired smoke detectors.

Stephon Collins et al. v. Gui-Fu Li et al., No. 1297, September Term, 2005, *Michael Chapman et al. v. Gui-Fu Li et al.*, No. 590, September Term, 2006, decided October 2, 2007. Opinion by Davis, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated October 3, 2007, the following attorney has been suspended for thirty (30) days by consent, effective immediately, from the further practice of law in this State:

SOLOMON ZEWDIE BEKELE

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By an Order of the Court of Appeals of Maryland dated October 3, 2007, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State:

JEFFREY S. MARCALUS

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By an Order of the Court of Appeals of Maryland dated October 4, 2007, the following attorney has been disbarred by consent from the further practice of law in this State:

MONICA MEYERS TURNBO

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By an Opinion and Order of the Court of Appeals of Maryland dated October 11, 2007, the following attorney has been indefinitely suspended from the further practice of law in this State:

JEFFREY LAWSON

*

The following attorney has been replaced upon the register in the Court of Appeals of Maryland effective October 15, 2007:

UZOMA C. OBI

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By an Order of the Court of Appeals of Maryland dated October 15, 2007, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

RACHEL KATHLEEN DONEGAN

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By an Opinion and Order of the Court of Appeals of Maryland dated October 15, 2007, the following attorney has been disbarred from the further practice of law in this State:

JEROLD KAY NUSSBAUM

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