Amicus curiarum

VOLUME 22
ISSUE 12 DECEMBER 2005
a publication of the office of the state reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

ATTORNEYS - MISCONDUCT - RECIPROCAL DISCIPLINE - APPROPRIATE SANCTIONS

Facts: Randy A. Weiss, a member of the District of Columbia, Virginia, Florida, and Colorado bars, was admitted to the Maryland Bar in 1982. Weiss embezzled a total of $676,465.59 from his law firm. This amount represents the sum of fifty-four separate transactions over a period of three years in which Weiss kept for himself part of the title insurance premiums belonging to the firm. At the end of the three years, Weiss informed the firm of his actions, returned the money to the firm, and reported his misconduct to the District of Columbia Bar Counsel.

The District of Columbia Court of Appeals suspended Weiss from the practice of law for three years, with the last year to be suspended in favor of probation for two years or until Weiss's therapist concludes that Weiss no longer requires therapy. Virginia, Florida, Colorado, the United States Court of Appeals for the Federal Circuit, and the United States District Court for the District of Maryland imposed the same sanction for the violation of the rules of professional conduct.

Weiss argued that the Court of Appeals should impose the same sanction the District of Columbia Court of Appeals imposed, based upon the Court's reciprocal discipline doctrine.

Held: Disbarred. It is a well settled principle of Maryland law that in reciprocal discipline cases this Court often applies a similar sanction to that of the original jurisdiction. This principle, however, is not an absolute requirement. Maryland Rule 16-773 requires the application of reciprocal discipline unless there is clear and convincing evidence that such application will result in grave injustice or that the conduct warrants a different sanction in this State. In cases where the conduct of the attorney involves theft, misappropriation, fraud, or deceit, this Court generally will not impose a sanction lesser than disbarment, absent compelling extenuating circumstances as the root cause of the misconduct. Theft by members of this bar, whether from clients, partners, or third parties, will not be tolerated. Such conduct is a violation of MRPC 8.4 and disbarment is the appropriate sanction.

Attorney Grievance Commission v. Randy A. Weiss, Misc. Docket No 15, September Term, 2005, filed November 22, 2005. Opinion by Cathell, J.

***

CRIMINAL LAW - CLOSING JURY - ARGUMENTS - COMMENTS ON CHARACTER OR CONDUCT - APPEALS TO SYMPATHY OR PREJUDICE

EVIDENCE - HEARSAY - ORAL STATEMENTS - STATEMENTS BY PERSONS AVAILABLE AS WITNESSES

EVIDENCE - WEIGHT AND SUFFICIENCY - CORROBORATION OF RAPE TESTIMONY OFFERED BY ABUSED CHILD

Facts: Joseph Lawson, petitioner, was convicted by a jury on two counts of second-degree rape, two counts of attempted second-degree rape, and two counts of second degree assault. These convictions were based upon the allegations of an eight-year-old girl who told her mother about at least two separate incidents in which the petitioner had sexually assaulted her. The mother reported the incidents to the police who, in turn, reported the abuse to the Prince George's County Department of Social Services. A social worker employed by the department interviewed the child after the report was made.

The child, mother, and social worker gave testimony at trial describing each incident of abuse. The mother's testimony was based solely on the child's statements made to her. The social worker's testimony was based upon her interview with the child.

During closing argument, the prosecutor made a number of improper statements. She utilized a "golden rule" argument asking the jury to put themselves in the shoes of the mother of the victim. She attempted to shift the burden of proof onto the defendant by implying that his failure to show that the child had a motive to lie could be used against him in reaching a decision. The prosecutor then improperly appealed to the jury's prejudices by implying that the defendant was a monster, who looks like anyone else, but a monster nonetheless. Finally, the prosecutor insinuated that if the defendant was not convicted, it was likely that he would abuse his cousin's eleven year old child, who lived in the petitioner's apartment. Petitioner objected only to the "golden rule" argument. His objection was sustained. The judge read the standard jury instructions, which the jury took into the deliberation room, stating that the burden was upon the State to prove every element of the crime and that the opening and closing arguments were not evidence. The judge did not, however, specifically instruct the jury that the statements by the prosecutor were inappropriate.

Petitioner appealed his convictions to the Court of Special Appeals. The intermediate court reversed the rape, attempted rape, and assault convictions for one of the incidents, because the child's testimony at trial did not support them. The court affirmed the remaining convictions for the other incident. Petitioner filed a petition for writ of certiorari, which the

Court of Appeals granted.

Petitioner argued that the social worker's testimony regarding the child's out of court statements was inadmissible hearsay. Furthermore, he contended that the uncorroborated child's in-court testimony was insufficient to support a rape conviction. Finally, petitioner argued that the prosecution's improper closing argument statements denied him a fair and impartial trial.

Held: Court of Special Appeals judgment affirming the convictions reversed and case remanded for a new trial. Md. Code(2001, 2005 Supp.), § 11-304 of the Criminal Procedure Article creates an exception to the hearsay rule. It allows social workers acting in the course of their profession to testify as to a child's out-of-court statements regarding sexual abuse so long as the child is under the age of twelve. The social worker will be allowed to testify, even if the statements were obtained due to child abuse allegations reported to the police. Those statements, however, will only be admissible if the child testifies at trial, the child is unavailable to testify, or if the accused had an opportunity to cross-examine the child regarding the statements. In this case the child testified at trial and, therefore, the social worker's testimony was admissible.

Attorneys have great leeway during their opening and closing arguments in presenting their cases to the jury. These statements, however, must be supported by the evidence admitted during trial and must not improperly appeal to the jury's prejudices and fears. When an appellate court reviews a defendant's assertion that his or her conviction should be overturned based upon the admission of improper closing remarks, a three step balancing inquiry is necessary. First, the reviewing court evaluates the impropriety of the statements. Second, the reviewing court evaluates the weight of the evidence against the accused. Third, the reviewing court evaluates the trial court's actions in addressing the inappropriate statements. In this case, the prosecutor's statements, when taken as a whole, could have prejudiced the petitioner in such a way as to deny him a fair and impartial trial. The evidence against him was the child's testimony and, although it was legally sufficient for a conviction, it might not have convinced the jury in the absence of the improper remarks. Finally, the trial court did not take sufficient steps to cure the prejudice created by the remarks. As a result, the petitioner is entitled to a new trial.

Maryland law does not require corroboration of a child victim's testimony regarding sexual abuse. Section 11-304(d)(2) of the Criminal Procedure Article specifically provides that corroboration evidence is only necessary when the child does not

testify at trial.

Joseph Lawson v. State of Maryland, No 12, September Term, 2005, filed November 28, 2005. Opinion by Cathell, J.

***

CRIMINAL LAW - DEATH PENALTY - PROPER SUBJECT MATTERS FOR MOTIONS TO CORRECT ILLEGAL SENTENCES, CONSTITUTIONAL NOTICE REQUIREMENTS, CONSTITUTIONALITY OF EVIDENTIARY STANDARDS DURING SENTENCING PHASE, AND BURDEN OF PROOF FOR BALANCING OF AGGRAVATING AND MITIGATING FACTORS

Facts: Appellant Vernon Evans murdered David Piechowicz and Susan Kennedy for a fee of $9,000 on behalf of Anthony Grandison. He was subsequently indicted for murder and received a timely Notice of Intention to Seek the Death Penalty. He was convicted of the murders and sentenced to death, and again received a sentence of death during a re-sentencing in 1992. Appellant appealed the denial of two Motions to Correct Illegal Sentence that argued that:

1. Imposition of the Death Penalty in his case is an illegal sentence, relying on statistical bias outlined in a study conducted by Professor Raymond Paternoster;
2. His death sentence was illegal because his indictment was rendered Constitutionally infirm by its failure to allege principalship or the existence of aggravating factors;
3. During the 1992 re-sentencing, the judge committed constitutional error by admitting evidence that would normally be excluded by the Rules of Evidence during the guilt/innocence phase of the trial because the existence of aggravating factors and principalship in the first degree had to be proved during that same sentencing stage; and
4. The Maryland and Federal Constitutions require the fact finder to determine whether aggravating factors outweigh mitigating factors with a standard of beyond a reasonable doubt.

Held: *Judgments affirmed, with costs.*

1. Maryland Rule 4-345(a) is not the appropriate vehicle to

raise the issue of potential statistical bias in the imposition of the Death Penalty in Maryland as explored in the Paternoster Study because there was nothing intrinsically illegal in the sentence, affirming *Baker v. State*, ___ Md. ___, ___ A.2d ___ (Sept. Term, 2004, No. 132, Op. filed October 3, 2005).

2. The indictment that Evans received was sufficient to satisfy Maryland and Federal Constitutional prerequisites because Evans timely received a Notice of Intention to Seek the Death Penalty. The Fifth and Sixth Amendment rights to a grand jury indictment are not applicable to the States, and the Notice adequately supplied any missing information that was necessary to satisfy the notice requirements of the Maryland Constitution.

3. The admission, during the sentencing phase, of evidence that would normally be excluded by the rules of evidence did not offend the Maryland and United States Constitutions. Even though principalship and the existence of aggravating factors must be proven during that phase to the fact finder beyond a reasonable doubt, the additional evidence enhances, rather than detracts, from the reliability of the proceedings by allowing the fact finder to consider as much evidence as possible during sentencing.

4. It is not unconstitutional to use a preponderance of the evidence standard to determine whether the aggravating factors sufficiently outweigh the mitigating factors to warrant imposition of the death penalty, affirming *Oken v. State*, 378 Md. 179, 184-86, 835 A.2d 1105, 1108, 1157-58 (2003), *cert. denied*, 541 U.S. 1017, 124 S. Ct. 2084, 158 L. Ed. 2d 632 (2004).

Vernon Evans, Jr. v. State of Maryland, Misc. No. 18 Sept. Term 2004 and Misc No. 3 Sept. Term 2005, filed November 10, 2005. Opinion by Wilner, J.

***

CONTRACTS - CONDITION PRECEDENT - CIRCUIT COURT PROPERLY DETERMINED THAT LANGUAGE IN SUBCONTRACT WHICH STATED "THE SUB-CONTRACTOR HEREBY WAIVES ANY RIGHTS IT OTHERWISE MIGHT HAVE AGAINST THE CONTRACTOR, AND AGREES NEVER TO LOOK TO THE CONTRACTOR FOR PAYMENT ON ACCOUNT OF ANY SUCH CLAIM EXCEPT TO SUCH EXTENT, IF ANY, AS THE CONTRACTOR MAY BE PAID BY THE OWNER ON ACCOUNT OF ANY SUCH CLAIM OF THE SUB-CONTRACTOR," WAS AMBIGUOUS AND FAILED TO CREATE A CONDITION PRECEDENT. WHERE THE LANGUAGE OF A CONTRACT PURPORTING TO CREATE A CONDITION PRECEDENT IS AMBIGUOUS OR DOUBTFUL, THE LANGUAGE WILL BE INTERPRETED AS EMBODYING A PROMISE OR CONSTRUCTIVE CONDITION RATHER THAN EXPRESS CONDITION, ESPECIALLY UNDER CIRCUMSTANCES WHERE THE EXPRESS CONDITION IS MORE LIKELY TO CAUSE FORFEITURE.

PLEADING - SUFFICIENCY OF ALLEGATIONS - PLEADINGS CONTAINED SUFFICIENT FACTS TO PLACE THE APPELLANT ON NOTICE THAT CONTROL OF THE CONSTRUCTION PROJECT WAS AN ISSUE IN THE CASE; COMPLAINT ALLEGED THAT SUBCONTRACT AND AMENDMENT REQUIRED APPELLEE TO PERFORM ITS WORK AT THE DIRECTION OF THE APPELLANT; APPELLEE ALSO ALLEGED THAT IT SOUGHT THE APPROVAL OF THE APPELLANT DURING THE COURSE OF ITS WORK; ANSWER TO COMPLAINT DENIED THAT APPELLEE WAS REQUIRED TO PERFORM ITS WORK AT THE DIRECTION OF APPELLANT AND THAT SUBCONTRACT AND AMENDMENT TO THE SUBCONTRACT REQUIRED APPELLEE TO PERFORM ITS WORK IN ACCORDANCE WITH THE WRITTEN SPECIFICATIONS OF THE CONTRACT.

CONTRACTS- ORAL MODIFICATION - THERE WERE SUFFICIENT FACTS PRESENTED TO DEMONSTRATE THAT THE PARTIES ORALLY MODIFIED THE WRITTEN CONTRACT; ALTHOUGH CONTRACT REQUIRED WRITTEN INSTRUCTIONS FROM CITY'S ENGINEER, TESTIMONY REVEALED THAT APPELLANT SUPERVISED APPELLEE ON THE JOB SITE, APPELLEE SOUGHT ANSWERS TO QUESTIONS CONCERNING THE JOB FROM APPELLANT, AND APPELLEE ONLY TOOK DIRECTIONS FROM APPELLANT.

Facts: Appellant entered into a contract with appellee to provide excavation, grading and other services related to appellant's construction contract with the City of Frederick, hereinafter "City." The City issued a directive for the handling of contaminated soil on the project, which required appellant to get approval from the City's project manager before treating the soil as contaminated. In a directive issued sometime later, the City instructed appellant to cease work on the contaminated soils, because it had determined through testing that the soil was not contaminated.

Both appellant and appellee continued to believe the soils were contaminated, and appellant instructed appellee, pursuant to

their contract, to continue treating the soil as if it were contaminated. The City did not pay appellant for the handling of contaminated soils, because it had directed appellant to cease treating the soil as contaminated; consequently, appellant did not pay appellee for its work on the contaminated soils. Appellee demanded payment from appellant for its work on the contaminated soils and, pursuant to their contract, appellant demanded payment from the City. The City refused payment and appellant filed suit against the City. The City prevailed and the court found that appellant failed to get approval from the City to treat the soil as contaminated. Appellant then refused to pay appellee claiming that a clause in the contract created a "pay-if-paid" condition precedent relieving it of any obligation to pay appellee.

Held: Affirmed. Although no special language is required to create a condition precedent, words such as "when," "after," "as soon as," "subject to," "provided that," and "if" are generally employed. *Chirichella v. Erwin*, 270 Md. 178 (1973). Language employed in Article XIX of the contract neither employed such language, nor language which would unmistakably demonstrate the intent of the parties to create a condition precedent. The pleadings presented sufficient facts to place appellant on notice that control over the project site and the work of the contractors was an issue in the case. Additionally, there were sufficient facts to demonstrate that the parties orally modified the contract. The testimony at trial showed that appellant controlled the work of appellee on the job site.

Richard F. Kline, Inc. et al. v. Shook Excavating & Hauling, Inc., No. 592, September Term, 2004, decided October 31, 2005. Opinion by Davis, J.

***

CRIMINAL LAW - ARREST, SEARCH AND SEIZURE - *TERRY* STOP - INFORMATION PROVIDED TO A POLICE OFFICER IN PERSON BY AN INFORMANT, PREVIOUSLY UNKNOWN TO THE OFFICER, CONCERNING THE IDENTITY AND WHEREABOUTS OF A PERPETRATOR OF A CRIME WITNESSED BY THE INFORMANT WAS ENOUGH TO GIVE THE POLICE OFFICER A REASONABLE

ARTICULABLE SUSPICION SUFFICIENT TO ALLOW THE OFFICER TO DETAIN THE PERSON IDENTIFIED BY THE INFORMANT EVEN THOUGH, AT THE TIME OF THE SUPPRESSION HEARING, THE POLICE OFFICER STILL DID NOT KNOW THE IDENTITY OF THE INFORMANT.

Facts: On September 21, 2002, a stranger approached off-duty Police Officer Anthony Knox in a 7-Eleven store in Bladensburg, Maryland. The "extremely nervous" man told Officer Knox that he had just witnessed a high speed car chase and that the driver of one of the vehicles displayed a handgun out the car window. The informant said that one of the cars involved in the chase was in the 7-Eleven parking lot. He also pointed to Elohim Cross (appellant), who was speaking on a pay phone, as the person who had displayed the weapon and drove the vehicle.

Officer Knox informed the Bladensburg Police Department of the tip, and Officers Russell Chick, Shawn Morder, and Corporal Charles Cowling reported to the scene. After observing appellant for several minutes while he spoke on the phone, the three officers approached him as he was about to enter his car. An officer ordered appellant to "put his hands on his head and walk away from the vehicle"; the officer then performed "a *Terry* stop patdown" as appellant was being handcuffed. While doing this, Officer Chick explained to the appellant that he was "being detained while we investigated the report of a firearm." The patdown resulted in the discovery of no weapons.

Officer Morder and Corporal Cowling then searched the interior of appellant's vehicle while appellant was asked some "background questions" by Officer Chick. During the search, Officer Morder observed a handgun through a space in the "partially opened" glove compartment. Corporal Cowling took a key to the glove compartment from appellant. In the glove compartment he found a handgun. The officer next found narcotics and money. The police then searched the trunk of appellant's vehicle, where they found more drugs along with drug paraphernalia. The drugs field tested positive for cocaine.

Appellant's counsel moved to suppress the gun and drugs found in the glove compartment, as well as the evidence obtained from the trunk. The motions judge denied Cross's motion to suppress.

Appellant ultimately was convicted of second-degree assault. He appealed the motion judge's denial of the motions to suppress the gun and drugs and paraphernalia, arguing that the warrantless search of the glove compartment violated his Fourth Amendment rights.

Held: Affirmed. The Court did not reach the issue of whether probable cause existed for the warrantless search of

appellant's vehicle. Based on the fact that appellant's pre-arrest detention was brief, that he was not transferred to another location, and that he was told why he was being detained, the Court held that the appellant was not arrested prior to the search. Because the initial search was limited to the area in the vehicle where a weapon was likely to be found and the officers had reason to believe the suspect was dangerous, the search came within the scope of a search permitted by *Michigan v. Long*, 463 U.S. 1032 (1983) – sometimes referred to as a "*Terry*-frisk" of an automobile.

The Court addressed the question of whether the police officers who searched the car had, prior to the search, a reasonable, articulable suspicion that the car contained a weapon and that appellant was dangerous. Although none of the officers who testified knew the informant's name or address, there was no evidence that the informant tried to conceal his identity or that he would have been unavailable for further questioning if the officers wanted to obtain his identity. These factors, in addition to the fact that the informant approached Officer Knox in person and appeared to Knox to be credible, made "the likelihood that the information was reliable [] much greater than if the information had been obtained from a truly anonymous tipster." Under all the circumstances, at the time the glove compartment was searched, the police officers had a reasonable articulable suspicion that appellant was dangerous and that his car contained a gun. Thus, under the principles first enunciated in *Terry*, the Court held that the search did not violate appellant's Fourth Amendment rights.

Elohim Cross v. State of Maryland, No. 720, September Term, 2004. Opinion filed on October 27, 2005 by Salmon, J.

***

CRIMINAL LAW - JURY INSTRUCTIONS - FAILURE TO INSTRUCT ON A CONVICTED COUNT - STRUCTURAL/FUNDAMENTAL ERROR - PLAIN ERROR.

Facts: Appellant was convicted of first degree murder, conspiracy to commit first degree murder, first degree assault, use of a handgun in the commission of a crime of violence or

felony, wearing or carrying a handgun, conspiracy to commit robbery with a dangerous or deadly weapon, robbery, and theft. He was sentenced to life in prison for the first degree murder conviction and a consecutive 20 year term for the use of a handgun. All other sentences were made to be concurrent, or were merged.

Appellant sought plain error review of the trial court's failure to give any instruction on the conspiracy offenses, among other assertions or error.

Held: The Court of Special Appeals held that (1) the trial court's total failure to instruct on a charged offense is not structural or fundamental error mandating reversal; and (2) that, on the extant record, the Court exercised its discretion to not conduct a plain error review.

Martin/Razzaq v. State, No. 1675, September Term 2002, filed October 28, 2005. Opinion by Sharer, J.

***

CRIMINAL LAW - POSTPONEMENTS.

AIDING AND ABETTING- DISTRIBUTION AND POSSESSION OF CONTROLLED DANGEROUS SUBSTANCES.

CONSPIRACY- DISTRIBUTION OF CONTROLLED DANGEROUS SUBSTANCES.

Facts: In the early morning hours of August 14, 2002, Detective Earnest Moore, an undercover Baltimore County Police officer and member of the Essex Community Drug and Violence Interdiction Team, was driving an unmarked police vehicle on Dartford Road in Essex, Maryland. Detective Moore was hailed to the curb by a woman who had been standing among a group on the street. The woman approached Detective Moore's vehicle with a man he later identified as Nathaniel Cottman, appellant.

The woman stood next to Detective Moore's driver's side window, while appellant stood at the driver's mirror and leaned towards the driver's window. The woman asked Detective Moore

whether he was a police officer, and he reported that he was not. Appellant then inquired, "Are you sure you're not police?" When Detective Moore repeated his denial and claimed that he had been drinking, the woman remarked to appellant, "he's all right." Appellant then walked to the front of Detective Moore's vehicle and waited, looking up and down the street. Detective Moore characterized appellant's actions as consistent with a drug dealer's lookout. While appellant maintained his watch over the street, the woman sold Detective Moore a bag of cocaine, which she produced from her mouth. Following the sale, appellant escorted the female seller away from the vehicle.

Upon Detective Moore's report to surveillance units of a successful drug purchase, appellant and his female companion were promptly arrested. Appellant identified both suspects minutes later as those persons who had engaged in the drug transaction. Appellant was charged with distribution of cocaine, possession of cocaine, and conspiracy to distribute cocaine.

Prior to trial, appellant moved to postpone his trial for a fourth time, claiming that the defense had recently located a "critical witness." Appellant, however, did not state the reason for the late hour discovery of the witness or proffer what the witness would testify to. The designee of the county administrative judge declined appellant's motion for postponement. Appellant was convicted in the Circuit Court for Baltimore County of all charges, and after merging his possession and conspiracy convictions, he was sentenced, as a repeat offender, to ten years imprisonment.

Held: Affirmed. The designee of the county administrative judge did not abuse his discretion in denying appellant's request for a postponement because appellant did not establish he had been diligent in attempting to locate the witness, that he had a reasonable expectation of producing the witness, or that the witness's testimony was competent and material.

The evidence was sufficient to support appellant's conviction for distribution of a controlled dangerous substance on an aiding and abetting theory, where appellant accompanied the female seller to the undercover detective's vehicle, questioned the prospective purchaser to determine if he was an undercover police officer, and acted as a "lookout" during the cocaine sale. The evidence was also sufficient to support appellant's conviction for possession of a controlled dangerous substance on either an aiding and abetting theory or constructive possession theory.

Appellant's actions in accompanying the female seller to and from the undercover officer's vehicle, in questioning the prospective purchaser to determine if he was a police officer,

and acting as a "lookout" during the drug sale supported a rational inference that appellant and the female seller had agreed to distribute cocaine. Therefore, the evidence was sufficient to support appellant's conviction for conspiracy to distribute a controlled dangerous substance.

Cottman v. State, No. 827, September Term, 2004, filed October 31, 2005. Opinion by Kenney, J.

***

JUDGMENTS - CONSENT JUDGMENT - *LONG v. STATE*, 371 MD. 72, 88 (2002); LOWER COURT ERRED BY ENTERING A MODIFIED JUDGMENT, DIFFERENT FROM THE AGREEMENT WHICH THE PARTIES ENTERED INTO IN OPEN COURT AND ON THE RECORD; MODIFIED AGREEMENT MATERIALLY ALTERED THE AGREEMENT REACHED BY THE PARTIES, WHICH THE COURT ACCEPTED AND WHICH WAS BINDING ON THE PARTIES.

Facts: Appellant and appellee entered into a comprehensive agreement, which settled their rights and obligations in anticipation of their impending divorce. The Agreement was reached by the parties, piecemeal, over the course of an eight-day court proceeding. The parties were to submit the Agreement, to the court, as a Consent Property Agreement for the court to sign. After months of dispute between the parties concerning the language in the written agreement, and in an attempt to settle the dispute, the court entered an order, purportedly reflecting the agreement reached by the parties. The court's order, however, did not accurately reflect the terms of the parties' agreement, as it was placed on the record.

Held: Reversed. The court abused its discretion by entering the order, which modified the agreement reached by the parties, entered on the record in open court. The modified agreement materially altered the rights and obligations of the parties under the agreement. A consent decree implies that the parties have consented to the agreement and, in this case, it was clear the parties did not consent to the written agreement.

Jonathan Scott Smith v. Linda Cheryl Luber, No. 2291, September Term, 2004, decided November 3, 2005. Opinion by Davis, J.

PROPERTY - COMMERCIAL LAW – MARYLAND UNIFORM FRAUDULENT CONVEYANCE ACT – CONSTRUCTIVE FRAUDULENT CONVEYANCE

Facts: In a prior suit, County Banking and Trust Company ("Bank"), the appellee, obtained a judgment against William Wallace ("William"), rendering him insolvent. William is the husband of Bonnie Cruickshank-Wallace ("Bonnie"), the appellant. In the instant case, the Bank sued Bonnie in the Circuit Court for Cecil County under the Maryland Uniform Fraudulent Conveyance Act ("MUFCA") for actual and constructive fraudulent conveyances.

In 1995, William and Bonnie executed a "Transfer Agreement" purporting to make all of William's future income and benefits from Great Christian Books, Inc. ("GCB"), tenancy by the entirety property. In 1999, they filed joint federal and state income tax returns for the 1998 tax year. The IRS and Maryland State Comptroller issued refund checks in amounts that equaled the amount of taxes withheld from William's 1998 salary from GCB. Bonnie did not earn any income in 1998, but had a loss carry-forward from her subchapter S corporation, Cruickshank Holsteiners, Inc.

The refund checks were jointly payable to William and Bonnie, so William endorsed the checks and gave them to Bonnie, who deposited them into a bank account in her sole name. Bonnie used the money for various living expenses for William and herself, and their two children, as well as for payments made directly to William.

In its complaint, the Bank alleged that William had fraudulently conveyed the refunds to Bonnie, thus keeping them out of the Bank's reach. The parties engaged in discovery, then the Bank and Bonnie each moved for summary judgment. The court granted the Bank's motion and denied Bonnie's. Bonnie noted an appeal, arguing that the refund checks were tenancy by the entirety property, and therefore could not be fraudulently conveyed, and that there was a genuine dispute of material fact as to whether William received fair consideration for his transfer of the checks to Bonnie.

Held: Affirmed. Although tenancy by the entireties property is not subject to the claims of individual creditors of either spouse, and thus cannot be fraudulently conveyed, the refund checks were not entireties property. The "Transfer Agreement" could not make all future income, including refunds, tenancy by the entireties property automatically upon coming into existence because common law unities of interest, title, time, and possession must coexist. The refund checks were not entireties property because the unities did not coexist and because there was no evidence that either the IRS and Comptroller or William intended to transfer the checks to the marital unit.

Nor did the fact that William and Bonnie filed joint returns, or that the checks were jointly payable, convert the checks into entireties property, because the refunds were almost entirely attributable to William's income and there was no evidence of an intent to transfer the checks to the martial unit. Finally, Bonnie's loss carry-forward could have made part of the refund checks entireties property, but not the whole amount.

Under the MUFCA, a transfer of property will be a constructive fraudulent conveyance if the transferor is insolvent and the transfer is not for fair consideration. There was no dispute that William was insolvent. Also, Bonnie's use of the refund checks for "family necessaries" - that is, support for William and the children - could not be fair consideration. The doctrine of family necessaries, which placed a legal duty on a husband to support his wife and children and allowed creditors to look to the husband to satisfy debt incurred by the wife for family support, was abolished by the Court of Appeals in *Condore v. Prince George's County*, 289 Md. 516 (1981), because it violated the Equal Rights Amendment. Now, each spouse in an intact marriage has a duty to support the other and their children. Therefore, Bonnie's use of William's tax refunds was not satisfying William's obligation to support her, but was merely satisfying her own obligation to support the family and could not constitute fair consideration. William could have used the state exemption laws to retain part of the refunds to satisfy his obligation of support. To the extent *Pearce v. Micka*, 62 Md. App. 265 (1985) is contrary to this opinion, it is disapproved.

Cruickshank-Wallace v. County Banking and Trust Company, No. 1447, September Term 2004, filed October 31, 2005. Opinion by Eyler, Deborah S., J.

***

TORTS - NEGLIGENCE- AUTO ACCIDENTS- MARYLAND BOULEVARD RULE.

Facts: At approximately 5:40 p.m. on January 9, 2002, William Barrett and James Nwaba were involved in an auto accident on Eastern Avenue in Essex, Maryland. In that area, Eastern has two eastbound lanes, and a median separates eastbound from

westbound traffic. As a result of the accident, Barrett brought a negligence action against Nwaba, which was eventually removed to the Circuit Court for Baltimore County.

At trial, Barrett testified that he was traveling east on Eastern and following a tractor trailer in the right-hand lane. After stopping for a traffic signal at, or immediately before, the intersection of Southern Avenue, Barrett proceeded to pass the truck. When he was approximately four to five car lengths ahead of the truck and it was safe to do so, Barrett merged back into the right-hand lane. After traveling an additional three to four car lengths, Barrett's vehicle was struck in the rear passenger's door by Nwaba's vehicle as Nwaba attempted to enter and turn right on Eastern. Barrett recalled that he incurred several injuries and numerous medical expenses as a result of the accident.

Nwaba testified that the accident occurred while he was attempting to exit a gas station and proceed east on Eastern Avenue. He looked to his left twice before entering the roadway and only saw the tractor trailer in the right-hand lane. As he pulled from the gas station at a "snail's pace," he heard a "bump." Although the area was well lit and there were no obstructions, he did not see Barrett's vehicle or any other traffic on Eastern before the accident. Approximately, one-half of Nwaba's vehicle remained in the gas station driveway at the time of the accident.

Officer Bruce Pfeiffer arrived on the scene shortly after the accident. From his accident investigation, he determined that the "area of impact" was nine feet ten inches north of the south curb of Eastern Avenue and approximately one-eighth of one mile from the Southern Avenue intersection. Officer Pfeiffer was not admitted as an expert, the results of his investigation were not submitted to the jury, and he provided no opinion as to the cause of the accident.

Following the presentation of all evidence, Barrett moved for judgment pursuant to the Maryland boulevard rule, codified at Maryland Code (1977, 2002 Repl. Vol.), §§ 21-403-21-404 of the Transportation Article, claiming that the undisputed evidence established that he was the favored driver and, because Nwaba failed to yield the right-of-way, he was negligent as a matter of law. The circuit court denied Barrett's motion, explaining that a jury need not credit Barrett's testimony and based upon other evidence, a jury could conclude that Nwaba was not negligent in entering the highway. Following deliberations, the jury found Nwaba not negligent.

Held: Reversed and remanded for further proceedings. The Maryland boulevard rule imposes a duty on a driver entering or

crossing a highway, private roadway, driveway, or other place to stop and yield the right-of-way to any through traffic on the through highway. That duty continues until the unfavored driver joins the flow of traffic on the favored highway. In a case where the favored driver is suing the unfavored driver, once the plaintiff establishes that he was operating lawfully on the favored highway and is struck by the defendant, an unfavored driver, the burden shifts to the defendant to produce evidence legally sufficient to create a factual dispute regarding the lawfulness of the plaintiff's actions or, in the absence of a statutory violation, the plaintiff's contributory negligence. When the defendant fails to meet the burden, no issue for the jury is created, and if the plaintiff moves for judgment, the trial court must find the defendant negligent as a matter of law.

Here, Barrett met his obligation of demonstrating that he was operating lawfully on the favored highway when he was struck by Nwaba. The evidence established the accident occurred in the middle of the right-hand lane and while one-half of Nwaba's vehicle remained in the gas station driveway. Nwaba testified that he never saw Barrett's vehicle and produced no other evidence to demonstrate that Barrett was operating unlawfully or in a negligent manner. If the Maryland boulevard rule is to maintain any relevance in Maryland's motor tort law, an unfavored driver cannot avoid liability and create an issue of the favored driver's contributory negligence merely by asserting that he did not see the favored driver when attempting to enter the favored highway. Therefore, the circuit court erred in denying Barrett's motion for judgment. Because there insufficient evidence to create a jury issue as to Barrett's contributory negligence or which driver had the last clear chance, the only issue for the jury was damages.
Barrett v. Nwaba, No. 1040, September Term, 2004, filed October 31, 2005. Opinion by Kenney, J.

***

VOIR DIRE - GENERAL QUESTIONS - General *voir dire* questions that are not designed to elicit responses about the biases of jurors, and that are not directed to a specific reason for

disqualification and exclusion of jurors as required by Maryland law, may be properly refused in the trial court's discretion.

VOIR DIRE – DISMISSAL OF JUROR – The prime concern when dismissing a juror for cause should be "whether a person holds a particular belief or prejudice that would affect his ability or disposition to consider the evidence fairly and impartially and reach a just conclusion;" even if prospective jurors had preconceived notions about plaintiffs in lawsuits, and in medical malpractice cases in particular, such beliefs would not automatically render them disqualified for cause.

VOIR DIRE – REFUSAL TO ASK QUESTIONS – Absent any prejudice to the plaintiffs, a question may be excluded if it is not properly formed to determine a potential cause for disqualification. The court may exercise its discretion by refusing to ask questions that it deems are speculative or insufficiently tailored to the particular case at issue.

JURY INSTRUCTION – BURDEN ON COMPLAINING PARTY – The complaining party has the burden of showing both prejudice and error in the failure to give a jury instruction. If the complaining party can show no error and no prejudice as a result of the court's denial to give the requested instruction, the trial court's decision not to give the requested instruction will be affirmed.

JURY INSTRUCTION – INFORMED CONSENT – Assuming that a doctor's failure to inform constituted an affirmative act, a patient was not entitled to an informed consent instruction, and the trial court did not err in refusing to give the requested instruction, if the patient fails to present any expert opinion testimony to establish that the professional standard of care required that the doctor inform the patient of the risks associated with not submitting to a CAT scan, and did not direct the court to any case holding that it is a breach of the standard of care for a doctor to fail to disclose those risks.

Facts: In January of 2001, the Atlantic General Hospital ("AGH") was party to a contract with Emergency Services Associates, P.A. ("ESA") pursuant to which ESA would provide staffing for the AGH's Emergency Department. Appellee Pamela Zorn, M.D. was an employee of ESA who was working in AGH's Emergency Department on January 8, 2001. At 7:38 a.m. on January 8, 2001, Appellant Richard Landon presented to the Emergency Department complaining of leg pain and flu-like symptoms over the preceding several days. A triage nurse initially assessed Mr. Landon, and he was thereafter evaluated by Dr. Zorn. Dr. Zorn then ordered medications and diagnostic tests. on considering the results of the various tests, Dr. Zorn formed an initial impression that Mr. Landon had a flu-like syndrome and, that independent of the flu, pain from an old leg injury was flaring

up. Based on the information available to her, Dr. Zorn was not satisfied that she had diagnosed the source of Mr. Landon's leg complaints. Consequently, she requested that Mr. Landon undergo an additional non-invasive radiological test, a CAT scan, to attempt to reach a diagnosis.

The contemporaneous medical records reflect, and Dr. Zorn testified at trial, that she tried at length to talk Mr. Landon into undergoing the CAT scan because she believed it would yield more information about his condition. Mr. Landon testified that he was not interested in having more testing done, and informed Dr. Zorn that he wanted to go home to sleep. Dr. Zorn testified that she told Mr. Landon that the CAT scan would provide more diagnostic information and that, without the CAT scan, she might not be able to diagnose his condition. Dr. Zorn then offered to let Mr. Landon stay in the Emergency Department for further observation. Mr. Landon again declined to stay and was thereafter discharged at 12:15 p.m. Although Appellants testified at trial that Mr. Landon's condition got worse throughout the afternoon and evening, he did not return to AGH until nearly twelve hours later.

Dr. Zorn and Mrs. Landon spoke when Mrs. Landon called back to the Emergency Department with a medication question at approximately 4:45 p.m. At that time, Dr. Zorn reiterated her desire to perform more testing and a CAT Scan, and Mrs. Landon testified that she would attempt to talk her husband into returning to have the test. Mrs. Landon advised her husband of the conversation with Dr. Zorn. Mr. Landon did not recall that conversation, but did not deny that it took place. Mr. Landon reappeared at AGH approximately seven hours after that call, only after Dr. Zorn, who was home after her ER shift and getting ready for bed, learned that Mr. Landon had never returned for additional testing and called Mrs. Landon's home to instruct her to bring Mr. Landon back to AGH, even if she had to call 911.

Dr. Zorn testified that because Mr. Landon refused to undergo the CAT Scan she recommended and wanted performed, Mr. Landon was discharged against her medical advice. After Dr. Zorn's call from her home, Mr. Landon returned to AGH just after midnight on January 9. He was then transferred to Maryland's Shock Trauma Center, where he was diagnosed with a group A beta hemolytic streptococcal infection, and where he underwent multiple surgeries, including a surgery which disarticulated his leg at the hip. Appellants' claim of medical negligence against the Appellees ensued. The claim proceeded through trial and the jury determined pursuant to an inquiry on the special verdict sheet that Dr. Zorn did not breach the standard of care in treating Mr. Landon. The Circuit Court for Worcester County thereafter entered judgment in favor of the

Appellees. The Landons appealed to the intermediate appellate court and we granted *certiorari* on our own motion. *Landon v. Zorn*, 385 Md. 511, 869 A.2d 864 (2005).

Held: The Landons' proposed *voir dire* question was not directed to a specific reason for disqualification and exclusion of jurors as required by Maryland law; thus, it was properly refused, in the court's discretion, on that ground. This Court does not find that the question was about "tort reform," as was argued by the Landons. The Landons' proposed question is essentially a general question that inquired into whether jurors had any "preconceived opinion or bias or prejudice" involving "plaintiffs in personal injury cases in general and medical malpractice cases in particular."

The Court declined the Landons' request to adopt the basic principles of *Borkoski v. Yost*, 594 P.2d 688 (Mont. 1979), and to apply them to the facts of the case *sub judice* as the facts of this case do not warrant expansion of the scope of *voir dire* in Maryland. Unlike the law of Montana, the scope of *voir dire* in Maryland is limited. The Landons' question can be distinguished from the question proposed in *Borkoski*, not only in its failure to address the issue of tort reform, but in its generality. It was the Landons' responsibility to propound *voir dire* questions designed to elicit potential bias from jurors, and not to bootstrap a tort reform argument on appeal to a general question inquiring into any potential "bias or prejudice" against plaintiffs in personal injury or medical malpractice cases. The trial court was well within its discretion in declining to propound the Landons' proposed question.

The Landons next challenged the court's refusal to give two jury instructions, one proposed by them addressing the issue of contributory negligence, and the other the MPJI-Cv. 27:4, Informed Consent. The court declined to give the contributory negligence instruction, and instead we found that the special jury instruction given by the trial court fairly covered the substance of the Landons' request. There was no merit to the Landons' objection to the trial court's failure to give the information contained in paragraph four of their proposed contributory negligence instruction.

The Landons, as the complaining party, have the burden of showing both prejudice and error; because the jury did not find that Dr. Zorn breached the standard of the care of a reasonably competent emergency medicine physician, the verdict sheet instructed the jury to go no further. Consequently, the jury did not reach any of the remaining questions, including the one regarding contributory negligence. The Landons, therefore, can show no prejudice as a result of the court's denial to give the requested instruction. The trial court's decision not to give

the requested instruction is affirmed.

Landon v. Zorn, No. 146, September Term 2004, filed October 6, 2005, Opinion by Greene, J.

***

ATTORNEY GRIEVANCE

By an Opinion and Order of the Court of Appeals of Maryland dated November 22, 2005, the following attorney has been disbarred from the further practice of law in this State:

RANDY A. WEISS

*

By an Order of the Court of Appeals of Maryland dated November 4, 2005, the following attorney has been suspended for thirty (30) days by consent, effective December 1, 2005, from the further practice of law in this State:

NATHANIEL D. JOHNSON

*

By an Order of the Court of Appeals of Maryland dated November 7, 2005, the following attorney has been indefinitely suspended by consent, effective December 21, 2005, from the further practice of law in this State:

PETER I. J. DAVIS

*

JUDICIAL APPOINTMENTS

On October 17, 2005 the Governor appointed the HON. ROBERT E. CAHILL, JR. to the Circuit Court for Baltimore County. JUDGE CAHILL was sworn in on November 1, 2005 and filled the vacancy created by the retirement of Judge Robert E. Cadigan.

*

On October 17, 2005, the Governor appointed TIMOTHY JOSEPH MARTIN to the Circuit Court for Baltimore County. JUDGE MARTIN was sworn in on November 8, 2005 to the judgeship authorized by the legislation of the 2005 Legislative Session.

*

On October 17, 2005 the Governor appointed PHILIP NICHOLAS TIRABASSI to the District Court of Maryland for Baltimore County. JUDGE TIRABASSI was sworn in on November 10, 2005 and fills the vacancy created by the elevation of Judge Robert E. Cahill to the Circuit Court.

*

On October 17, 2005, the Governor appointed JUDITH CLAIBORNE ENSOR to the Circuit Court for Baltimore County. JUDGE ENSOR was sworn in on November 28, 2005 and fills the vacancy created by the retirement of Judge J. Norris Byrnes.

*