Amicus curiarum

VOLUME 22
ISSUE 4 april 2005

a publication of the office of the state reporter

Table of Contents

COURT OF APPEALS

ADMINISTRATIVE LAW AND PROCEDURE – JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS – SCOPE OF REVIEW IN GENERAL – THEORY AND GROUNDS OF ADMINISTRATIVE DECISION

TAXATION – SALES, USE, SERVICE, AND GROSS RECEIPTS TAXES – ASSESSMENT, PAYMENT, AND ENFORCEMENT

TAXATION – SALES, USE, SERVICE, AND GROSS RECEIPTS TAXES – TRANSACTIONS TAXABLE IN GENERAL – PLACE OF TRANSFER OR USE

Facts: In June, 2000, appellants purchased a yacht in Maryland. Appellants are residents of Florida, and they indicated on Department of Natural Resources (DNR) Form B-110, "Certification of State of Principal Use," that the vessel would be used principally in the State of Florida. Based on their execution of this form, appellants did not pay the 5% Maryland excise tax due on the sale of a vessel under Md. Code (1973, 2000 Repl. Vol.), § 8-716(c) of the Natural Resources Article.

A DNR investigator observed the vessel in Maryland on four occasions from June until late September, 2000, and DNR issued a Notification of Assessment to appellants, stating that the vessel had incurred a Maryland excise tax liability. Appellants appealed the assessment.

Before an Administrative Law Judge ("ALJ"), the issue was whether appellants owed the excise tax. All parties proceeded upon the assumption that non-residents who purchase vessels in Maryland are exempt from the § 8-716(c) excise tax if they certify that the vessel will not be "principally used" in Maryland, as defined in § 8-701(n) of the Natural Resources Article. They also assumed that any period of thirty days or more during which a vessel is "held for maintenance or repair" is excluded, under § 8-716(a)(3) of the Natural Resources Article, from the calculation of principal use. Appellants argued that their vessel had been "held for maintenance or repair" the entire time it was in Maryland; DNR disputed this contention. Each side presented evidence in support of its claim. Appellants also argued that a vessel which spends less than six months of a calendar year in Maryland is not "principally used" in this State within the meaning of the statute.

The ALJ upheld the tax assessment in a proposed decision later incorporated, with certain modifications, into the Final Decision of the Secretary of Natural Resources. The Secretary held that in order to qualify as "held for maintenance or repair for 30 days or more," a vessel must not be used for any non-maintenance purpose during a thirty-day period. Based on the record, he found that appellants' vessel had spent 140 days in Maryland, and during that time had on one occasion gone for thirty days without being used for any non-maintenance purpose. Accordingly, he found that the vessel had been "used" in Maryland for 110 days in 2000. He held that principal use should be calculated from the date of purchase to the end of the calendar year. He found that the vessel had not been used in any other state for longer than 110 days, and that Maryland was thus the vessel's "state of principal use" in 2000.

On judicial review, the Circuit Court for Queen Anne's County held that § 8-716(c) contained no statutory basis for the purported exemption. It vacated the Secretary's Final Decision and Order and ordered the Secretary to dismiss the appeal.

Appellants noted a timely appeal to the Court of Special Appeals. Before that Court decided the case, the Court of Appeals issued a Writ of Certiorari on its own initiative. Before the Court of Appeals, both parties argued that DNR's longstanding interpretation of § 8-716 as containing the tax exemption at issue was entitled to deference. Appellants further contended that the Secretary's findings as to "maintenance or repair" were not supported by the evidence presented before the ALJ. They also reiterated their argument that "principal use" requires a minimum of six months presence in Maryland.

<u>Held</u>: Affirmed. The Court of Appeals held that appellants were liable for the tax, albeit for different reasons than were relied upon by the Circuit Court.

Under *Brodie v. MVA*, 367 Md. 1, 4, 785 A.2d 747,749 (2000), a reviewing court "may not pass upon issues . . . not encompassed in the final decision of the administrative agency" and thus "will review an adjudicatory agency decision solely on the grounds relied upon by the agency." The Court therefore concluded that, unless the Secretary's Final Decision encompassed a determination as to the validity of the purported exemption, the Court should not consider that issue.

The Court noted that reasonable arguments could be made on both sides of this question. On the one hand, the exemption's statutory basis was neither briefed nor argued before the agency, nor ruled on in the Final Decision. On the other hand, the Final Decision did depend on an implied premise that the exemption existed. The Court determined, however, that so long as it found appellants not factually entitled to the purported exemption, it did not need to decide whether the exemption's validity was properly before the Court, nor did it need to decide whether the exemption in fact existed. In its review of the Secretary's Final Decision, the Court therefore assumed without deciding that the exemption exists as defined by the parties. Significantly, in a footnote, the Court stated:

> "This case should provide fair notice to the Department of Natural Resources, boat dealers, boat builders, and potential boat purchasers that the exemption at issue may not exist under the statute. Inasmuch as the Circuit Court for Queen Anne's County may well have been correct in its interpretation, DNR might consider proposing to the Legislature language clarifying or amending the statute to provide explicitly for that which is reflected in Form 110B."

The Court held that "a reasoning mind" could have arrived at the Secretary's conclusions that a vessel must not be used for any non-maintenance purpose during a thirty-day period, and that appellants' vessel had satisfied this requirement for only one thirty-day period during the year in question.

Because the Court found that the Secretary's determinations regarding "maintenance or repair" were supported by substantial evidence, and because it found that the Secretary's construction of "state of principal use" was legally correct, it instructed the Circuit Court to affirm the Secretary's order.

Robert A. Schwartz, *et al.* v. Department of Natural Resources, No. 94, September Term, 2004, filed March 14, 2005. Opinion by Raker, J.

***

AUTOMOBILES - LICENSE AND REGISTRATION OF PRIVATE VEHICLES - REVOCATION, FORFEITURE, OR SUSPENSION OF LICENSE - MOTOR VEHICLE

ADMINISTRATION MAY DENY A MARYLAND DRIVER'S LICENSE TO AN INDIVIDUAL WHOSE LICENSE IS PERMANENTLY REVOKED IN ANOTHER JURISDICTION FOR HAVING BEEN CONVICTED OF FOUR DUI OFFENSES.

Facts: On April 8, 2003, respondent Maryland Motor Vehicle Administration ("MVA") declined to consider the application for a Maryland driver's license made by Norris Emmitt Gwin, petitioner. At the time of application, petitioner had four convictions for driving under the influence of alcohol or drugs ("DUI") for which he had received a licence revocation in Illinois and a permanent license revocation in Florida. The MVA indicated that it denied consideration of petitioner's application on the basis of Md. Code (1977, 2002 Repl. Vol.), § 16-103.1(1) of the Transportation Article, which permits the MVA to deny a driver's license to an individual whose driver's license has been revoked in Maryland or any other state. Petitioner argued that Maryland's status as a signatory of the Driver License Compact, Md. Code (1977, 2002 Repl. Vol.), § 16-703 of the Transportation Article, permitted Maryland to conduct a driving fitness investigation and, upon a satisfactory result, to issue a driver's license to an individual whose license had been revoked by another state, after that individual had served one year of the extra-jurisdictional revocation.

Petitioner sought review with the Office of Administrative Hearings ("OAH") of the MVA's denial of his license application. Following an administrative hearing, the ALJ found in favor of petitioner. The MVA petitioned for judicial review in the Circuit Court for Anne Arundel County of the ALJ's determination. The trial court reversed the ALJ and petitioner filed a petition for writ of certiorari which the Court of Appeals granted in late November 2004.

Held: Affirmed. The Court of Appeals found that there is no conflict between Md. Code (1977, 2002 Repl. Vol.), § 16-103.1(1) of the Transportation Article, which permits the MVA to deny a driver's license to an individual whose driver's license has been revoked in Maryland or any other state, and the Driver License Compact, found at Md. Code (1977, 2002 Repl. Vol.), § 16-703 of the Transportation Article. The Court stated that the clear legislative intent of these two statutes indicates that Maryland law recognizes extraterritorial license revocations and the MVA is not compelled to issue a license to an individual whose license has been permanently revoked in another jurisdiction, even after a period of one year of the revocation.

Norris Emmett Gwin v. Motor Vehicle Administration No. 91, September Term, 2004, filed March 10, 2005. Opinion by Cathell, J.

EVIDENCE – OPINION EVIDENCE – CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL – GROUNDS FOR ADMISSION

CRIMINAL LAW – EVIDENCE – OPINION EVIDENCE – WITNESSES IN GENERAL – SUBJECTS OF OPINION EVIDENCE

Facts: Appellant Jeffrey Ragland was arrested for distribution of a controlled substance, after being observed engaging in a hand-to-hand exchange of unknown items with witness Paul Herring, who was later found in possession of crack cocaine. No drugs or paraphernalia were recovered from Ragland's vehicle.

At trial, the State called Officer Michael Bledsoe and Detective Kenneth Halter, both of whom had participated in the operation that led to Ragland's arrest. The State had not notified the defense that either officer would testify as an expert witness, nor did it proffer them as experts. The Court did not make any findings as to whether any testimony the officers might give would satisfy the requirements of Md. Rule 5-702 or the reliability standards of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), as adopted in *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978). The prosecutor asked each officer various questions about his training and experience in the investigation of drug crimes. Over defense objection, the State solicited and the officers gave opinion testimony that, based on their training and experience, they believed Herring's and Ragland's activities to have constituted a drug transaction.

In his closing argument, the prosecutor reviewed the evidence against Ragland and then argued that "the last factor that supports all of these things coming together to show that the defendant in this case is guilty of a drug transaction is the knowledge and the training and the experience that these police officers brought."

Ragland was convicted of cocaine distribution. He noted a timely appeal to the Court of Special Appeals, and the Court of Appeals issued a Writ of Certiorari on its own initiative. Before the Court of Appeals, Ragland argued that the officers' testimony regarding the nature of the events they had observed constituted expert opinion. He contended that their testimony was inadmissible because the State had not identified Bledsoe and Halter as experts pre-trial, had not provided appropriate discovery under Md. Rule 4-263(b)(4), and had not qualified them as experts at trial pursuant to Md. Rule 5-702.

Held: Reversed. Case remanded for a new trial. The Court explained that the issue in this case lies at the intersection of Md. Rule 5-701, governing lay opinion testimony, and Md. Rule 5-702, governing expert testimony. For the most part, the universe of opinion testimony is bisected into two categories. Expert opinions must be based on specialized knowledge, skill, experience, training, or education, but need not be confined to matters actually perceived by the witness. Lay opinions, on the other hand, must be rationally based on the perception of the witness.

This bisection is imperfect, the Court stated, because a witness who has personally observed a given event may nonetheless have developed opinions about it which are based on that witness's specialized knowledge, skill, experience, training, or education. The question then becomes whether the fact of personal observation will permit admission of the opinion as lay testimony under Rule 5-701, or whether the "expert" basis of the opinion will require compliance with Rule 5-702 and admission as expert testimony.

The Court reviewed a split in authority among the federal circuits as to the question *sub judice*. According to the "narrow view," a witness whose testimony could be admitted as expert testimony under Federal Rule 702 *must* be qualified and received as an expert before the testimony may be admitted. According to the "broad view," lay witness testimony may include opinions predicated on specialized knowledge or training so long as the testimony is rationally based on the personal perception of the witness.

The issue was settled for the federal courts when Congress amended Fed. R. Evid. 701 to require that lay opinion testimony be "limited to those opinions . . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The Advisory Committee's note to Rule 701 states that "Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing."

The Court reviewed post-2000 federal and state cases and noted that those considering the question have held that the 2000 amendment merely clarified the correct interpretation of the pre-2000 Fed. R. Evid. 701. It also examined the scholarly literature, and found support for this same proposition. The Court held that Md. Rules 5-701 and 5-702 prohibit the admission as "lay opinion" of testimony based upon specialized knowledge, skill, experience, training or education.

Turning to the facts *sub judice*, the Court held that the officers' testimony could not be described as lay opinion; that these witnesses who had devoted considerable time to the study of the drug trade had offered their opinions that, among numerous possible explanations of the events they had observed, the correct one was that a drug transaction had taken place. The connection between their training and their opinions was made explicit by the prosecutor's questioning. The Court held that, in admitting the testimony under Md. Rule 5-701, the trial court abused its discretion.

The Court further found that the error was not harmless. The primary witness against Ragland was Herring, who was testifying under a plea agreement, and who admitted on cross-examination that he once falsified a police report in order to recover a car, and "didn't have a problem" with lying to get what he wanted. The remaining evidence was circumstantial, and depended upon an inference that Herring had obtained his piece of crack cocaine from Ragland. To support this inference, the State relied in large part on the police officers' opinion testimony. Under these circumstances, the Court could not say beyond a reasonable doubt that this testimony did not contribute to the verdict.

Jeffrey Louis Ragland, Jr. v. State, No. 52, September Term, 2004, filed March 18, 2005. Opinion by Raker, J.

***

FAMILY LAW - CHILD CUSTODY - FACTORS RELATING TO PARTIES SEEKING CUSTODY - EMPLOYMENT - A FIT NATURAL PARENT'S JOB IN THE MERCHANT MARINE, REQUIRING HIM TO BE APPROPRIATELY AT SEA FOR PERIODS OF MONTHS DOES NOT CONSTITUTE EXCEPTIONAL CIRCUMSTANCES WARRANTING THE GRANTING OF CUSTODY OF THAT PARENT'S CHILD TO A PRIVATE THIRD-PARTY.

CHILD CUSTODY - FACTORS RELATING TO PARTIES SEEKING CUSTODY - RIGHT OF BIOLOGICAL PARENT AS TO THIRD PERSONS IN GENERAL - IN A CUSTODY DISPUTE BETWEEN A NATURAL PARENT AND A PRIVATE THIRD PARTY, UNLESS A NATURAL PARENT IS FOUND UNFIT OR EXCEPTIONAL OR EXTRAORDINARY CIRCUMSTANCES EXIST, THE "BEST INTERESTS OF THE CHILD" STANDARD DOES NOT NORMALLY APPLY.

Facts: Charles McDermott, petitioner, and his former wife, Laura Dougherty, are the natural parents of a son born in April 1995. Mr. McDermott filed for divorce from Ms. Dougherty in September 1995 in the Circuit Court for Harford County, launching a somewhat protracted dispute over custody of the child. Petitioner is a merchant marine which requires, as part of the job duties, spending periods of several consecutive months at sea. Between 1995 and early 2002, primary residential custody of the child changed several times. The child's natural mother was convicted of a fourth drunken driving violation in November 2001, which would result in a period of incarceration. Just prior to her incarceration, the child's mother, who at that time had primary residential custody of the son, signed a power of attorney granting her parents (the child's maternal grandparents), Hugh and Marjorie Dougherty, respondents, decision-making authority in respect to the child. Unaware of the natural mother's incarceration and told by respondents that they did not know her whereabouts, petitioner, who was contracted to go to sea for a period of service, filed a motion in early January 2002, requesting that custody be shared by himself and by the maternal grandparents. After petitioner went to sea, the court signed an order to show cause in response to the custody request and scheduled the matter for a hearing. It is unclear if petitioner knew about the hearing.

In February 2002, respondents filed a "Complaint for Third-Party Custody and Motion for an Ex-parte Order" and the court signed an order placing the child in the joint legal custody of both the maternal and paternal grandparents and giving the maternal grandparents primary residential custody. When petitioner returned from sea in early July 2002, his son went to stay with him without any formal change to the February 2002 custody order. Petitioner then filed a "Complaint for Modification of Custody" seeking permanent primary and residential custody of his son.

A trial took place in July 2003. The respondents/maternal grandparents asserted that petitioner's job deprived the child of stability and that respondents were the only stable presence in the child's life. The circuit court issued a written opinion in September 2003, finding the mother to be unfit and, finding that "exceptional circumstances" existed according to the factors of *Ross v. Hoffman*, 280 Md. 172, 191, 372 A.2d 582, 593 (1977), and granted sole legal and physical custody to the maternal grandparents.

The natural father appealed to the Court of Special Appeals, which affirmed the circuit court in April 2004. The Court of Appeals granted the father's Petition for a Writ of Certiorari in August 2004.

Held: Upon undertaking an exhaustive examination of the extra-jurisdictional caselaw in respect to custody disputes involving a natural parent and a private third party, the Court determined that custody should be placed with the natural father. Where private third parties, such as the maternal grandparents in this case, are attempting to gain custody of children from their natural parents, unless the natural parents are unfit or extraordinary circumstances detrimental to the child are found to exist, the "best interests of the child" standard normally does not apply.

Under circumstances in which there was no finding of parental unfitness, and the parent desires custody, the requirements of a parent's employment, requiring him or her to be appropriately absent for a period of time, do not constitute "extraordinary or exceptional circumstances" to support awarding custody to a private third party.

<u>Charles D. McDermott v. Hugh J. Dougherty, Sr., et al.</u> No. 58, September Term, 2004, filed March 10, 2005. Opinion by Cathell, J.

***

<u>TAXATION - SALES, USE, SERVICE, AND GROSS RECEIPTS TAXES - TRANSACTIONS TAXABLE IN GENERAL - PURPOSE OF USE OR CONSUMPTION AS AFFECTING TAXABILITY</u>

<u>Facts</u>: In 1989, Appellant Charles Kushell purchased a federally-documented yacht in California for use as a primary residence. At the time of purchase, Kushell lived and worked in California, and did not intend that the vessel would ever be used principally in Maryland.

In 1997, Kushell began keeping the vessel in Maryland for the summer months. Kushell was told by a representative of the Department of Natural Resources ("DNR") that he was not required to pay a use tax on the vessel so long as it was federally documented and used in Maryland for less than six months of any given year. Kushell examined the DNR website, which contained the following text: "What is meant by 'used principally in Maryland?' A vessel is considered used principally in Maryland if it is in Maryland the greatest percentage of time in a given calendar year." Based on these statements, Kushell believed that so long as he kept his boat in Maryland less than six months per year, his boat would not be "in principal use" in Maryland for use tax purposes. In fact, "state of principal use" is defined in Md. Code (1973, 2000 Repl. Vol., 2001 Cum. Supp.), § 8-701(o) of the Natural Resources Article as "the state on whose waters a vessel is used or to be used most during a calendar year."

During calendar year 2001, Kushell kept his vessel in Maryland for a period of 171 days. For the remaining 189 days of 2001, he kept the vessel outside the United States, primarily in the Bahamas. Thus, Maryland was "the state on whose waters [the] vessel was used . . . most" during 2001, and DNR assessed excise tax, plus penalties and interest, at the end of that year. Had Mr. Kushell known that he would incur tax liability by this conduct, he would have registered the boat in Florida, and kept it in that state, rather than the Bahamas, for the remainder of the year.

Kushell appealed the tax assessment. An Administrative Law Judge ("ALJ") ruled that Kushell was liable for the tax, rejecting Kushell's contention that imposition of tax under § 8-716(c)(1)(iv) of the Natural Resources Article required that an owner have purchased his vessel with the intent to use it principally in Maryland. He also rejected Kushell's contention that DNR should be equitably estopped, based on the statements of its website and personnel, from collecting the tax. He further rejected Kushell's arguments that § 8-716(c)(1)(iv) is unconstitutionally vague.

The Secretary of Natural Resources adopted the entire proposed decision of the ALJ. Kushell filed in the Circuit Court for Anne Arundel County a petition for judicial review, and the Circuit Court affirmed the agency decision. Kushell noted a timely appeal to the Court of Special Appeals, and the Court of Appeals issued a Writ of Certiorari on its own initiative.

<u>Held</u>: Reversed. Applying ordinary rules of English grammar, the Court found that the plain text of § 8-716(c)(1)(iv), "an excise tax is levied . . . on: [t]he possession within the State of a vessel purchased outside the State to be used principally in the State," imposes a tax only on the possession of vessels purchased outside the state for the purpose of being used principally inside the State.

The Court found that "to be used principally in the State" is an infinitive phrase, functioning as an adverb conveying purpose and modifying the nearest plausible antecedent: the participial phrase "purchased outside the state." In order to achieve a contrary reading, the statute would have to be rewritten, either by varying word order, eliminating the words "to be," or adding punctuation. The Court stated that it would not "add or delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute."

The Court rejected DNR's argument that this reading of § 8-716(c)(1)(iv) would render superfluous the system of use tax abatement, set out at § 8-716(f), for vessels on which sales tax was paid to another state with reciprocal provisions. While it is true that the abatement will be unnecessary for owners who, like Kushell, have no boat tax liability under § 8-716(c)(1)(iv), the Court noted that it will still apply to owners who incur liability by re-titling vessels in Maryland, and will apply to owners who purchased vessels in other states with the intent to principally use them in Maryland.

Charles J. Kushell, IV v. Department of Natural Resources, No. 96, September Term, 2004, filed March 14, 2005. Opinion by Raker, J.

***

TORTS - NEGLIGENCE – PREMISES LIABILITY – DEFENSES AND MITIGATING CIRCUMSTANCES – PROFESSIONAL RESCUERS; "FIREFIGHTER'S RULE" – FIREFIGHTER WHO SUSTAINED INJURIES WHEN RESPONDING TO A MOTEL FIRE AFTER FALLING INTO AN OPEN STAIRWELL THAT WAS IMPERCEPTIBLE DUE TO SMOKE FROM THE FIRE CANNOT RECOVER DAMAGES AGAINST THE MOTEL OWNER BECAUSE OF THE FIREMAN'S RULE.

Facts: In the early morning hours of January 25, 2000, a fire broke out at the Regal Inn, a motel located at 8005 Pulaski Highway in Baltimore County and owned and operated by Shastri Narayan Swaroop, Inc ("Swaroop"). One of the firefighters that responded to the call about the fire was Jonathan D. Hart. Hart was employed as a Lieutenant with the Baltimore County Fire Department and his assigned functions upon arrival at the Regal Inn were search and rescue, and ventilation.

Upon arrival at the Regal Inn, the firefighters encountered heavy smoke conditions, which resulted in severely reduced visibility near the Regal Inn. Hart was ordered to a certain side of the Regal Inn to perform search and rescue efforts. After making his way to his assigned location, Hart sought a way to access the second floor of the Regal Inn to search for any trapped occupants. Using a specialized thermal imaging device, Hart saw what he believed to be a stairway to the second floor of the Regal Inn. As he made his way through the dense smoke in his approach toward the perceived stairway, Hart suddenly found himself stepping into an open space and, unable to prevent his descent, fell several feet into the well of an open and unguarded stairwell. Hart suffered severe injuries as a result of the fall.

On June 30, 2000, Hart filed a claim sounding in tort against Swaroop in the Circuit Court for Baltimore County. On August 20, 2001, subsequent to the completion of discovery, Swaroop filed a motion for summary judgment, claiming that Hart, as a matter of law, was precluded from bringing the action pursuant to the fireman's rule. On November 5, 2001, the circuit court denied Swaroop's motion.

The case was tried before a jury beginning on March 10, 2003. At the close of Hart's case, Swaroop moved for judgment. The circuit court denied Swaroop's motion. At the close of evidence, Swaroop renewed the motion but it was again denied. On March 12, 2003, the jury returned a verdict in favor of Hart as against Swaroop and awarded damages in the amount of $454,396.43.

On appeal to the Court of Special Appeals, that court, on July 19, 2004, reversed the judgment of the circuit court, holding that the fireman's rule barred Hart's claim and the circuit court had erred in denying Swaroop's motion for summary judgment and motions for judgment. Hart thereafter filed a Petition for Writ of Certiorari and on November 12, 2004, the Court of Appeals granted the petition.

<u>Held:</u> Affirmed. The Court of Appeals held that the fireman's rule, which generally prevents firefighters from recovering tort based damages inflicted by a negligently created risk that required their presence on the scene in their professional capacity, was applicable to the circumstances surrounding Hart's injury and, therefore, the fireman's rule barred Hart's tort claim against Swaroop.

After acknowledging that the fireman's rule now is based upon public policy considerations, as opposed to its initial basis in premises liability, the Court of Appeals stated that Hart's injuries occurred while he was in the midst of his firefighting duties at the moment he fell and was injured. The Court also stated that the open stairwell was not to be considered a "pre-existing hidden danger" under the circumstances, as it was open and obvious under normal conditions and only concealed because of the heavy volume of smoke from the fire. The Court concluded that Hart's injury was the kind that the fireman's rule is meant to bar.

Jonathan D. Hart, et ux. v. Shastri Narayan Swaroop, Inc. No. 89, September Term, 2004, filed March 14, 2005. Opinion by Cathell, J.

***

TORTS - NEGLIGENCE - STATUTE OR ORDINANCE - VIOLATION IS EVIDENCE OF NEGLIGENCE – REAFFIRMING *BROOKS V. LEWIN REALTY III, INC.*, 378 MD. 70, 835 A.2D 616 (2003), TO MAKE OUT A PRIMA FACIE CASE IN A NEGLIGENCE ACTION BASED ON THE BREACH OF A STATUTORY DUTY, A PLAINTIFF MUST SHOW (A) THE VIOLATION OF A STATUTE OR ORDINANCE DESIGNED TO PROTECT A SPECIFIC CLASS OF PERSONS WHICH INCLUDES THE PLAINTIFF, AND (B) THAT THE VIOLATION PROXIMATELY CAUSED THE INJURY COMPLAINED OF.

LIABILITY OF LANDLORD - REASONABLENESS OF ACTION – AFTER FINDING A VIOLATION OF THE ORDINANCE, BUT BEFORE A LANDLORD CAN BE FOUND LIABLE, THE TRIER OF FACT MUST DETERMINE WHETHER THE LANDLORD ACTED REASONABLY, GIVEN ALL THE CIRCUMSTANCES. IT IS INCUMBENT UPON THE LANDLORD TO TAKE SUCH REASONABLE STEPS AS MAY BE NECESSARY. WHAT QUALIFIES AS "REASONABLE" WILL DEPEND ON THE FACTS AND CIRCUMSTANCES OF EACH CASE.

RETROACTIVE APPLICATION OF LAW - APPLICATION TO ALL PENDING CASES – NEW INTERPRETATIONS OF CONSTITUTIONAL PROVISIONS, STATUTES OR RULES APPLY TO THE CASE BEFORE THE COURT AND ALL OTHER PENDING CASES WHERE THE RELEVANT QUESTION HAS BEEN PRESERVED FOR APPELLATE REVIEW.

Facts: In March of 1985, Lelia Whittington ("Lelia") and her daughter, Crystal Whittington ("Crystal"), moved into a residential rental property located at 17 North Bentalou Street, a row house in Baltimore City. It was built prior to 1950 and was later determined to contain lead-based paint. While residing at the property, Crystal gave birth to Jasmine on April 3, 1990. The women lived in the home for nine years until August of 1994 when Lawrence Polakoff, the owner, asked them to move out.

Lelia and Crystal testified that prior to moving into the Bentalou property they conducted a walk-through to inspect it. Both women testified that the windowsills, and baseboards had been freshly painted before they moved. The paint on the windowsills, however, was "bumpy" from having been applied on top of old chipping paint. Crystal testified that the majority of the walls had wallpaper on them but those that were painted had been freshly painted and were "smooth." The women testified that during their tenancy they noticed that the paint around the windows had begun to chip and flake. Crystal testified that she noticed chipping and flaking paint about 1½ years into the tenancy, while Lelia testified that she noticed the chipping "about two to three years" into the tenancy. Crystal also testified that around the same period of time, 1½ years into the tenancy, the wallpaper began to peel away from some of the walls, revealing painted walls with disintegrating plaster behind the wallpaper.

Prior to Jasmine's birth, a workman painted the two windowsills in the living room. The paint was applied again over top of the chipping and flaking paint without removing the old paint. According to testimony, the paint continued to chip. Other than the one time the windowsills were painted, no other painting or repairs to the chipping and flaking paint were made during the nine-year tenancy. There was testimony, however, that other repairs were made to the house, including work on the windows themselves.

In early 1993, when Jasmine was almost three years old, a routine physical revealed that she had elevated levels of lead in her blood. Doctors placed Jasmine on a special diet and gave her iron to treat the poisoning. Crystal was also instructed to remove anything from the home that could contribute to Jasmine's lead levels, e.g., lead containing dust.

Polakoff testified that at the time of the trial he had been in the real estate business for approximately thirty (30) years. He testified that at the time he leased the premises to the Whittingtons, he was aware of the following: that most housing in Baltimore City built before 1950 would probably contain some sort of lead-based paint; that deteriorating lead paint can be a potential danger to young children; that it was a violation of the Baltimore City Housing Code for a property to have peeling, chipping, or flaking paint; and that the Code requires flaking and chipping paint to be made smooth before repainting the surface. He also testified that he did not inspect 17 North Bentalou to see if it was "fit for habitation" before the Whittingtons moved in because "I have a painter working for me who had probably 30 years experience painting Baltimore City houses, mostly row houses. He knew the process. He was experienced. He had a level of expertise and he knew how to prepare a home for painting and that's what he did on all the houses he painted for me including 17 North Bentalou Street." Polakoff further testified that he did not inform Ms. Whittington of the dangers of lead paint prior to her moving in; however, he did inform her of the procedure for reporting needed repair work

Held: Affirmed. The Court reaffirmed *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 835 A.2d 616 (2003), which held that in order to establish a *prima facie* case in a negligence action involving the violation of a statute or ordinance, a plaintiff must show (a) the violation of a statute or ordinance that is designed to protect a specific class of persons which includes the plaintiff, and (b) that the violation proximately caused the injury complained of. Proximate cause is established if the plaintiff is within the class of persons sought to be protected and the harm suffered is of the kind intended to be prevented by the statute. Once those facts have been established, the trier of fact must decide whether the actions taken by the defendant were reasonable under all the circumstances.

The Baltimore City Code imposes duties and obligations upon landlords who rent residential property. Those duties include keeping the dwelling free of any flaking, loose, or peeling paint or paper. The duty to keep the property in compliance is continuous and failure to keep the property in compliance is evidence of negligence. That evidence of negligence does not amount to negligence *per se* or strict liability. Rather, it is *prima facie* evidence of negligence. Before a landlord can be found liable, the trier of fact must determine whether the landlord acted reasonably given the circumstances. What is "reasonable" will depend on the facts and circumstances of each case.

Liability will depend on the reasonableness of the landlord's efforts to remain in compliance with the statute; therefore, it is incumbent upon the landlord to take such reasonable steps as may be necessary. One surefire way of avoiding lead-paint poisoning liability is to remove lead paint from the rental property. We recognize, however, that the current law does not require this action. Less extreme options may include: notifying the tenant in writing and orally of the possible presence of lead paint in the property and its potential danger; asking the tenant to notify the landlord or property manager immediately if flaking, loose, or peeling paint occurs; and inspecting the property at the inception and at regular intervals throughout the tenancy to ensure that there is no flaking, loose, or peeling paint. This list is by no means exhaustive nor is it a guarantee that a jury will find the landlord's actions reasonable. Our point is simply to show that there are reasonable ways of attempting to satisfy one's duty pursuant to the Code.

In the case at bar, the plaintiff produced testimony that flaking, loose, or peeling paint existed as early as 1½ years into the tenancy and that the paint on the windowsills was "bumpy" from the inception of the tenancy as a result of new paint being applied on top of old chipping paint. There was testimony that prior to Jasmine's birth, a workman repainted the windowsills in the living room but, again, the new paint was applied on top of the old chipping paint. Jasmine met her burden of production regarding a violation of the Code. She established proximate cause by presenting evidence that she is a member of the class of people sought to be protected by the Code, and that her injury, lead-paint poisoning, is the type of injury the drafters of the Code sought to prevent. These two things taken together, a violation of the Code and proximate cause, establish a *prima facie* case of negligence. Consequently, Jasmine was entitled to have her case presented to the trier of fact for a determination of whether Polakoff acted reasonably given the circumstances.

The jury heard testimony that Polakoff was aware that most housing in Baltimore City built before 1950 would probably contain some sort of lead-based paint, that deteriorating lead paint can be a potential danger to young children, that it was a violation of the Code for a property to have peeling, chipping, or flaking paint, and that the Code requires that flaking and chipping paint to be made smooth before repainting the surface. Polakoff testified that he did not inspect the premises at the inception of the lease but instead relied on the experience of a painter with whom he had worked for many years. He further testified that at no time during the nine-year tenancy did he or anyone working for him inspect the interior of the house to ensure its compliance with the Code. Polakoff instead relied on tenants to notify him of needed maintenance. He further testified that he did not inform Ms. Whittington of the dangers of lead paint prior to her moving into the property. Based on this information, the jury could reasonably conclude that Polakoff did not act as a reasonable landlord would have acted, given the circumstances.

Lawrence Polakoff, et al. v. Jasmine Turner, No. 20, September Term, 2004, filed March 10, 2004, Opinion by Greene, J.

***

WORKERS’ COMPENSATION INSURANCE - Actual Notice of Cancellation of Insurance Required – § 19-406 (a) of the Insurance Article permits an insurer to choose whether to serve notice of cancellation of workers’ compensation insurance by personal delivery or by certified mail. Service by certified mail, however, is not complete upon mailing. The statute contemplates actual delivery of notice.

WORKERS’ COMPENSATION INSURANCE - Rebuttable Presumption of Delivery – The burden of proving notice is on the insurer. If the insurer can show that it mailed the notice by certified mail to the last known address of the employer, as stated in the statute, the insurer enjoys a rebuttable presumption that the notice actually arrived.

WORKERS’ COMPENSATION INSURANCE - Notice in the Case of Corporations or Partnerships – Notice in the case of an employer that is a corporation may be given to the employer pursuant to § 19-406 (a) of the Insurance Article, or to an agent or officer upon whom legal process may be served, pursuant to § 19-406 (b) of the Insurance Article. Notice in the case of an employer that is a partnership may be given to the employer pursuant to § 19-406 (a) of the Insurance Article or to a partner, pursuant to § 19-406 (b).

Facts: In October of 1997, Rockwood Casualty Insurance Co. issued a workers’ compensation insurance policy to the Carousel with coverage from December 23, 1997, through December 23, 1998. On December 30, 1997, Rockwood sent a Notice of Cancellation to Carousel by certified mail, cancelling the policy for failure to pay premiums. The notice was addressed simply to the “Carousel Hotel.” Both parties agree that the post office failed to produce evidence that the notice had been picked up or delivered to Carousel.

On March 7, 1998, Genora Hodge, a Carousel employee, sustained a work-related injury and filed a workers’ compensation claim. Rockwood argued that Carousel was uninsured because Rockwood had sent a proper notice, cancelling the insurance before the injury occurred. As a result, the employee asserted a claim against the Uninsured Employers’ Fund (UEF). The Commission determined that Rockwood had issued a workers’ compensation policy to Carousel and that Rockwood’s notice did not comply with the statutory requirements. Consequently, Rockwood had not successfully cancelled Carousel’s insurance before the injury to Ms. Hodge occurred.

Rockwood sought judicial review in the Circuit Court for Worcester County. Both Rockwood and UEF filed motions for summary judgment on the question of whether Rockwood’s notice was effective. On January 6, 2003, the Circuit Court for Worcester County granted UEF's motion, affirming the Commission. Rockwood appealed and the Court of Special Appeals affirmed in an unreported opinion.

Held: Judgment of the Court of Special Appeals affirmed. We hold that Section 19-406 of the Insurance Article requires the insurer to *serve* the employer with notice and gives the insurer two ways to accomplish service: personal service or service by certified mail. The term "to serve" implies actual receipt. If the Legislature intended some lesser standard, it could have just required the insurer to *send* or *mail* the notice to the employer by regular mail. Instead, it requires the insurer *to serve* the notice by personal delivery or by certified mail.

It is clear that the Legislature's purpose in passing § 19-406 was to ensure that employers actually receive notice before coverage is cancelled, so that employers have the opportunity to secure other insurance coverage. Statutory procedures for cancelling workers' compensation insurance must be strictly complied with in order to achieve a valid cancellation. Interpreting the statute to require insurers to prove that they served the employers with notice protects injured claimants.

In addition to our conclusion that the statute requires actual notice to the employer before a cancellation is effective, we also hold that if the insurer can show that it mailed the notice by certified mail to the last known address of the employer, as stated in the statute, the insurer enjoys a presumption that the notice actually arrived. The presumption, however, is rebuttable.

In the case at bar, there was evidence presented that the notice was never delivered to the employer. In such a case, the presumption that the notice actually arrived is rebutted. It is generally held that the burden of proving notice is on him who must give it. If the presumption that the properly-addressed letter arrived is rebutted, the insurer must then prove by other evidence that the employer received actual notice, or that the employer intentionally refused to receive the notice, amounting to an evasion of service. No such proof was offered by Rockwood in this case. The undisputed material facts in this case show that Rockwood failed to prove that it provided notice as required by the statute, entitling UEF to summary judgment on that issue. There can be no *presumption* of receipt of notice where the *undisputed evidence* shows that there was no delivery.

Finally, the Legislature has given insurers the option either to serve the notice on the "employer," under § 19-406 (a) (1), or if the employer is a corporation or a partnership, to serve "an agent or officer of the corporation on whom legal process may be served" or "a partner." Anyone authorized by the "employer" to receive the mail may accept delivery. Rockwood mailed the notice to the employer, as permitted by section 19-406 (a) (1). As it turns out in this case, no one at Carousel Hotel received the notice that was mailed "certified mail." If someone authorized by Carousel Hotel to receive the mail had accepted and signed for the mail and Rockwood could prove delivery by presenting the return receipt, the notice provisions of section 19-406 would have been satisfied. If the Legislature intended otherwise, it would have used the term "shall" instead of "may."

The purpose of this statute is to make sure that employers receive notice of the loss of insurance so that they can obtain new insurance to cover injured employees. Interpreting the statute to require actual notice to the employer, which in this case was "Carousel Hotel," the entity that entered into the agreement for insurance in the first place (and not necessarily to statutory agents, officers or partners of the employer) is consistent with that purpose without violating the plain language of the statute.

Rockwood Casualty Insurance Co. v. Uninsured Employers' Fund, No. 34, September Term 2004, filed February 8, 2005, Opinion by Greene, J.

***

WORKERS' COMPENSATION COMMISSION - INJUNCTIONS - AUTHORITY TO GRANT INJUNCTIVE RELIEF PENDING APPEAL OF A WORKERS' COMPENSATION AWARD - § 9-741 OF THE LABOR AND EMPLOYMENT ARTICLE PROHIBITS THE STAY OR INJUNCTION OF A WORKERS' COMPENSATION AWARD PENDING JUDICIAL REVIEW.

Facts: Linda Hanks filed a claim with the Workers' Compensation Commission, seeking benefits for an occupational disease sustained on March 1, 1990. The Commission determined that Hanks should be compensated. Thereafter, Hanks filed several issues, requesting additional relief from the Commission.

Gleneagles, Inc., the employer, contested Hanks's entitlement to additional benefits. In April 2000, Hanks impleaded the Subsequent Injury Fund.

In May, 2003, the Commission held a hearing and issued an Award of Compensation, finding, among other things, that Hanks had sustained a permanent partial disability, of which 50% was attributable to the occupational disease of March 1, 1990. The Commission also found that Hanks's claim was not barred by limitations. The Commission ordered Gleneagles to pay Hanks $282.00 per week, beginning April 28, 1992, and continuing for 333 weeks. The Commission also ordered the Fund to pay Hanks $144.00 per week, beginning at the end of Gleneagles' payments and continuing for 240 weeks.

Gleneagles filed a Petition for Judicial Review in the Circuit Court for Harford County. Gleneagles also filed a Request for Immediate Temporary Restraining Order and Request for Stay and/or Preliminary Injunction. On May 22, 2003, a judge of the Circuit Court held a hearing in chambers on those requests. The court issued a temporary restraining order on May 27, 2003, stating that the Commission's order of May 9, 2003, "is stayed by this order and the employer and insurer are required to make no monetary payments to the claimant pursuant to that order."

The court held another hearing on July 28, 2003, to address Hanks's request to review the Temporary Restraining Order. The court issued an Order and Memorandum Opinion on September 19, 2003, striking the prior order and stating that the court had no authority to grant a stay of an Award of Compensation issued by the Commission. Gleneagles appealed. In a reported opinion, the Court of Special Appeals affirmed the circuit court. Gleneagles petitioned this Court for *certiorari*, which we granted.

Held: Affirmed. Section 9-741 of the Labor and Employment Article states, in pertinent part, that "[a]n appeal is not a stay of: (1) an order of the Commission requiring payment of compensation[.]" Md. Code (1991, 1999 Repl. Vol.), § 9-741 of the Labor and Employment Article. In addition, Md. Rule 7-205 permits the court to grant a stay of an order or action of an administrative agency, under certain conditions. Md. Rules 15-501 et seq. provide the methods for obtaining injunctive relief generally. The language of § 9-741 of the Labor and Employment Article and the case law interpreting the "no-stay"provision states that in the case of a Workers' Compensation Commission award, the court may not grant a stay, under Md. Rule 7-205, or an injunction, because to do so is "prohibited by law."

While there are differences in the rules regarding obtaining a stay of an administrative decision and an injunction generally, the result in this case is the same. Whether it is called an injunction, a temporary restraining order, or a stay, Hanks was deprived of her workers' compensation award pending appeal. That is the very result the Legislature intended to avoid by enacting the "no-stay" provision. The general equitable powers of the courts cannot be relied upon in a case in which jurisdiction has been limited by law, as accomplished by § 9-741 of the Labor and Employment Article.

The statute in this case does not state "an appeal is not *an automatic* stay" of an order requiring payment of compensation, nor does it, in some other way, leave open the possibility that having overcome particular obstacles, one might be able to procure a stay. Neither does our statute permit the act of filing an appeal to effectuate an automatic stay. Rather, the Maryland statute states "an appeal is not a stay " of an order requiring payment of compensation. Md. Code (1991, 1999 Repl. Vol.), § 9-741 of the Labor and Employment Article. A fair view of that statutory language and our previous case law on the subject directs the outcome in this case – that is– that an employer/insurer is not entitled to a stay or injunction of a workers' compensation award pending judicial review.

Gleneagles argues that to deny them injunctive relief in this case is particularly harsh because of the large lump-sum payments ordered and because the law does not permit them to "recover back" any payments made even if they are ultimately successful on appeal. While we appreciate the difficult position in which Gleneagles finds itself as a result of the large lump-sum award, we are not permitted to change the law for them. The size of the award against Gleneagles is no reason to abandon our previous jurisprudence regarding the legislative mandate that an appeal is not a stay of a Commission award.

We will not violate the statutory mandate in any particular case in an attempt to avoid an unjust result. Seeming inequities in the Workers' Compensation Act must be remedied by the Legislature, should they consider it necessary. The Legislature is in the best position to make any changes to such a complicated and detailed system.

<u>Gleneagles, Inc., et al. v. Linda M. Hanks</u>, No. 57, September Term 2004, filed March 10, 2005, Opinion by Greene, J.

***

_____COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - STATUTORY INTERPRETATION; MONTGOMERY COUNTY CODE ("MCC"); ANIMAL CONTROL PROVISIONS; IMPOUNDMENT OF ANIMALS; PREREQUISITES FOR AN ANIMAL OWNER TO APPEAL A DECISION OF THE DIRECTOR OF THE ANIMAL SERVICES DIVISION ("ASD") TO THE ANIMAL MATTERS HEARING BOARD (THE "BOARD"); PREPAYMENT OF THE COST OF CARE FOR AN IMPOUNDED ANIMAL IS NOT REQUIRED BEFORE THE OWNER OF AN ANIMAL CAN APPEAL A DECISION OF THE DIRECTOR OF ASD TO THE BOARD.

Facts: On June 4, 2003, ASD officers executed a warrant to search a warehouse located at 2629 Garfield Street in Silver Spring, and to seize any animals defined as "dangerous" or "endangered" under the MCC. Inside the warehouse, which was the place of business for Reptile Connection, Inc., owned by Christopher Coroneos, the ASD officers found over 2000 exotic animals, including venomous snakes and lizards. Some of the animals were dead; some needed immediate veterinary care; and others were housed without access to light, heat, food, or water. ASD officers had begun removing the animals when Coroneos arrived at the scene. He could not provide copies of any state or federal permits for keeping the animals. ASD also seized a computer and other documents at the warehouse.

On June 5, ASD arranged for the impounded animals to be provided care through private vendors. Two days later, ASD informed Coroneos that he could appeal the seizure of his animals under MCC section 5-306(a), but that, under section 5-303(c), he would have to prepay the costs of boarding and caring for the animals to secure the appeal.

On June 9, Coroneos filed a *pro se* appeal to the Board, challenging the confiscation of his animals, computer, and documents. On June 12, Coroneos retained counsel, who wrote a letter to the Director of ASD, seeking waiver of the prepayment of the costs of care, which came to $45,390 per month. Counsel explained that to pay the amount would constitute a "serious financial hardship" to Coroneos, under MCC section 5-303(c)(7), and the figure was "far beyond" the actual cost of care.

On June 20, in response to the ASD's request, Coroneos's counsel sent the ASD Coroneos's 2001 federal and state tax returns, which showed a gross income of $47,722. Counsel explained that Coroneos had no other documentation, as it had been seized by ASD on June 4, 2003. The ASD subsequently denied Coroneos's request for a waiver of the prepayment amount and said that he would have to pay the $45,390 by June 27, 2003, or be deemed to have abandoned the animals under MCC section 5-303(c)(5).

On June 26, Coroneos's counsel wrote to the Director of ASD, asking that some of the animals for which Coroneos had buyers be returned to him, as he could not afford to make the prepayment. Coroneos's counsel asked for a hearing on the prepayment of costs issue, and also filed an appeal to the Board on behalf of Coroneos and his corporation, on the issues of impoundment and waiver. Counsel asked for a hearing on both issues.

On July 7, Coroneos's counsel proposed a settlement offer to the County Attorney, which would allow Coroneos to reclaim some of the reptiles while at the same time assure the County that the conditions at his place of business would be acceptable. The County Attorney subsequently rejected the settlement offer but extended the deadline for prepayment. He also said that, in lieu of prepayment, Coroneos could petition the Board to post a bond to pay these expenses, in the event that Coroneos did not prevail in his appeal. The bond amount would be $300,000.

On July 18, to initiate the instant case, the appellants filed in the Circuit Court for Montgomery County, a "COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, AND DAMAGES," alleging that the County had violated their due process rights under the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. They asked the court to enjoin the County from charging them for the costs of care of the animals without proof of costs; to enjoin the County from treating the animals as abandoned; to require the County to set conditions for the release of the animals; and to schedule an immediate hearing on the appeals to the Board.

On August 20, 2003, the County Attorney wrote to Coroneos's counsel, saying no appeals were pending before the Board and no hearing would be scheduled because the right to appeal was waived by not paying the fees, posting the bond, or making suitable arrangements for alternative care of the animals.

The County then filed a timely answer, discovery ensued, and the County filed a motion for summary judgment, arguing that the court lacked subject matter jurisdiction because the appellants had not exhausted their administrative remedies; and that the appellants had waived their right to appeal by not prepaying the cost of care expenses. The appellants filed a timely opposition to the motion, arguing that, under the proper interpretation of MCC section 5-306(c), they were not required to prepay the cost of care of the animals to pursue an appeal to the Board, but by conditioning their appeals on prepayment, they were denied administrative process.

The court held a hearing on the motion and granted summary judgment for the County on the ground that the appellants had waived their right to the process they were due by not making the prepayment, posting the bond, or securing alternative arrangements for the care of the animals. The court determined that MCC sections 5-303 and 5-306, read together, made completing one of these three options a precondition to an appeal to the Board. The appellants appealed to the Court of Special Appeals.

Held: Reversed and remanded for further proceedings. The Court of Special Appeals held the appellants were not required, by MCC section 5-306(c), to prepay the cost of care, post a bond, or arrange adequate care for the animals, as a condition to pursuing their appeals. The Court reasoned that section 5-306(c) plainly and unambiguously requires payment of the cost of impoundment before and during an appeal from an order issued or affirmed *by the Board*, but does not impose a prepayment requirement for an appeal from a decision *by the Director* to the Board. The Court noted that, by its express language, section 5-306(c) applies only to appeals taken from orders *by the Board* and makes no reference to appeals from a decision *by the Director* to the Board. The Court concluded that it was not necessary to analyze section 5-303 to determine the meaning of section 5-306(c); it noted that, when read in harmony with section 5-306, section 5-303 imposes liability on an animal owner for the costs of care, but does not make the prepayment of these costs a prerequisite to appeal to the Board a decision by the Director.

The Court also commented on the issue, raised by the appellees, that the appellants failed to exhaust their administrative remedies under section 5-306, and therefore the circuit court lacked subject matter jurisdiction to hear the case. The Court explained that the doctrine of exhaustion of remedies is not ordinarily a limitation on the subject matter jurisdiction of the circuit court and is implicated only when a litigant attempts to invoke a circuit court's original jurisdiction to adjudicate a claim based on a statutory violation for which there is an administrative remedy. The Court noted that the appellants resorted to the circuit court only after they were denied an administrative remedy, when the Board treated their case as if no administrative remedy were available. The Court also noted that an exception to the doctrine of exhaustion of remedies is when an agency requires that a party follow, to a significant manner and degree, an unauthorized procedure. The Court reasoned that this exception applied to the appellants when the County told them, on behalf of the Board, that the administrative remedy of appeal was preconditioned on a prepayment that the law did not require the appellants to make.

<u>Christopher Coroneos, et al. v. Montgomery County, Maryland,</u> No. 265, September Term, 2004, filed March 1, 2005. Opinion by Eyler, Deborah S., J.

***

<u>CIVIL PROCEDURE - JURISDICTION OVER PARTNERSHIP - MD. CODE (2002 REPL. VOL.), CTS. & JUD. PROC. (C. J.), § 6-102; GENERAL *IN PERSONAM* JURISDICTION OF FOREIGN CORPORATION BY SERVICE OF PROCESS ON MARYLAND CORPORATE GENERAL PARTNER; MD. CODE, (1999 REPL. VOL.) CORPS. & ASS'NS (C.A.), § 9A-201; BECAUSE MARYLAND CURRENTLY EMPLOYS THE ENTITY THEORY OF PARTNERSHIPS, RATHER THAN THE COMMON LAW VIEW OF A PARTNERSHIP AS AN AGGREGATE OF THE INDIVIDUAL PARTNERS, JURISDICTION CANNOT BE CONFERRED ON MARYLAND COURT BY VIRTUE OF THE FACT THAT GENERAL PARTNER IS DOMICILED IN MARYLAND IN CASE WHERE LIMITED PARTNER WHOSE BUSINESS TRANSACTIONS FORMED BASIS OF LITIGATION IS DOMICILED EITHER IN DELAWARE OR CALIFORNIA, AND HAS CONDUCTED NO ACTIVITIES IN MARYLAND; NEITHER CAN JURISDICTION BE CONFERRED ON MARYLAND COURT BY VIRTUE OF SERVICE OF PROCESS ON GENERAL PARTNER REINCORPORATED IN MARYLAND IN CASE WHERE, ALTHOUGH GENERAL PARTNER IS AUTHORIZED PURSUANT TO § 6-102 TO RECEIVE SERVICE, CORPORATION HAS NO OTHER CONTACTS WITH THE STATE; LOWER COURT ERRED IN DENYING THE MOTION TO DISMISS FOR LACK OF *IN PERSONAM* JURISDICTION IN CASE WHERE THERE WERE NO CONTACTS, MUCH LESS MINIMUM CONTACTS WITH THE STATE OF MARYLAND; DISMISSAL AS TO LIMITED PARTNERSHIP ALSO REQUIRED DISMISSAL AS TO CORPORATE GENERAL PARTNER.</u>

<u>Facts</u>: Limited partners of a California joint-venture (JV) construction and lease partnership sued the JV's general partner, which itself was a California limited partnership, and that limited partnership's corporate general partner, in the Circuit Court for Baltimore City, serving the JV's general partner by service in Maryland upon corporate general partner, a corporation organized under the laws of Maryland. The causes of action had no relation to Maryland other than service of process in Maryland; no defendant conducted any business in Maryland, related or unrelated to the parties' dispute. The circuit court denied defendants' motions to dismiss for lack of general personal jurisdiction over foreign

business entity.

<u>Held</u>: Judgment vacated. The trial court never acquired personal jurisdiction over nonresident limited partnership, which was a necessary party to the litigation. The nonresident limited partnership was not domiciled in Maryland by virtue of the fact that its corporate general partner was a Maryland corporation. Although service of process on corporate general partner sufficed, under Maryland law, to effect service upon the nonresident limited partner, such in-state service could not constitutionally permit Maryland to exercise general personal jurisdiction over nonresident business entity.

<u>Mission West Properties, L.P. et al. v. Republic Properties Corporation et al.</u>, No. 524, September Term, 2004, decided March 1, 2005. Opinion by Davis, J.

***

<u>CONTRACTS - PARTIES CONTRACT MINDFUL OF EXISTING LAW - EXISTING LAW INCORPORATED UNLESS CONTRARY INTENT - BALTIMORE CITY CHARTER IN EXISTENCE AT THE TIME PARTIES DRAFTED CONTRACTUAL DISPUTE RESOLUTION CLAUSE - CHARTER PROVISIONS MUST BE INCORPORATED INTO THE CONTRACTUAL CLAUSE TO CONFORM CLAUSE TO CHARTER - CLAUSE VOID TO THE EXTENT IT CONFLICTS WITH CHARTER - PURSUANT TO CHARTER, CITY HAS DISCRETION AS TO WHICH DISPUTE RESOLUTION PROCEDURE IS APPROPRIATE</u>

<u>Facts</u>: Appellant, a general contractor, entered into a building contract with the City of Baltimore under which appellant was to construct a police station for the City. Alleging numerous performance failures on the part of the City, appellant claimed that the City had materially breached the contract.

After limited, unsuccessful, attempts to resolve the dispute through administrative channels, appellant brought an action in the Circuit Court for Baltimore City, seeking a declaratory judgment that the City was contractually compelled to submit to binding arbitration. Appellant and the City both filed Motions for Summary Judgment. The circuit court denied appellant's Motion and granted summary judgment in favor of the City.

Central to the litigation was the parties' contractual dispute resolution clause. That clause permitted the Director of Public Works to issue final and binding determinations as to any question touching upon the contract. Appellant argued that the language of the clause required the parties to submit their disputes to binding arbitration. In the alternative, appellant argued that the clause was void because it conflicted with the language of the Baltimore City Charter. Appellant sought to have the clause conformed to a Charter provision which required binding arbitration.

The City argued that the contractual clause was of no effect, having been subsumed by provisions of the Charter. The City asserted that the Charter permitted it to direct any dispute to either an arbitration procedure or administrative remedy.

<u>Held</u>: Affirmed. It is well established that parties are presumed to contract mindful of the existing law and that all applicable laws must be read into the agreement of the parties as if expressly provided by them. The Baltimore City Charter existed at the time the parties drafted the contract and dispute resolution procedure clause. As a result, the Charter provisions are incorporated into the clause.

The clause is void to the extent that it provides for mandatory arbitration in conflict with the Charter. The Charter provides for judicial review of the decision of a public official. Consequently, the clause isvoid to the extent that it provides no judicial review from a final and binding determination of the Director of Public Works, a city official.

Additionally, the City, pursuant to the Charter, has the prerogative as to whether a dispute will be directed to either an arbitration procedure or administrative remedy.

<u>Baltimore Contractors, LLC v. Mayor and City Council of Baltimore</u>, No. 2808, Sept. Term, 2003, filed February 28, 2005. Opinion by Sharer, J.

***

<u>CRIMINAL LAW - ATTORNEY'S FAILURE TO FILE POST TRIAL MOTION - MARYLAND RULE 4-345(b), *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 687,</u>

104 S.CT. 2052, 2064 (1984) *FLANSBURG V. STATE*, 103 MD. APP. 394 (1995), AFF'D, 345 MD. 694 (1997); *GARRISON V. STATE*, 350 MD. 128, 139 (1998 *GROSS V. STATE*, 371 MD. 334, 349 (2002)); WHEN A DEFENDANT IN A CRIMINAL CASE IS DENIED HIS RIGHT TO A DESIRED MOTION FOR MODIFICATION OF SENTENCE THROUGH NO FAULT OF HIS OWN, HE IS ENTITLED TO FILE A BELATED MOTION FOR MODIFICATION OF SENTENCE, WITHOUT THE NECESSITY OF PRESENTING ANY OTHER EVIDENCE OF PREJUDICE.

Facts: In 1997, appellant was convicted in the Baltimore City Circuit Court for various offenses. He was sentenced to a ten year term of incarceration, with eight years suspended in exchange for five years of probation. Upon his release, he was convicted of a crime in 1999, while on probation. The court found that appellant violated his probation and reimposed the eight year suspended sentence. In 2001, appellant filed a petition for post conviction relief, asking the court to permit him to file a belated motion for modification of his sentence, as the delay was not his fault. The court denied him relief, finding that appellant did not satisfy prong two of the *Strickland v. Washington*, 466 U.S. 668 (1984), test, because although appellant showed counsel's performance was deficient, he did not prove that the attorney's performance prejudiced him. The court noted that even though appellant requested that his attorney timely file the motion, the motion to modify would not have been granted.

On appeal, appellant argues that, pursuant to *State v. Flansburg*, 345 Md. 694 (1997), he is entitled to relief.

Held: When a defendant in a criminal case is denied his right to a desired motion for modification of sentence through no fault of his own, he is entitled to file a belated motion for modification of sentence, without the necessity of presenting any other evidence of prejudice. In *Flansburg*, although the defendant had requested that his attorney file a motion for modification of sentence, the attorney failed to do so. In the defendant's petition for post conviction relief, he claimed his attorney's failure to file the motion deprived him of his right to counsel. The circuit court denied his petition, stating his requested relief was not permitted under the Maryland Post Conviction Procedure Act. We reversed the circuit court and the Court of Appeals affirmed our decision.

The Court of Appeals held that the attorney's failure to follow the client's directions to file a motion is a ground for the post conviction relief the defendant sought - permission to file a belated motion for reconsideration of his sentence. Based on *Flansburg and Strickland*, we conclude that the failure of an attorney to follow a client's directions to file a motion for modification of sentence is a sufficient failure by itself to show prejudice, because the defendant was unable to have a reconsideration of sentence hearing. Therefore, if a defendant asks his or her attorney to file a motion for reconsideration of sentence, and the attorney fails to do so, the defendant must be afforded the opportunity to file a belated motion, without the necessity of presenting any other evidence to establish prejudice.

Lamont Matthews v. State of Maryland, No. 2321, September Term, 2001, decided February 24, 2005. Opinion by Davis, J.

***

CRIMINAL LAW - HEARSAY - MISTRIAL - SENTENCING:

Facts: Appellant, John Allen Rutherford, was charged with, *inter alia*, the second degree rape and child abuse of his five-year-old daughter, Sarah. On an occasion in November 2001, Sarah's distraught behavior and certain statements she made led a neighbor to contact the police and take Sarah to the hospital.

At the hospital, a physical examination of the child disclosed that she had sustained trauma to her genitals and surrounding tissue. Sarah told the examining physician that on a number of occasions her father had touched her privates, put his penis in her vagina, and put his penis in her mouth.

A social worker testified at trial that Sarah had told her at the hospital that "Daddy had touched her privates, daddy had rubbed her privates, daddy had put his thingie in her mouth, [and] daddy had put his private in her private." The social worker also testified that, sometime thereafter, she visited Sarah at her school and Sarah recanted, saying that "daddy didn't do it," and that "three black boys down the street" had done it. Sarah could offer no supporting details, however. The social worker added that Sarah admitted to having conversations with appellant and his mother about the time of Sarah's recantations, which prompted appellant to move for a mistrial. The court denied the mistrial request, but instructed the jury to disregard this testimony.

Another witness for the State, Leslie O'Keefe, testified that she was transported in an inmate van to the courthouse with appellant on May 22, 2002, and that she spoke with appellant. O'Keefe testified that appellant said he was in jail because he had supposedly raped his five-year-old daughter, and that DNA found on the blanket of his bed "came back positive." Appellant argued that, under the common law doctrine of verbal completeness, he should be allowed to elicit testimony concerning a second conversation appellant had allegedly had with O'Keefe. During that conversation, which occurred later in the day, appellant informed O'Keefe that his mother told him that she had seen Sarah putting Barbie dolls into her vaginal area. The court denied appellant's request to examine O'Keefe about this conversation.

Appellant was convicted of second degree rape, child abuse, and other lesser offenses. The court imposed, *inter alia*, consecutive sentences for rape and child abuse.

Held: Affirmed. The common law doctrine of verbal completeness allows a party to admit the remainder of a writing or conversation in response to the admission, by an opponent, of part of that writing or conversation. The trial court did not abuse its discretion in refusing to permit appellant to question O'Keefe about the second conversation that appellant had allegedly had with O'Keefe. The second conversation took place several hours after the first and was not necessary to correct any misleading impression left by the first.

The court did not abuse its discretion in refusing to grant appellant's requested mistrial. The court agreed with appellant that the social worker's testimony, implying that appellant and his mother were trying to manipulate Sarah and caused her recantation, was objectionable. The court declined to grant the extreme sanction of a mistrial, but instructed the jury to disregard the objectionable testimony. Given this, and that the objectionable testimony was mentioned but once, and that the jury heard considerable evidence of appellant's guilt, including DNA evidence, the court did not abuse its discretion in denying the mistrial.

The court's sentencing appellant to consecutive sentences for rape and child abuse did not offend the double jeopardy prohibition against multiple punishments for the same offense. The test for determining when separate sanctions may be imposed on multiple offenses arising out of the same criminal transaction, *Blockburger v. United States*, 284 U.S. 299 (1932), is a rule of statutory construction, and therefore does not control when there is clear legislative intent to impose multiple punishments. *See id.; Missouri v. Hunter*, 459 U.S. 359 (1983); *Albernaz v. United States*, 450 U.S. 333 (1981). Because the General Assembly has expressly provided for separate punishment for child abuse and the underlying abusive behavior, in this case, rape, separate sentences were proper.

Rutherford v. State, No. 131, September Term, 2003 - filed December 23, 2004; opinion by Barbera, J.

***

CRIMINAL LAW - SENTENCING CREDIT STATUTE:

Facts: On September 1, 2002, appellant, Anthony Gilmer, engaged in a fist fight with fellow detainee, Jonathan blue, at the Baltimore City Detention Center. Shortly after a correctional officer halted the fight, appellant and Blue resumed fighting. Appellant stabbed Blue with a knife in the head and neck.

Appellant was convicted by a jury in the Circuit Court for Baltimore City of first and second degree assault. The court merged the convictions and sentenced appellant to fifteen years' imprisonment. Appellant argued that, under Maryland Code (2001), § 6-218(b) of the Criminal Procedure Article, the court should have awarded him credit for time served from July 2, 2001, the date on which appellant began incarceration on an unrelated charge that resulted in a *nolle prosequi*. The court refused to award appellant that credit, but did credit his sentence with time served from September 1, 2002 (the date of the assault in this case) until the date of his sentence.

Appellant also argued, on appeal, that the court erred in refusing to ask the proposed *voir dire* question, "Do you believe that evidence produced by the Defendant in his defense is less credible than evidence produced by the State?"

Held: Affirmed. Maryland Code (2001), § 6-218(b)(2) of the Criminal Procedure Article provides that credit must be given on a defendant's sentence for time spent incarcerated on an unrelated charge that results in dismissal or acquittal. A *nolle prosequi* entered before trial and not tied to a plea bargain is not tantamount to either a dismissal or an acquittal. A *nolle prosequi* falls within the category of all other cases to which § 6-218(b)(3), not (b)(2), speaks. Under § 6-218(b)(3), the court possesses the discretion to award sentencing credit for time served on an unrelated charge. Because in this case the unrelated charge resulted in a *nolle prosequi*, the court had the discretion whether to award credit, and did not abuse its discretion in declining to award such credit.

Additionally, a trial court enjoys considerable discretion in its management of *voir dire*, including the scope and specific wording of the questions asked. When a defendant requests that the court pose a specific question, and the court refuses to ask that question verbatim, a relevant inquiry on appeal is whether the proposed question was adequately covered by those questions actually asked by the court.

The court refused to ask the exact question as worded by appellant. Nevertheless, the court asked whether anyone had "prejudged the evidence, that is as to what the State may give or the defense may give as to what is credible without hearing it in this case?" The court also asked the prospective jurors whether they had any known bias that might affect their ability to render a fair and impartial verdict. The court later asked whether counsel had anything further to add and defense counsel responded that he did not.

On this record, appellant waived any challenge to the court's refusal to ask his proposed *voir dire* question. Even if properly preserved, the court's *voir dire* adequately covered any bias the defendant attempted to uncover in his proposed question, so the court did not abuse its discretion in declaring to ask the question as framed by defense counsel.

<u>Gilmer v. State of Maryland</u>, No. 787, September Term, 2003 - filed January 28, 2005; opinion by Barbera, J.

***

<u>TORTS - FALSE IMPRISONMENT - LEGAL JUSTIFICATION FOR CONTINUED</u>

POST-ARREST DETENTION OF A PERSON BASED ON A FACIALLY VALID WARRANT; OFFICERS HAVE LEGAL AUTHORITY TO DETAIN PURSUANT TO A WARRANT A PERSON THEY REASONABLY AND IN GOOD FAITH BELIEVE IS THE PERSON WHO IS THE SUBJECT OF THE WARRANT BUT THEY HAVE AN OBLIGATION TO USE REASONABLE DILIGENCE TO DETERMINE THAT THE PERSON HELD IN FACT IS THE SUBJECT OF THE WARRANT - WHETHER OFFICERS DETAINING PERSON WERE NOT DOING SO UPON THE REASONABLE AND GOOD FAITH BELIEF THAT SHE WAS THE SUBJECT OF THE WARRANT WAS A QUESTION OF FACT PRECLUDING SUMMARY JUDGMENT.

Facts: On Friday, March 7, 2003, at 5:00 p.m., Evelyn Dett was stopped by police for a traffic violation. The officer ran a background check on Dett's name, revealing an open bench warrant for "Vanessa Hawkins a/k/a/ Evelyn Dett," having State Identification ("SID") number 381961. An SID number is a unique number assigned by the Central Booking and Intake Center ("Central Booking") based on a person's fingerprint. The officer, believing Dett was the subject of the bench warrant, arrested her and took her to Central Booking, where Dett was held pursuant to a commitment order issued that evening by the Baltimore City Sheriff, for "Vanessa Hawkins" with "SID no. 381961."

Beginning at 6:15 p.m., Dett was booked, photographed, and fingerprinted. When her fingerprint was uploaded, it generated an SID number of 2413966. Several computer searches were then run on this new SID number, a flag was inserted into Dett's identification record, and an employee of Central Booking filled out a "Problem Paperwork Notice" requesting that Dett be re-fingerprinted so that the correct SID number could be ascertained. The employee noted on the Problem Paperwork Notice that she had been told nothing could be done about the SID number discrepancy until Monday.

At 7:30 p.m., Dett was moved to a group cell where she remained until her release at 1:30 a.m. to the Detention Center. Several reports generated at that time used SID number 2413966, and one of them used Dett's birth date, not the birth date on the bench warrant.

Around 6:00 a.m. on Saturday, several more searches were conducted on both SID numbers. There was no information in the criminal records database on Dett's SID number, 2413966. A search of SID number 381961, the number of the person wanted on the bench warrant, revealed that the person had had seven prior encounters with Central Booking and used Dett's name and date of birth as an alias. There were no further entries for Saturday and none for Sunday, March 9th. On Monday, March 10, there were two entries on the Problem Paperwork Notice, one of which says "these are two different people."

On Tuesday, an employee at Central Booking requested a "court seal & true test" for Vanessa Hawkins, SID No. 2413966. Later that day, the Sheriff issued a document directing the release of Vanessa Hawkins, with SID number 2413966, stating "Wrong Defendant." Dett was released at 3:00 p.m.

From the time of the arrest, Dett protested that she was not the person wanted in the bench warrant. She was told at Central Booking that if her fingerprint did not match the fingerprint of the person wanted in the warrant, she would be released. When her fingerprint did not match, she was not released, but moved to the Detention Center.

On December 12, 2003, Dett filed suit in the Circuit Court for Baltimore City against the State; the Department of Public Safety and Correctional Services; the Division of Pretrial Detention and Services ("DPDS"); the Detention Center; Central Booking; and the Division of Parole and Probation for false imprisonment and violation of her due process rights under Article 24 of the Maryland Declaration of Rights. She alleged that she suffered damages and demanded a jury trial. Without filing an answer and before any discovery was taken, the appellees filed a joint motion for summary judgment and memorandum of law, supported by documents generated by Central Booking; the bench warrant; the Sheriff's confinement order and "release"; and an affidavit of an assistant warden at Central Booking. The appellees alleged that no material facts were in dispute and that they had legal justification to hold Dett, and that, under *Glover v. State*, 143 Md. App. 313 (2002), they could not release her without a court order.

Dett filed an opposition, and the appellees filed a reply, arguing that DPDS "acted reasonably once it had reason to suspect that [Dett] was the wrong person . . . in custody." Neither party requested a hearing. The court issued an order granting summary judgment, and Dett appealed to the Court of Special Appeals.

<u>Held:</u> Reversed and remanded for further proceedings. The Court of Special Appeals held that whether DPDS had legal justification to detain Dett based on a facially valid warrant depended on whether DPDS reasonably and in good faith believed that Dett was in fact the subject of the warrant.

The Court first distinguished *Glover* from the instant case. The Court explained that in *Glover*, a court issued a bench warrant for "James Glover," with SID number 991140962, and DPDS detained a James Glover having that SID number. It was later discovered that the court had issued the bench warrant for the wrong James Glover. Being an error in warrant *issuance* and not *execution*, the Court held that DPDS had the lawful authority to detain James Glover; had no duty to investigate whether they had detained the correct person despite his protestations; and could not release him without a court order correcting the mistake. The Court distinguished the instant case as involving an error of *execution* of a warrant; therefore, it concluded that the reasonable and good faith belief of DPDS that Dett was the person wanted by the bench warrant was a necessary part of the analysis of whether DPDS had legal justification to hold her.

Concluding *Glover* was inapposite to the instant case, the Court reasoned that DPDS did not have to procure a court order before releasing Dett; in fact, the Court explained that if DPDS did not reasonably believe Dett was the person wanted in the bench warrant, DPDS was obligated to release her, as they were without legal justification to hold her. The Court noted that issues of good faith and reasonable belief are questions not suitable for resolution on summary judgment. It also observed that the summary judgment record plainly presented a genuine dispute of material fact as to whether, at some point during Dett's four-day detention, the appellees no longer believed Dett was the subject of the bench warrant and commitment order pursuant to which they were holding her. Accordingly, the Court concluded that the issue of whether legal justification to detain Dett could not be decided as a matter of law, and summary judgment on that ground was improper.

Noting that summary judgment for Dett's state constitutional tort claim was granted for the same reason, the Court found that summary judgment should not have been granted on that claim, on that basis, either.

Evelyn Yulonda Dett v. State of Maryland, et al., No. 286, September Term, 2004, filed March 1, 2005. Opinion by Eyler, Deborah S., J.

***

ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective March 9, 2005:

DENISE R. STANLEY

*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective March 10, 2005:

ROBERT PHILIP THOMPSON

*

By an Opinion and Order of the Court of Appeals of Maryland dated March 16, 2005, the following attorney has been disbarred from the further practice of law in this State:

CHARLES M. JAMES, III

*

By an Opinion and Order of the Court of Appeals of Maryland dated March 17, 2005, the following attorney has been indefinitely suspended from the further practice of law in this State:

BRENDA C. BRISBON

*

By an Opinion and Order of the Court of Appeals of Maryland dated March 18, 2005, the following attorney has been indefinitely suspended from the further practice of law in this State:

ANDREW M. STEINBERG

*

By an Order of the Court of Appeals of Maryland dated March 18, 2005, the following attorney has been suspended for sixty (60) days by consent effective May 1, 2005, from the further practice of law in this State:

STEPHEN P. BOUREXIS

*