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Facts:

Crystal Ford sold Mr. Frazier an extended warranty for his 2003 Ford Explorer. The actual duration of the warranty was two years shorter than what Mr. Frazier was told by the salesperson, and as a result, Mr. Frazier incurred unanticipated repair expenses when he had his vehicle serviced. Crystal Ford did not respond to informal complaints by Mr. Frazier or his attorney. Mr. Frazier then filed a complaint styled as a class action, alleging fraud and violation of the Maryland Consumer Protection Act.

Mr. Frazier did not immediately file a motion for class certification, but sought discovery from Crystal Ford concerning warranties they had sold to other customers. Rather than comply with the discovery demand, Crystal Ford paid to extend Mr. Frazier's warranty to the original promised date and offered to compensate him for his repair expenses. He declined the offer.

On motion by Crystal Ford, the Circuit Court denied class certification on the ground that Mr. Frazier's claim was moot and granted summary judgment in part to Crystal Ford on both counts, holding that Mr. Frazier was precluded from obtaining punitive damages. At a later hearing to determine the award of attorney's fees under the Consumer Protection Act, the court awarded to Mr. Frazier his full attorney's fees, including expenses incurred in pursuit of class certification after the offer to compensate him, taking into account that he had induced Crystal Ford to correct the warranties of other customers.

Mr. Frazier appealed the denial of class certification and grant of summary judgment, and Crystal Ford appealed the award of attorney's fees. The Court of Special Appeals affirmed.

Held: Reversed in part, affirmed in part.

The Court reversed the lower court's holding that tender of relief to a prospective class representative prior to class certification requires denial of class certification. To deny class certification simply as a result of a tender of individual relief to the representative plaintiff would frustrate one of the purposes of the class action device – to make financially practical those cases with large amounts of harm spread thinly over numerous plaintiffs leading to small individual amounts in controversy. Denial of class certification would be appropriate only if the prospective class plaintiff had a reasonable opportunity to seek class certification, including any necessary discovery.

The Court also held that punitive damages – if otherwise appropriate – may be awarded when a defendant tenders compensatory damages. There must be an underlying compensatory damages award with respect to a particular injury before a fact-finder may award punitive damages for that injury, but a tender of compensatory damages can satisfy this requirement. As punitive damages were not tendered by Crystal Ford, summary judgment on grounds of mootness was inappropriate because the full remedy that the court could provide had not been provided.

Finally, the Court affirmed the award of attorney's fees. It was within the discretion of the Circuit Court to consider, within the "results obtained" by the attorney's efforts, the benefits already obtained for prospective class members.

Ronald L. Powell, et al. v. Jeffrey Breslin, et al., No. 11, September Term 2012, filed October 19, 2012. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2013/11a12.pdf

CIVIL PROCEDURE – APPEALS – JUDICIAL REVIEW – RES JUDICATA – PRESERVATION OF CLAIMS – RELIEF FROM JUDGMENTS – EXCUSABLE MISTAKES & NEGLECT

ON REVIEW OF A DENIAL OF A MOTION TO REOPEN CASE AND VACATE JUDGMENT (AN EFFORT TO REVIVE CLAIMS BARRED BY RES JUDICATA), APPELLANT WAS NOT ENTITLED TO RELIEF WHERE RES JUDICATA BARRED THE RELITIGATION OF THE SAME CLAIMS RAISED IN A PREVIOUS SUIT AND PURSUED ON APPEAL (CREATING PARALLEL LITIGATION), BUT APPELLANT FAILED TO PURSUE AVAILABLE PROCEDURAL MEANS TO PRESERVE HIS INITIAL CLAIMS BY REQUESTING APPROPRIATE STAYS. MOREOVER, THERE WAS AN ABSENCE OF CLEAR AND CONVINCING EVIDENCE THAT FRAUD, IRREGULARITY, OR MISTAKE OCCURRED IN THE LOWER PROCEEDINGS.

Facts:

Ronald L. Powell, joined with Brian Powell and Lisa L. Powell (collectively referred to as "Powell"), brought suit against Dr. Jeffrey R. Breslin (employed by Drs. Kremen, Breslin & Fraiman, P.A.) for the injury and ultimate death in 2004 of their father, Jackie D. Powell, caused allegedly by the medical negligence and lack of informed consent in the administration by Dr. Breslin of epidural anesthesia. On 30 July 2004, Powell filed a Statement of Claim (commencing *Powell* I) with the Maryland Health Care Alternative Dispute Resolution Office ("HCADRO") along with a Certificate of Qualified Expert and Report ("Certificate"), pursuant to Md. Code (1974, 2006 Repl. Vol. 2010 Supp.), Courts and Judicial Proceedings Article ("CJP") § 3-2A-04(b). Powell filed a notice of intention to wave arbitration before the HCADRO ,and the claim was transferred to the Circuit Court for Baltimore City on 8 August 2005. Due to the inability of Powell's medical expert to attest to the standard of care applicable to vascular surgeons, such as Dr. Breslin, thereby rendering Powell's Certificate insufficient as a matter of law, Judge Allison of the Circuit Court granted Dr. Breslin's Motion for Summary Judgment on 24 January 2007.

Powell appealed the grant of summary judgment to the Court of Special Appeals on 27 March 2009. The intermediate appellate court held that when a Certificate is insufficient as a matter of law under CJP § 3-2A-04(b) because it was signed by an expert who was not qualified to attest to the standard of care required by CJP § 3-2A-02(c), the appropriate remedy is to dismiss the suit against the Defendants, without prejudice. *Powell v. Breslin*, 195 Md. App. 340, 361, 6 A.3d 360, 372 (2010). The Court of Appeals affirmed that judgment in *Breslin v. Powell*, 421 Md. 266, 298-99, 26 A.3d 878, 898 (2011) ("*Powell* I"), and directed the vacation of Judge

Allison's grant of summary judgment. *Id.* at 299, 26 A.3d at 898. By the time that Judge Pierson of the Circuit Court (Judge Allison having retired in the interim) entered an order dismissing the complaint without prejudice on 28 September 2011, unfortunately the statute of limitations for the claims in *Powell* I had expired.

The procedural time line for the present case, *Powell* II, began on 2 February 2007, when Powell filed a second, identical Statement of Claim as had been filed initially with the HCADRO in *Powell* I. It appears that Powell initiated *Powell* II as an effort to maintain a viable claim, in that *Powell* I remained pending and undecided on appeal at the time. Powell then filed a Certificate and waived arbitration in *Powell* II on 27 July 2007. The claim was transferred to the Circuit Court on 27 August 2007. Soon after, Dr. Breslin filed a Motion for Summary Judgment, claiming that the doctrine of res judicata barred the relitigation of Powell's claims. Judge Pierson agreed, and granted summary judgment. Due to clerical errors in the mailing of Judge Pierson's order, Judge Cannon vacated Judge Pierson's order and granted summary judgment anew on 3 November 2008.

On 10 December 2008, Powell appealed, which resulted in concurrent appeals of *Powell* I and *Powell* II pending in the Court of Special Appeals. On 7 July 2009, however, Powell dismissed his appeal of *Powell* II in the Court of Special Appeals. Approximately two years later, Powell filed on 12 October 2011 in the Circuit Court a Motion to Reopen Case and Vacate Judge Cannon's grant of summary judgment, pursuant to Md. Rule 2-535, based on the hindsight that her reliance on the preclusive effect of Judge Allison's decision in *Powell* I was faulty because Judge Allison's decision was found on appeal ultimately to be erroneous. Judge Cannon denied the Motion on 17 November 2011.

Powell appealed to the Court of Special Appeals, and, while that matter was pending, filed a Petition for Writ of Certiorari with the Court of Appeals on 1 March 2012, which was granted on 20 April 2012, *Powell v. Breslin*, 425 Md. 396, 41 A.3d 571 (2012). Powell maintained that, unless the Court ordered the trial court to reopen *Powell* II on essentially a novel equitable basis, or interpreted Maryland Rule 2-535(b) to conclude that there was fraud, mistake or irregularity in Judge Cannon's refusal to reopen *Powell* II, Powell would lose the opportunity obtained by prevailing in *Powell* I.

Held: Affirmed.

The Court held, first, that Judge Cannon did not err as a matter of law in granting summary judgment on 12 November 2008 because, at the time Judge Cannon entered final judgment in *Powell* II, the doctrine of res judicata barred the maintenance of the litigation of *Powell* II based on Judge Allison's as-yet-then-unreversed 24 January 2007 grant of summary judgment in *Powell* I. The Court discussed how perhaps this unfortunate decision could have been avoided had stays been sought at various junctures in the litigation.

Second, the Court held that, in the absence of clear and convincing evidence that fraud, mistake or irregularity occurred in the proceedings leading to Judge Cannon's denial of Powell's revisory motion, there were no grounds to vacate Judge Cannon's ruling under Maryland Rule 2-535(b), and, therefore, Judge Cannon did not abuse her discretion in denying Powell's Motion to Reopen Case and Vacate Judgment.

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Andre Bourgeois, Individually and On Behalf Of a Class of Others Similarly Situated v. Live Nation Entertainment, Inc., et al., Misc. No. 8, September Term 2012, filed January 18, 2013. Opinion by Wilner, J.

http://mdcourts.gov/opinions/coa/2013/8a12m.pdf

COMMERCIAL LAW – TICKET SERVICE CHARGES

Facts:

The U.S. District Court of Maryland certified four questions arising from a class action alleging the defendants violated Baltimore City ordinances dealing with the sale of tickets to certain entertainment and sports events in the City.

The plaintiff purchased online from defendant Ticketmaster a ticket to aconcert held at the Lyric in November 2009. The price printed on the ticket that the plaintiff received was $52. To that amount, Ticketmaster added a "service charge" of more than $12. Plaintiff later filed the action challenging the legality of Ticketmaster's collection of the service charge, based on Art. 15, §§ 21-1 through 21-5 and Art. 19, § 55-1 of the Baltimore City Code. The complaint included the "common count" for money had and received.

Held:

In response to the questions, the Court of Appeals held:

- If a ticket agency is authorized in writing by a licensed exhibitor to sell tickets as an agent of the exhibitor, the ticket agency is not required to be licensed under Art. 15, § 21-1 of the Baltimore City Code by reason of exercising that authority. A purported authorization by the exhibitor to charge more than the established price for the tickets is invalid and does not limit or expand the exception in § 21-1(b).

- Article 19, § 55-1(a) of the Baltimore City Code is not limited to ticket resales. Except as permitted in § 55-1(b), it prohibits the collection of a service charge, in addition to the price printed on the ticket, in connection with the original sale of the ticket by the Exhibitor or the exhibitor's authorized agent.

- Art. 19, § 55-1(a) of the Baltimore City Code does not permit anyone other than a ticket agency licensed under art. 15, § 21-1 to collect anything more for a ticket than the established price printed on the ticket plus applicable state or federal taxes. Included in that prohibition is a ticket agency exempt from licensure under art. 15, § 21-1(b). Section 55-1(b) permits a ticket agency licensed under art. 15, § 21-1 to collect an additional 50¢ per ticket.

- Maryland continues to recognize an action for money had and received. Unless otherwise precluded by statute, the action lies to recover money paid in excess of that allowed by the Baltimore City ordinances, if the agreement pursuant to which it was paid has not been fully consummated. Except with respect to a usurious contract, however, the action does not lie to recover money paid under a fully consummated contract as to which the parties may be regarded as being in pari delicto.

Maryland State Comptroller of the Treasury v. Brian Wynne, et ux., No. 107, September Term 2011, filed January 28, 2013. Opinion by McDonald, J.

Battaglia and Greene, JJ., dissent.

http://mdcourts.gov/opinions/coa/2013/107a11.pdf

CONSTITUTIONAL LAW – COMMERCE CLAUSE – STATE INCOME TAXATION – COUNTY INCOME TAX – CREDIT FOR INCOME TAXES PAID BY MARYLAND RESIDENTS TO OTHER STATES BASED ON OUT-OF-STATE INCOME – SUBCHAPTER S CORPORATIONS

MARYLAND CODE, TAX-GENERAL ARTICLE, §10-703

Facts:

Maryland state income tax law imposes a "state" income tax, paid to the state, and a "county" income tax, collected by the state but paid to the county of residence. When residents earn income out-of-state, Maryland allows a credit against the state tax for taxes paid on that income to the state where the income was generated. No such credit is given against the county income tax obligation.

Brian and Karen Wynne, a married couple living in Howard County, were credited with earning income in numerous other states that taxed such income as a result of Brian Wynne's ownership interest in a Subchapter S corporation (Under federal and Maryland law, income of a Subchapter S corporation is "passed through" to its owners.) They appealed the judgment of the Tax Court denying them a credit against the county income tax for income tax paid to other states on that same income. The Circuit Court reversed and granted a credit, finding that the failure to provide a credit violated the dormant Commerce Clause of the U.S. Constitution. The Comptroller appealed.

Held: Affirmed.

The Court concluded that the failure to provide a credit violated the Commerce Clause according to the standard laid out by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In applying that standard, the Court concluded that the failure to provide a credit made the tax both unfairly apportioned and discriminatory against interstate commerce.

The Court reasoned that the failure to provide a credit violated the Commerce Clause because it encourages interstate businesses to conduct more of their business within Maryland and favors in-state businesses in the raising of capital from Maryland residents because Maryland residents are taxed more highly on income earned out-of-state.

State of Maryland v. John Wesley Ray, No. 23, September Term 2012, filed December 18, 2012. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2012/23a12.pdf

CRIMINAL PROCEDURE—RE-INSTITUTION OF CHARGES AFTER A DISMISSAL UNDER SECTION 3-107(a) OF THE CRIMINAL PROCEDURE ARTICLE

CRIMINAL PROCEDURE—DISMISSAL OF CHARGES UNDER SECTION 3-107(a) OF THE CRIMINAL PROCEDURE ARTICLE—PRESUMPTION OF UNRESTORABILITY

CRIMINAL PROCEDURE—DEFENDANT'S RESTORABILITY AFTER DISMISSAL UNDER SECTION 3-107(a)

Facts:

John Wesley Ray is a diagnosed paranoid schizophrenic with violent thoughts toward others and delusions about his involvement with law enforcement. He spent eleven years at Clifton T. Perkins Hospital, waiting to become competent to stand trial for a crime he allegedly committed in 2001. In 2009 his charges were dismissed pursuant to Section 3-107(a) of the Criminal Procedure Article ("CP") of the Maryland Code (2001, 2008 Repl. Vol.), which requires dismissal of charges upon passage of certain time periods. Shortly after the dismissal, however, the State re-indicted Ray, who once again was found incompetent and dangerous and placed at Perkins for another round of incompetency-to-stand-trial ("IST") treatment.

Ray filed a motion to dismiss the indictment, arguing that the State should not be allowed to "continue to confine" him "by simply re-indicting [him] on the same charges that were required to be dismissed pursuant to § 3-107." The Circuit Court for Harford County denied Ray's motion, but the Court of Special Appeals reversed on appeal.

Held: Vacated.

The Court of Appeals vacated judgment of the Court of Special Appeals, holding that the State may re-indict a defendant after a CP § 3-107 dismissal without establishing his competency. The Court reasoned that CP § 3-107 expressly provides that a dismissal of charges is without prejudice, and nothing in the legislative history suggests that the General Assembly intended to place a limit on the State's power to re-indict after a CP § 3-107 dismissal. But the Court emphasized that, although the State may re-indict a defendant after a CP § 3-107 dismissal, it may not continue to confine the defendant in an IST commitment without first overcoming the presumption that the defendant is not restorable.

The Court explained that the dismissal deadlines under CP § 3-107 provide yardsticks for determining the reasonable amount of time necessary to determine if a defendant is restorable. Once these statutorily-prescribed time periods expire and charges are dismissed, there is a presumption that the time, necessary for determining whether an individual is restorable, has passed. To then place a re-indicted defendant in IST commitment without overcoming the presumption that he was unrestorable would contradict the legislative intent behind the recent amendments to Maryland incompetency statutes, which are meant to prevent indefinite ITS commitments.

Accordingly, the Court held the error below was not that the Circuit Court allowed the State to re-indict Ray after a CP § 3-107 dismissal, but that it placed him in IST commitment, when there was a presumption that he was unrestorable. The Court remanded the case to the Circuit Court to determine whether Ray's continued IST commitment is proper.

Employees' Retirement System of the City of Baltimore v. Sylvester Dorsey, No. 29, September Term 2012, filed January 23, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2013/29a12.pdf

EMPLOYEES' RETIREMENT SYSTEM – LINE-OF-DUTY DISABILITY RETIREMENT – EFFECT OF PREEXISTING CONDITION

Facts:

Petitioner, Sylvester Dorsey, was injured while performing his duties as a Baltimore City school police officer in August 2007. Within the statutory time limit, he applied for line-of-duty disability retirement as a Class C member of the Employees' Retirement System (ERS) of the City of Baltimore. Eligibility for line-of-duty disability retirement for Class C members is primarily governed by Baltimore City Code, Article 22, §§ 9(j). This section requires the claimant to prove, by a preponderance of the evidence, that he or she has lost 50% of the use of one body part or 25% of the use of each of two body parts as "the direct result of bodily injury through an accident independent of all other causes and independent of any preexisting physical or medical conditions . . . ." Based on Petitioner's testimony and medical records, a hearing examiner determined that Petitioner had sustained a 25% impairment to his right arm as a result of the August 2007 incident. The hearing examiner also found that Petitioner had sustained a 40% impairment to his back, with 25% attributable to the work injury and 15% attributable to degenerative disc disease, a condition which predated the work injury, but which only became symptomatic following the work injury. The hearing examiner concluded, however, that Petitioner did not satisfy the requirements for line-of-duty disability retirement because "the impairment to Mr. Dorsey's back is not independent of all other causes." The hearing examiner reasoned that "the pre-existing degenerative disc disease in his back contributes to Mr. Dorsey's disability and without it Mr. Dorsey would not be as disabled as he currently is."

Petitioner did not contest the hearing examiner's factual findings, but sought judicial review of the hearing examiner's denial of line-of-duty disability retirement. The Circuit Court for Baltimore City reversed, concluding that the hearing examiner had made a legal error. The Court of Special Appeals agreed. Respondent, ERS, appealed to this Court.

Held: Affirmed.

The Court of Appeals held that the plain meaning of the statute required a claimant to show at least a 50% impairment to one body part or at least a 25% impairment to each of two body parts directly attributable to the work injury. The Court explained that although a preexisting condition cannot contribute to either of those minimum thresholds, any additional impairment above those thresholds attributable to a preexisting condition does not disqualify a claimant from receiving line-of-duty disability retirement. The Court explicitly rejected the ERS's argument

that “any causation by a preexisting condition will disqualify the applicant for line-of-duty disability retirement.” In this case, although Petitioner’s overall disability was aggravated by his preexisting degenerative disc disease, the hearing examiner’s findings that Petitioner had a 25% impairment to his right arm and 25% impairment to his back directly attributable to the work injury satisfied the pertinent statutory requirement.

Benn Ray, et al. v. Mayor and City Council of Baltimore, et al., No. 21, September Term 2012, filed on January 22, 2013. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2013/21a12.pdf

REAL PROPERTY LAW - ZONING - JUDICIAL REVIEW - STANDING

REAL PROPERTY LAW - ZONING - JUDICIAL REVIEW - STANDING - AGGRIEVED CLASS

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REAL PROPERTY LAW - ZONING - JUDICIAL REVIEW - STANDING - SPECIAL AGGRIEVEMENT - PROTESTANT LACKS PROXIMITY

EVIDENCE - ADMISSIBILITY - LAY PERSON OPINION - PROPERTY OWNER'S FUTURE BELIEF OF DECREASING PROPERTY VALUES

Facts:

On November 22, 2010, the Baltimore City Council passed Ordinance 10-397, which approved a PUD for an 11.5-acre tract of land known as the "25th Street Station." The PUD authorizes a mixed-use development located in the Remington and Charles Village neighborhoods of Baltimore City. Benn Ray and Brendan Coyne ("Petitioners") filed a Petition for Judicial Review of the PUD's approval. Ray resides in the Remington neighborhood and his residence is approximately 0.4 miles away from the PUD. Ray claims that he can see and hear the PUD site from his second-floor bathroom during the winter months of the year, that the PUD will increase traffic in the area, and that the PUD will change the character of the neighborhood. Coyne resides in the Charles Village neighborhood and his residence is also approximately 0.4 miles away from the PUD. Coyne believes that the PUD will adversely change the character of his neighborhood, and will make Charles Village a less desirable place to live, thereby decreasing the value of his home.

The Baltimore City Circuit Court dismissed Petitioners's Petition for Judicial Review for lack of standing. The trial court found that Petitioners were not *prima facie* aggrieved because they were not "adjoining, confronting or nearby" property owners. The trial court also found that Petitioners had failed to show special aggrievement because they did not distinguish their injury from that suffered by the public generally. And finally, Coyne's lay opinion testimony about the decrease in his property's value was inadmissible. The Court of Special Appeals affirmed.

Held: Affirmed

Reviewing Maryland's jurisprudence on standing to challenge a rezoning action, the Court made clear that proximity is the most important factor to be considered. This is because Maryland courts have only granted standing to challenge a rezoning action to two types of protestants: those who are *prima facie* aggrieved and those who are almost *prima facie* aggrieved. There may also exist a potential third category, however, as dicta in Maryland cases suggest a poorly-defined category of protestants with standing who, despite being far removed from the subject property, may nevertheless be able to establish that he is specially and adversely affected by the board's action.

When determining whether an individual is specially aggrieved, the entire neighborhood containing the PUD is not considered to be part of the aggrieved class. Instead, the creation of a class of aggrieved persons is done on an individual scale. A court must examine the specific facts alleged to show aggrievement in each case, and compare that injury to the harm suffered by the general public.

In this case, both protestants failed to prove special aggrievement. By living approximately 0.4 miles away from the PUD, the protestants lacked sufficient proximity to be considered almost *prima facie* aggrieved. The fact that the PUD was of a large urban nature has no affect on this analysis. Furthermore, protestants' claims of change in the character of the neighborhood, increase traffic, and visibility of the PUD site are insufficient to prove special aggrievement when the protestants lack proximity.

Finally, a property owner's testimony that the value of his property will decrease because of a future development 0.4 miles away is inadmissible. A property owner is competent to testify about the value of his property only to the extent that he has a reasonably good idea of what the property is worth. The future speculation of what effect a potential development 0.4 miles away from the residence will have on the property's value requires the specialized knowledge of an expert.

B. Marie Green, Supervisor of Assessments of Montgomery County v. Church of Jesus Christ of Latter-day Saints, No. 35, September Term 2012, filed January 23, 2013. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2013/35a12.pdf

REAL PROPERTY TAXATION – EXEMPTIONS – PROPERTY OWNED BY RELIGIOUS GROUPS OR ORGANIZATIONS – DEFINITION OF CONVENT

Facts:

The Church of Jesus Christ of Latter-day Saints (Appellee) sought a property tax exemption for a 44-unit apartment complex in Montgomery County used to house a revolving group of workers who perform religious ceremonies within the Church's Washington, D.C. Temple. The Supervisor of Assessments of Montgomery County (Appellant) denied the exemption, taking the position that the complex did not qualify as a parsonage or convent under Maryland Code (2001, 2012 Repl. Vol.), § 7-204 of the Tax-Property Article. The Maryland Tax Court agreed with the Supervisor's decision, reasoning that many of the workers were married, they did not make a lifetime commitment to serve, they did not share things in common, and they did not take vows of poverty, chastity, and obedience to a superior. The Circuit Court for Montgomery County reversed the Tax Court's decision, ruling that the apartment complex qualified as a parsonage and convent.

Held: Affirmed.

The Court of Appeals concluded that the meaning of the words parsonage and convent in the statute was a pure question of law and accordingly conducted a *de novo* review. The Court observed that the word convent is not defined in the statute and found nothing in the legislative history of the tax exemption that shed light on its meaning. Although the Court traditionally accords deference to the construction of a statute by the agency charged with administering it, the Court found no long-standing practice on the part of the Tax Court interpreting the term convent. Instead, the Court analyzed dictionary definitions of convent provided by the parties and looked at cases from outside of Maryland before concluding that the Tax Court applied an unduly narrow interpretation of the word. The Court noted that the definitions of convent did not mention marital status, lifetime commitments, common purses, or specific vows of poverty, chastity, and obedience. Additionally, the Court stated that the term convent must be applied in a non-discriminatory manner and cannot be interpreted solely within the context of certain forms of Christianity. The Court held that a convent is a community of people who live together, follow strict religious vows, and devote themselves full-time to religious work. Because the Court concluded that the Tax Court applied an incorrect legal standard to determine whether the

complex was a convent, the Court stated it was unnecessary to decide whether the complex also could constitute a parsonage.

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100 Investment Limited Partnership et al. v. Columbia Town Center Title Company, et al., No. 19, September Term 2012, filed January 29, 2013. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2013/19a12.pdf

TORTS – NEGLIGENCE – DUTY OF CARE

CONTRACTS – EXCULPATORY CLAUSES

Facts:

In 1982, the Millers sold a 1.144-acre tract of land in Howard County to Dr. Khan. In October, 1986, however, the Millers purported to sell the same land to 100 Investment Limited Partnership ("the Partnership"). Cambridge Title Company ("Cambridge") did the title work for this transaction. In December, 1986, after a transfer of ownership interests in the Partnership, Columbia Town Center Title Company ("Columbia") was engaged to do the title work for the same tract of land. In conducting their respective title work, both Cambridge and Columbia (collectively, "the Title Companies") issued title commitments that failed to report the previous sale to Dr. Khan. Chicago Title Insurance Company ("Chicago Title") underwrote the title insurance policies. Thereafter, the Partnership subdivided the land, executed and recorded easements in connection with the property, and purportedly conveyed the land to other parties.

In 2001, the Partnership learned of the previous sale to Dr. Khan when Dr. Khan decided to sell his land. To cure the title defect, the Partnership repurchased the disputed tract of land from Dr. Khan's buyer at fair market value. Thereafter, the Partnership filed a complaint in the Circuit Court for Howard County alleging claims for negligence against the Title Companies and vicarious liability against Chicago Title for its agents' negligent title searches. The trial court found the Title Companies negligent, and Chicago Title vicariously liable under a theory of *respondeat superior*. The Court of Special Appeals reversed.

Held: Affirmed in part and reversed in part.

Where the failure to exercise due care creates a risk of economic loss only, we require an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent. To impose a duty in tort in the present case, where there is only an economic injury, the Partnership would have to establish:(1) that the title companies must have been aware that the title search information was to be used for a particular purpose; (2) in the furtherance of which a known party intended to rely upon; and (3) there must have been some conduct on the part of the title companies linking them to that party, which evinces the title companies' understanding of that party's reliance. Further, under

Restatement (Second) of Torts § 552, there is an additional basis for tort liability assumed by professional "suppliers of information" for the guidance of others in their business transactions.

Here, the Partnership engaged the Title Companies to perform title work for the land purchase. The Title Companies also undertook to issue title insurance commitments for the Partnership. These commitments contained detailed information applicable to the sale of the land, specifically detailing the kind of information found in a title search. Such information is relied upon in making decisions as to whether to proceed to closing. By supplying information normally adduced in a title search and placing that information in a preliminary title report before closing, the Title Companies were on notice that the Partnership would use that information to assess the ownership rights it would acquire. As such, the Title Companies owed a duty to exercise a reasonable degree of skill and diligence in conducting the title search and issuing the commitment to the Partnership. Similarly, under *Restatement 552*, when the Title Companies provided the preliminary title information to the Partnership, they owed a duty to exercise reasonable care to the Partnership.

Further, Chicago Title could not be held vicariously liable for the Title Companies' negligent title search because the language in the title insurance policy between Chicago Title and the Partnership unambiguously limited any liability to the policy's terms. Absent evidence of fraud, disparate bargaining power, or public policy reasons as to why the clause should not be enforced, we will not disturb the parties' ability to contractually exempt a party from liability in negligence.

COURT OF SPECIAL APPEALS

Station Maintenance Solutions, Inc. v. Two Farms, Inc., No. 2039, September Term 2011, filed January 24, 2013. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2013/2039s11.pdf

SCHEDULING ORDER – MARYLAND RULE 2-504 – SETTLEMENT CONFERENCE – SANCTIONS – CONTEMPT

Facts:

This case involves the Circuit Court for Baltimore County's entry of a default judgment in favor of appellee, Two Farms, Inc. d/b/a Royal Farms, and against appellant, Station Maintenance Solutions, Inc., as a sanction for an alleged violation of a scheduling order by appellant's insurer. On May 11, 2010, appellee was sued in the circuit court, as a result of approximately 5,400 gallons of gasoline that leaked from appellee's underground storage tanks and contaminated an adjacent single family home property. On June 28, 2010, the circuit court issued a Scheduling Order, scheduling a settlement conference for April 5, 2011.

On August 2, 2010, appellee filed a third party complaint against appellant for contribution and/or indemnification for any amount for which appellee may be held liable. On December 3, 2010, the property owners filed an amended complaint, adding appellant as a defendant. On March 30, 2011, the circuit court granted a consent motion to change the date of the April 5, 2011, settlement conference to October 18, 2011.

On August 2, 2011, the property owners and appellee participated in a mediation conference, at which they agreed to settle the property owners' claims against appellee for $2,700,000, and the property owners agreed to assign their claims against appellant to appellee. On August 31, 2011, in response to a joint request by the parties, the circuit court issued a notice of hearing order moving the settlement conference from October 18, 2011, to September 27, 2011. On September 6, 2011, the circuit court issued a second order titled "Order to Attend Settlement Conference," providing that "[a] senior officer or employee of [appellant]'s insurance carrier must be present, with binding settlement authority up to the full limits of its policy."

On September 27, 2011, the settlement conference was conducted in the judge's chambers, not on-the-record in open court. It is undisputed that both parties and a representative of the insurance carrier attended the settlement conference, and that the representative of insurance carrier was an independent third-party adjuster, not a "senior officer or employee . . . with binding settlement authority up to the full limits of [the] policy" as ordered by the circuit court.

The parties dispute what occurred during the settlement conference, but both agree that the circuit court granted appellee's oral request for a default judgment against appellant in the amount of $1,000,000. The circuit court docket entries state that default judgment was entered in favor of appellee, noting that a senior officer or employee of the insurance carrier with binding settlement authority up to the full amount of the policy was not present at the settlement conference. The circuit court did not issue a written order or opinion, although on November 1, 2011, the circuit court issued a document titled "Judgment," reflecting the entry of default judgment against appellant in the amount of $1,000,000.

On October 10, 2011, appellee's counsel took the deposition of Robert L. Ferguson, Jr., an attorney retained by appellant. Ferguson testified, in part, that he advised the insurance carrier to withdraw any motion to strike the judgment "so that the judgment would stand, and protect its insured from any risk of excess verdict. . . . [He also] asked that the insurer pay the judgment so that it could be entered and satisfied."

On October 31, 2011, the circuit court entered the default judgment against appellant. On November 22, 2011, appellant filed an appeal.

Held: Reversed.

The Court of Special Appeals reversed the judgment of the circuit court, vacating the default judgment and remanding for further proceedings. Maryland Rule 2-504(a)(1) provides, in pertinent part, as follows: "Unless otherwise ordered by the County Administrative Judge for one or more specified categories of actions, the court shall enter a scheduling order in every civil action, whether or not the court orders a scheduling conference pursuant to Rule 2-504.1."

Maryland Rule 2-504(b)(2)(C) provides that a scheduling order may also contain "a specific referral to or direction to pursue an available and appropriate form of alternative dispute resolution, including a requirement that individuals with authority to settle be present or readily available for consultation during the alternative dispute resolution proceeding, provided that the referral or direction conforms to the limitations of Rule 2-504.1(e)[.]"

"[A]lthough [Maryland Rule 2-504] does not, by its terms, provide for sanctions, [] case law [] makes [clear that] the imposition of sanctions for the violation of a scheduling order [is] appropriate."

The cases that consider the question of the circuit court's authority to sanction a party for the violation of a scheduling order affirm that, although no sanctioning power is enumerated in Maryland Rule 2-504, circuit courts have inherent power to do so. It is abundantly clear that a circuit court has authority to sanction a party for its violation of a scheduling order.

"When a party or circuit court is confronted with an uncooperative party, the party or circuit court may seek to compel the party's cooperation, or punish the party. Specifically, the party or circuit court may pursue direct [or constructive] civil or criminal contempt sanctions[.]"

Despite amendments to Maryland Rule 2-504, circuit courts retain authority under the Rule to impose sanctions, including monetary sanctions, against parties that violate scheduling orders.

The circuit court lacks, however, the authority to impose a sanction against a party for a violation of a scheduling order based solely on the conduct of the party's insurer. Where there is no information that the party is complicit in its insurers's violation of a scheduling order, the circuit court has no authority to sanction the party.

The authority to sanction is grounded in the belief that a party will comply with the order in order to avoid imposition of a penalty against it. If an insurance company–or, for that matter, any person or entity–was aware that someone else would be punished for its violation of a court's scheduling order, the threat of sanctions would create no incentive for it to comply with an order of the court.

Although the circuit court lacks authority to sanction a party solely for its insurer's violation of a scheduling order, there are several courses of action, of varying degrees of severity, available to the circuit court to address an insurer's alleged violation of the scheduling order, including: (1) speaking with a representative of the insurer to ascertain the reason for its failure to attend the conference as ordered; (2) proceeding with the settlement conference without a representative of the insurer present to evaluate whether a settlement was potentially attainable; (3) scheduling a hearing affording the insurer the opportunity to explain the alleged violation; or (4) postponing the settlement conference to give the insurer an opportunity to comply with the order.

To sanction a party for violation of a scheduling order, the underlying order must be valid.

Where the underlying scheduling order is valid, the circuit court may proceed under Maryland Rule 15-205 or 15-206 to sanction an insurer for constructive criminal or civil contempt for violation of the order.

The circuit court abuses its discretion in issuing a scheduling order requiring an insurer to attend the settlement conference "with binding settlement authority up to the full limits of its policy" amount. In ordering an insurer to attend a settlement conference with binding authority to settle for full policy limits, the circuit court, in essence, substitutes its authority for that of the insurer's in setting the upper limit at which the insurer must be willing to settle. A scheduling order that predetermines an amount up to which an insurer is required to negotiate undermines the insurer's ability to evaluate the claim against a party and select a level at which it is willing to negotiate and settle.

Whether sanctioning a party for a scheduling order violation under Maryland Rule 2-504 or awarding damages, the circuit court is required to make findings explaining the action taken.

"[T]he imposition of a sanction that . . . effectively dismisses a potentially meritorious claim without a trial, should be reserved for egregious violations of the court's scheduling order, and should be supported by evidence of willful or contemptuous or otherwise opprobrious behavior on the part of the party or counsel."

Kimberly Marcia Moody v. State of Maryland, No. 2018, September Term 2010, filed January 23, 2013. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/2018s10.pdf

HICKS DEADLINE – CUSTODIAL INTERROGATION – SUFFICIENCY OF THE EVIDENCE

Facts:

A jury convicted appellant of first degree assault and conspiracy to commit first degree assault stemming from a fight that took place outside of a nightclub in Baltimore City.

Held: Reversed

Judgments reversed and case remanded for further proceedings. The suppression court erred in denying appellant's motion to suppress her statements to the two detectives at the police station, which were made in response to custodial interrogation without the benefit of *Miranda* warnings.

In determining whether a suspect is in custody, a court must consider all of the circumstances of the interrogation, including events before, during, and after the interrogation. Given the facts here, that appellant was interviewed by the police for an hour at the police station, after she was removed from her vehicle at gunpoint, handcuffed, and then driven to the police station in a patrol car, and that she was never told that she was not a suspect, that she was not under arrest, or that she was free to leave, appellant was in custody for purposes of *Miranda*.

The circuit court properly found good cause for the postponement beyond the 180-day *Hicks* deadline where defense counsel did not object to the State's request or suggest that DNA evidence was not important. When defense counsel and appellant failed to object, the circuit court also properly denied appellant's subsequent motion to dismiss the charges.

There was sufficient evidence for a rational trier of fact to find the essential elements of first degree assault as an aider and abetter where appellant drove her friend to the scene of the crime, waited while her friend beat two victims with a metal pipe and shot three people, and then provided for her immediate escape. The evidence also was sufficient to convict appellant of conspiracy to commit first degree assault because a reasonable fact finder could infer that appellant and her friend agreed to return to the scene of a prior altercation and assault the woman with whom appellant's friend previously had the altercation.

Dewan Holmes v. State of Maryland, No. 2128, September Term 2011, filed January 24, 2013. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2013/2128s11.pdf

CRIMINAL LAW & PROCEDURE – JURY INSTRUCTIONS – PARTICULAR INSTRUCTIONS – DEADLOCKED JURIES

Facts:

On December 15, 2009, Keytwan Deputy ("Deputy") visited a friend of his father in Baltimore City. During the visit, Deputy used the computer to browse the internet. After approximately ten minutes, appellant, Dewan Holmes ("Holmes") entered the residence, at which point he initiated a conversation with Deputy.

Deputy testified that he was "uncomfortable" around Holmes and so he ignored Holmes for as long as possible. As Holmes persisted with criticisms and questions, Deputy finally responded by stating "I don't even know you . . . Take your chair and go back over there and sit by the front door where you were sitting at before you sat next to me." Shortly thereafter, Holmes stood up, put his jacket on, and left. Moments later, Holmes returned with two unidentified men. When Holmes re-entered the residence, Holmes shut the door behind him, lifted his shirt, and removed a handgun from his waistband. Holmes pointed the revolver at Deputy and said "talk that shit now."

Deputy began running through the residence. Deputy ran down a hallway, turned into a bedroom, and ran straight through a closed window. After crashing through the glass, Deputy heard a gunshot and took off running. Deputy knocked on doors to houses, and eventually found someone to alert the paramedics. While being inspected for injuries on a porch, Deputy was told by paramedics that he was shot. Deputy was later transported to a hospital to be treated for his injuries.

At trial, ample evidence was admitted that Holmes was the individual who held and fired the gun at Deputy. The jury began deliberations on September 7, 2011 which continued into the following day. On the second day, the jury submitted a note to the court stating that "[w]e are unable to meet an agreement on three charges. What are our options for next steps in the proceeding? Thank you." The court instructed the jury that they were to "[c]ontinue in[their] deliberations." The defense moved for a mistrial, which the circuit court denied.

More than one hour later, the jury reached a verdict. The jury returned a guilty verdict on five of the seven counts. Shortly after the jury rendered its verdict, defense counsel informed the court that Holmes had told her that one of the jurors saw him in shackles while he was escorted by a correctional officer in the hallway. Defense counsel explained to the court that, upon initially learning of this, she had investigated the incident by speaking with one of the correctional officers involved and with that officer's sergeant, both of whom denied that the incident

occurred. The trial court questioned the foreman juror, who confirmed that, in delivering the jury's "[s]econd question," he had seen Holmes while "they was bringing him in." In response to questioning, the foreman stated that he "didn't notice" that Holmes was shackled at the time, and he denied that the incident impacted his verdict.

Defense counsel filed a motion for a new trial on the ground that the jury foreman viewed the defendant in shackles and in custody which violated Holmes's right to a fair trial. The circuit court denied the motion and determined that "there was no prejudice of the Defendant being seen in the hallway by the juror."

Upon a review of the facts and circumstances of the case, as well as Holmes's prior contacts with the criminal justice system, the circuit court sentenced Holmes to 20 years of imprisonment for first-degree assault; using a handgun during the commission of a crime of violence; wearing, carrying, or transporting a handgun; possessing a regulated firearm after having been convicted of a disqualifying felony; and discharging a firearm within the city limits of Baltimore City.

On appeal, Holmes argued that the evidence was insufficient to sustain his convictions beyond a reasonable doubt. Holmes further contended that the circuit court erred in replying to a jury note by deviating from the language used in Maryland Criminal Pattern Jury Instruction 2:01. Additionally, Holmes claimed that the circuit court erred in denying his motion for new trial, and erred in failing to merge his sentence for wearing, carrying or transporting a handgun, with the sentence imposed for using a handgun during the commission of a crime of violence. Lastly, Holmes maintained that the circuit court abused its discretion by invoking impermissible considerations at sentencing.

Held: Affirmed.

Judgments of the circuit court affirmed. The Court of Special Appeals, however, merged Holmes's sentence for wearing, carrying, or transporting a handgun into Holmes's sentence for use of a handgun during the commission of a crime of violence.

The Court of Special Appeals held that the evidence was sufficient for a jury to convict Holmes on all counts beyond a reasonable doubt. The Court determined that the evidence was sufficient to establish that: (1) Holmes was in possession of a regulated firearm after having been convicted of a disqualifying crime; (2) Holmes discharged a handgun within the city limits of Baltimore City; (3) Holmes wore, carried, or transported a handgun; (4) Holmes committed first-degree assault; and (5) Holmes used a handgun during the commission of a crime of violence.

The Court of Special Appeals further held that the trial court's instruction to the jury, "continue in your deliberations," was not an abuse of discretion for two reasons. First, Holmes's claim was not preserved for appellate review because he failed to note an objection to the trial court's response to the jury's note on the grounds he raised on appeal. Assuming that Holmes's claim

was preserved, the circuit court did not abuse its discretion in its response to the jury's note because the record did not indicate that the trial judge's motive was to ensure a unanimous verdict or was otherwise improperly coercive. Accordingly, the trial court's instruction to the jury to "continue in your deliberations" was not an abuse of discretion.

Additionally, the Court of Special Appeals held that the circuit court did not abuse its discretion in denying Holmes's motion for new trial in light of allegations that, while the jury was still deliberating, a juror saw Holmes, in shackles, being escorted by a correctional officer.

In light of the well settled merger principles, the Court of Special Appeals merged Holmes's three-year sentence for wearing, carrying, or transporting a handgun into his 15-year sentence for use of a handgun in the commission of a crime of violence.

Finally, the Court of Special Appeals held that the circuit court did not err at sentencing by conveying to Holmes the impact of his conduct on the community. The Court determined that the trial judge consciously disregarded personal ill-will and extra-judicial considerations in sentencing Holmes.

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David Calvin Mines v. State of Maryland, No. 2681, September Term 2010, filed November 27, 2012. Opinion by Sharer, J.

http://mdcourts.gov/opinions/cosa/2012/2681s10.pdf

CRIMINAL LAW – EXCULPATORY WITNESSES

Facts:

Appellant was convicted of attempted armed robbery, attempted robbery, second-degree assault, and a weapons violation. The charges arose out of the attempted robbery of a pizza delivery man. Appellant was identified by the victim shortly after the event.

Appellant testified at trial. At the time of the attempted robbery, he said he was with several friends, including his girl friend and neighbors. None of those whom he identified by name were called to testify. On cross-examination, the State asked why those potential exculpatory witnesses were not called by appellant. The State also commented on their absence in closing. Defense counsel made timely objections to both the questions and closing argument. Appellant contends that the cross-examination and closing argument violated his Fifth Amendment rights and permitted the State to shift the burden to him.

Held: Affirmed

In affirming, the Court held that when appellant testified in his own defense and, in his own testimony identified potential exculpatory witnesses, but called none of them to the stand, questions by the State, and comments in closing argument, did not violate his Fifth Amendment rights, and did not constitute improper burden shifting.

Guillermo Aguilera-Tovar v. State of Maryland, No. 1841, September Term 2010, filed December 20, 2012. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2012/1841s10.pdf

CRIMINAL LAW – MIRANDA WARNINGS

Facts:

Guillermo Aguilera-Tovar, appellant, was accused of molesting a seven-year-old boy, whose family shared a house with appellant's family. Shortly after the boy's father called the Montgomery County Police Department's Family Crimes Division to complain about appellant, two police detectives drove to appellant's residence and persuaded him to join them, in their police vehicle, to discuss the matter. After assuring appellant that "he was not under arrest," the detectives asked appellant if he knew why the police had come to see him, and he responded that he did. Appellant then denied the accusations against him but agreed to go to the offices of the Family Crimes Division, the following morning, to take a polygraph examination. After the police took appellant back to his house, they spoke briefly with appellant's wife, who agreed to accompany appellant the following morning, along with their children, so that she and the children could be separately interviewed.

The next morning, appellant, his wife, and their children drove to the Family Crimes Division. Appellant was escorted by a police detective to the polygraph suite, while his wife and their children were taken to be interviewed, separately, by a social worker. The detective who conducted the polygraph examination told appellant, at the outset, that "he was there voluntarily and could leave at any time" and elicited appellant's admission that he knew that the reason for the examination was because he had been accused of molesting the boy. The detective did not, however, administer *Miranda* advisements.

After the conclusion of the hour-long examination, appellant was escorted to an adult interview room, where he was interrogated by a Spanish-speaking police detective, since appellant was fluent in Spanish but not in English. That detective also did not administer *Miranda* advisements. Having been informed by the polygraph examiner that the "results were indicative of deception," the detective interrogated appellant persistently, unrelentingly, and in an accusatory fashion, accusing him of "lying" and insisting that the polygraph test results were "almost 100% correct." Among other things, the police detective threatened to tell appellant's wife that he had "failed" the test. Ultimately, appellant changed his story from one of complete denial to one where he conceded that he had hugged and tickled the boy and that, while doing so, he had become sexually aroused.

During appellant's ensuing trial on charges of sexual abuse of a minor and third-degree sex offenses, he moved to suppress the statements he had made following the polygraph

examination, but the motions court denied his motion. He was thereafter tried and convicted of sexual abuse of a minor and three counts of third-degree sex offense, and he appealed.

Held: Reversed and remanded.

It was undisputed that appellant had been subjected to an "interrogation" following the polygraph examination. As a criminal suspect, to be entitled to be given *Miranda* advisements, must establish that he was in "custody" while being "interrogated," the only issue in dispute was whether, under the circumstances, appellant was in "custody" while he was being interrogated. The Court of Special Appeals concluded that, under the totality of circumstances, he was, and, as he was never given the *Miranda* advisements, his statements should have been suppressed.

The factors weighing in favor of a finding of custody included the following: appellant was interrogated in a police station; he was aware that he was a suspect and was not merely being questioned as a witness; and, most importantly, he had just been subjected to a polygraph examination and was confronted repeatedly and persistently with the fact that he had "failed" that examination and that he had "lied" about the sex abuse allegations.

Stephen Simmons v. State of Maryland, No. 1893, September Term 2010, filed December 19, 2012. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/1893s10.pdf

CRIMINAL LAW – MANIFEST NECESSITY FOR A MISTRIAL – DOUBLE JEOPARDY

Facts:

Appellant was charged with first-degree murder. During opening statement, defense counsel stated that appellant had "offered to take a lie detector test." The State objected, and the court sustained its objection. The following day, the prosecutor requested that the court declare a mistrial based on this statement, arguing that it left the State in an untenable position because it was prohibited from introducing any evidence regarding polygraph examinations. Specifically, the prosecutor contended that, given this "powerful piece of information that cannot be addressed," manifest necessity required the court to grant a mistrial. The court granted the State's motion, and declared a mistrial.

Defense counsel subsequently filed a motion to dismiss the charges on grounds of double jeopardy. The court denied the motion.

Held: Affirmed.

Defense counsel's disclosure during opening statement, that appellant had been willing to take a lie detector test, was so prejudicial that the trial court properly exercised its discretion in determining that manifest necessity existed to declare a mistrial.

The prejudicial comment was an assertion by appellant's attorney in the powerful setting of opening statement, where defense counsel had the opportunity to introduce into the minds of the jury his theory of the case. Opening statements can have a significant impact on a jury, and a reasonable juror could infer from defense counsel's disclosure that appellant was confident that the results of a polygraph examination would be negative, indicating his innocence. Compounding the prejudice accruing to the State is that there was no way for the State to explain or otherwise mitigate defense counsel's disclosure. Because the law prohibits mention of polygraph examinations, the State could not address defense counsel's improper disclosure or his implied assertion of appellant's innocence in any meaningful way.

Given that this was a close case, where credibility determinations were paramount, there was no way to erase the potential infection of the jurors' minds caused by defense counsel's improper disclosure. The court, therefore, properly exercised its discretion in concluding that the prejudice to the State's ability to have a fair trial was clear, and that there was manifest necessity

for a mistrial. Because there was manifest necessity to declare a mistrial, double jeopardy principles do not bar the retrial of appellant.

Delores Craft O'Brien Heffernan v. State of Maryland, No. 1711, September Term 2011, filed December 21, 2012. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2012/1711s11.pdf

CRIMINAL LAW – NON-PAYMENT OF RENT

Facts:

Following a jury trial in the Circuit Court for Montgomery County, Delores Craft O'Brien Heffernan, appellant, was convicted of two counts of obtaining propertywith a value over $500, by presenting a bad check. Appellant appealed and challenged the legal sufficiency of the evidence.

In late October 2009, appellant saw an advertisement in a local newspaper for a basement apartment owned by Constance Heckert. On November 1, 2009, after visiting the apartment at 11410 Stonewood Lane in Rockville, appellant and Ms. Heckert executed a lease agreement The term of the lease was one year with a rental of $11,400, payable in $950 monthly installments.The lease also required a security deposit in the amount of $950.

Ms. Heckert testified that, in accordance with her usual practice, she required payment of the first month's rent and payment of the security deposit at the time she entered into the lease. Appellant gave Ms. Heckert two checks dated November 1, 2009, each in the amount of $950, one for the security deposit and one for the first month's rent. Ms.Heckert testified that she "deposited [the checks] right away" and, on November 10, left to spend the winter in Florida.

Ms. Heckert testified that, prior to leaving for Florida, she gave appellant an extra key to her home, so appellant could water plants. According to Ms. Heckert, she also instructed appellant to pay rent by directly depositing money in Ms. Heckert's bank account. In order to do this, Ms. Heckert stated that she provided appellant with the necessary information and deposit slips.

Ms. Heckert testified to the following. On November 21, she discovered that appellant's November 1 checks bounced due to insufficient funds. Two days later, on November 23, appellant promised to pay Ms. Heckert the amount owed. On November 26, Ms. Heckert called appellant again because appellant failed to pay any money owed. The following day, appellant promised that, on November 30, she would deposit money into Ms. Heckert's account. On December 2, 2009, appellant "called to say she had put in $1,000 after 6 o'clock," but in fact she had deposited $340.Appellant claimed to have deposited an additional $950 that day, but in fact, the total amount appellant deposited into Ms. Heckert's account between November 30-December 4, 2009 was $750. On December 17, Ms. Heckert returned to her home in Rockville because she "knew that something was really wrong." Upon her arrival, she discovered that items of personalty were missing and that there was damage to both her home and appellant's apartment.

Appellant testified to the following. While seeing the apartment for the first time, she informed Ms. Heckert that she could not immediately move in due to her financial situation**.** Appellant explained that she could not move in because she would not receive enough money to cover rent until November 15, after which time she could enter into a lease.Appellant asked Ms. Heckert if she would be willing to take postdated checks, but Ms. Heckert was unwilling to oblige. While Ms. Heckert was unwilling to take postdated checks,she was willing to refrain from cashing the rent check until November 15. Specifically, Ms. Heckert said: "We can start the lease today and, if you give me the checks, I will hold the checks until you tell me when is appropriate to deposit them." Ms. Heckert stated that she would not cash the security deposit check until November 30.
Appellant testified that there were many problems with her apartment. She stated that she contacted Ms. Heckert on either November 20 or November 23 about problems with the heating and ventilation. Ms. Heckert was unwilling to resolve the problem to appellant's satisfaction, and as a result, according to appellant, she informed Ms. Heckert that she was vacating the premises.

Appellant also explained that she deposited $750.00, not the $950.00 owed for the first month's rent, because she and Ms. Hechert had an agreement that appellant would clean Ms. Heckert's house for $200.00. Appellant did not deposit the additional $950.00 owed for the security deposit because, according to her testimony, Heckert said "forget about the other check since [appellant] was prorating and moving out."

Appellant contended that Criminal Law (CL) § 8-103 did not apply to her because "a leasehold interest in a rental apartment does not meet the definition of 'property' or 'services' applicable to the bad check statute." In addition, appellant argued that appellant did not "obtain" anything in exchange for the checks, explaining that appellant obtained possession because of the signed lease, not because of the checks.

Held:

Appellant failed to preserve the claim before the Court. Nevertheless, the Court addressed the merits of appellant's argument because of confusion in the bench and bar with respect to the application of the statutes in question to the payment of rent.

CL § 7-101(1) provides that "Property means anything of value" and § 7-101(2) provides that "Property includes" the categories that follow. The word "means" is typically employed "if the definition is intended to be exhaustive." This is followed by the word "includes," which is to be construed to illustrate possibilities—not as a way to limit or narrow statutes. Thus, "property" is anything of value and the items listed in § 7-101(2) are illustrative and not exhaustive. Thus, the statute may include the obtention of a leasehold interest.

Appellant's remaining argument was that she did not "obtain" anything by uttering the bad checks. Appellant argued that she obtained possession of the leased premises by virtue of the

lease, not the checks. Ms. Eckert testified, however, that possession of the apartment was given to appellant upon receipt of the checks. The factfinder could conclude that appellant drew two bad checks to obtain a leasehold interest. Thus, the evidence was sufficient to support the convictions.

The court reiterated, however, that the statute requires a person to "obtain" the property in question. The holding does not extend to those who have previously failed to pay rent.

Melvin D. Williams v. State of Maryland, No. 644, September Term 201, filed December 19, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/0644s11.pdf

REQUEST TO DISCHARGE COUNSEL – MARYLAND RULE 4-215(e) – CRIME OF RESISTING ARREST – USE OF FORCE AGAINST PERSON OTHER THAN THE OFFICER ATTEMPTING TO MAKE THE ARREST.

Facts:

After two deputies approached the appellant as he was walking down the middle of the street, they saw him discard a bag that appeared to contain illegal drugs. One deputy ordered the appellant to put his hands behind his back but, when the deputy touched the appellant's arm to begin handcuffing him, the appellant fled. The deputies chased the appellant on foot around a residence. A bystander who saw the chase tackled the appellant and held him down while the appellant struggled to get away. The deputies caught up with the appellant and ordered him to lie down on the ground or else he would be tased. Instead the appellant continued in a physical altercation with the bystander, and one of the deputies tased the appellant. The appellant was handcuffed and placed under arrest. A search incident to arrest revealed cocaine on the appellant's person.

The appellant was represented by the same lawyer from the Office of the Public Defender throughout the proceedings. About a year and a half before trial, the appellant handwrote a letter to the circuit court stating that he wanted to discharge his lawyer and be assigned another lawyer. The letter was copied to defense counsel and the prosecutor. The court did not take any action respecting the letter. Thereafter, the appellant appeared before the court with defense counsel for several pretrial proceedings, for the two-day trial, and for sentencing. During these appearances, he never said or indicated in any way that he wanted to discharge his lawyer. The appellant was convicted of possession of cocaine and resisting arrest.

Held: Affirmed.

The circuit court did not err in failing to conduct an inquiry under Rule 4-215(e) in response to the appellant's letter asking to discharge counsel. The letter did not automatically trigger the right to an inquiry proceeding under the rule and, moreover, the appellant waived his request to discharge counsel by appearing with counsel representing him at pretrial hearings, the trial, and sentencing without ever mentioning his prior letter or any present desire to discharge counsel.

The evidence was legally sufficient to support the conviction for resisting arrest. Among other elements, the crime requires proof that the defendant refused to submit to the arrest and resisted the arrest by use of force. Here, the appellant knew the deputies were attempting to arrest him,

refused to submit to arrest, and used force against a bystander in his effort to resist being arrested. The appellant's use of force against the bystander in this situation was sufficient to satisfy the required element of force for the crime of resisting arrest.

Michael Robinson, Jr. v. State of Maryland, No. 2332, September Term 2011, filed December 21, 212). Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/2332s11.pdf

VINDICTIVE PROSECUTION – ENTITLEMENT TO A HEARING – BILL OF PARTICULARS – DEFENSE OF OTHERS JURY INSTRUCTION

Facts:

After a fight in a night club in Prince George's County, off-duty Sheriff's Office deputies working as security guards closed down the club. Appellant subsequently hit Deputy Lide with his car while Deputy Lide was attempting to break up a fight in the parking lot. Another officer, who was standing nearby, testified that she saw appellant's car pass by her and turn toward Deputy Lide "coming really fast," and she saw people around the car "getting out of the way or at least attempting to."

The State initially filed criminal charges against appellant as a result of the incident, but these charges were nol prossed on July 19, 2010. On August 12, 2010, the State again charged appellant with second degree assault and other offenses.

Appellant filed a motion to dismiss for retaliatory prosecution, arguing that he was recharged after he "filed a notice of intent to file suit against the police[.]" Counsel alleged that the new charges were based on a desire to retaliate for the civil suit, and he asked to call the two deputies to testify to the sequence of events. The court stated that appellant could raise the argument with the jury, and it denied the motion to dismiss without an evidentiary hearing. The jury convicted appellant of second-degree assault.

Held: Affirmed.

Although it is improper for the State to retaliate against a person for exercising a legal right, a conclusory allegation of improper motive on the part of the State is insufficient to entitle a defendant to an evidentiary hearing. Rather, there must be some evidence tending to show prosecutorial misconduct. Here, appellant provided the circuit court with no evidence of actual vindictiveness, nor did he provide verifiable facts supporting his claim of vindictive prosecution. Rather, appellant's allegation was based solely on the fact that charges against him were refiled after he filed a civil suit against the officers. A claim of vindictive prosecution based solely on the timing of the filing of the charges, without some evidence of actual bad faith, does not rise beyond the level of mere conjecture. Appellant's assertion was insufficient to entitle him to a hearing, and the circuit court properly denied appellant's motion to dismiss.

The court also properly denied appellant's motion to dismiss the charges against him based on the State's failure to file a bill of particulars. In light of the information the State provided to appellant in the charging document, the Application for Charges, and in discovery, and where there has been no showing of any surprise to the appellant regarding the evidence offered by the State, the circuit court did not abuse its discretion in denying appellant's motion.

The circuit court did not abuse its discretion when it refused to instruct the jury on the defense of defense of others where there was no evidence that appellant's act of hitting the victim with his car was reasonably necessary to defend his friend, and appellant testified that he did not intend to hit the victim or even see him until right before the collision.

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In Re: Malichi W., No. 0688, September Term 2011, filed December 20, 2012. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2012/0688s11.pdf

FAMILY LAW – ADOPTION – PROCEDURES – INTERVENTION
FAMILY LAW – ADOPTION – FINALITY

Facts:

Kris Golden was the maternal cousin of eight-year-old Malichi W. The juvenile court terminated the parental rights of Malichi's biological parents on August 10, 2010. Malichi's biological mother consented to the termination on the condition that Malichi be adopted by Ms. W., who was Malichi's pre-adoptive foster mother, and who had custody of the child since June 6, 2006. Malichi's biological father did not object, and thus he consented by operation of law. On March 9, 2011, the Baltimore City Department of Social Services (the "Department"), the child's appointed guardian, consented to Malichi's adoption by Ms. W. Ms. W. then petitioned the court to adopt Malichi on March 24, 2011.

On April 8, appellant Kris Golden filed a motion in Malichi's adoption proceedings captioned "Motion to Intervene and Appeal." She wanted to be considered as an adoptive parent for Malichi. The juvenile court denied the motion on April 12,, stating that it lacked good cause. On May 31, 2011, Golden filed a second motion with the same caption as her first. On June 1, 2011, the juvenile court granted Ms. W's petition for adoption of Malichi. The court then denied Golden's motion on June 10, 2011, finding that there was a lack of good cause and that the issue was moot because "the child was adopted on 6/1/11." Golden filed an appeal.

Held: Affirmed

Under FL §5-345(a), any adult may petition a juvenile court for an adoption of the child post-TPR. However, the petitioner must include in his or her filing all written consents required by FL §5-350(a). Here, because Yolanda W. filed the consent of Malachi's guardian, the Maryland Department of Social Services, Golden could not petition for adoption. This fact posed an insurmountable barrier to the relief sough by Golden – consideration as an adoptive parent.

Even assuming that Golden's goal was to overturn Ms. W.'s adoption of Malachi, no mechanism exists for her intervention in a post-TPR adoption. The Court examined Title 5, Subtitle 3 of the Family Law Article of the Md. Code (1984, 2006 Repl. Vol.), Title 3, Subtitle 8 of the Courts and Judicial Proceedings Article of the Md. Code (1977, 2006 Repl. Vol.), Title 9 and Title 11 of the Maryland Rules, and Maryland Rule 2-214. None of these rules confer upon a non-parental, non-custodial relative the right to intervene in an adoption proceeding after the termination of parental rights.

In fact, Md. Rule 11-122(b) allows non-parental intervention at the discretion of the juvenile court, but only for "dispositional purpose." According to the corresponding statute, a "dispositional hearing" is one that determines whether a child is in need of assistance and, if so, the nature of the court's intervention to protect the child's health, saftey, and wellbeing. The specificity and exclusivity of Rule 11-122(b) create the negative implication that no right of intervention exists beyond the dispositional stage – here, an adoption following termination of parental rights. The rationale for such a construction is readily apparent, as there is a need to surround the final adoption decree with a high degree of certainty, and anything which would undermine public confidence in adoption proceedings must be read by the courts in the gravest light.

With a review of the potentially applicable law, the Court of Special Appeals found no statute or rule that would allowed Golden's intervention in the adoption after termination of parental rights. Thus, Golden had no right to intervene in the adoption.

B. H. v. Anne Arundel County Department of Social Services, No. 1835, September Term 2011, filed October 16, 2012. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2012/1835s11.pdf

FAMILY LAW – INDICATED CHILD ABUSE – EVIDENCE – HEARSAY DECLARATIONS

Facts:

On April 22, 2010, B. H. prepared an evening meal for himself and his two minor children. Brayden, B. H.'s four-year old son, did not enjoy the mushrooms prepared with his dinner and refused to eat them. Despite Brayden's protest, B. H. insisted that Brayden remain at the table while he and Brianna, B. H.'s eleven-year old daughter, finished eating. Brayden left the table and B. H. followed after him, attempting to return him to his seat. In the process of carrying Brayden back to the table, the child sustained three superficial bruises to his neck and a scratch on his chin. B. H. then attempted to force Brayden to eat the mushrooms by placing them in his mouth.

Because the parents share custody of the children, their mother picked them up from school the following afternoon. Brayden's mother noticed the injuries and took him to his pediatrician. The pediatrician's office referred the matter to the Anne Arundel County Department of Social Services, who in turn, contacted the police. The police conducted an investigation that resulted ultimately in B. H. being charged with Child Abuse in the Second Degree, Assault in the Second Degree, and Reckless Endangerment. All charges were placed on the STET docket on September 3, 2010.

While the criminal case was pending, the Department of Social Services conducted its own civil investigation. Its assigned investigator interviewed Brayden, Brianna, the children's mother, B. H., and the police officer that charged B. H. The investigation concluded that B. H. was responsible for indicated child abuse as defined by COMAR § 07.02.07.12(A). B. H. unsuccessfully appealed that finding to an Administrative Law Judge. In upholding the finding of indicated child abuse, the ALJ relied, in part, on the hearsay statements of the children testified to by the DSS investigator. The Circuit Court for Anne Arundel County upheld the ALJ's opinion.

Held: Affirmed.

The Court of Special Appeals affirmed the decision of the Administrative Law Judge. In upholding the Department of Social Services determination that B. H. was responsible for indicated child abuse, the ALJ admitted into evidence the statements that Brayden and Brianna

made to the DSS investigator. Neither child testified directly at the administrative hearing, rather, the DSS investigator testified to the contents of her interviews.

Under the case of *Jones v. State*, 68 Md. App. 162 (1986), before a child may directly testify in a criminal proceeding, the finder of fact must determine that the child can observe and recall events, and is conscious of the duty to tell the truth. As a predicate to admitting a child's hearsay statements in a criminal matter, the statements must have particularized guarantees of trustworthiness pursuant to MD. CODE ANN., CRIM PROC. § 11-304(e). There is no analog to Section 11-304(e) applicable strictly in a contested case administrative proceeding, although an Administrative Law Judge may apply the factors for guidance. In a contested case administrative proceeding, hearsay statements may not be excluded solely on the basis that they are hearsay. MD. CODE ANN., STATE GOV'T §10-213(c). It remains necessary, however, for an agency to consider the reliability and probative value of a child's hearsay statements before they are admitted into evidence. Statements that are sworn, made close in time to the incident under investigation, and that corroborate one another are presumed to possess a high caliber of reliability. Where the Department of Social Services investigator gave sworn testimony, when her interviews of the children were conducted only five days after the alleged abuse, and where the children's hearsay statements were internally consistent and supported by the defendant's own testimony, the hearsay declarations were rendered sufficiently reliable to be admitted in an administrative hearing.

Marvin A. Address, et al. v. Robert Millstone, et al., No. 2486, September Term 2009, filed November 21, 2012. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2012/2486s09.pdf

INSURANCE LAW – IRREVOCABLE LIFE INSURANCE TRUST

Facts:

Robert Millstone, the CEO of a recycling corporation, had a long-term business relationship with Marvin A. Address, the president of an eponymous insurance brokerage, Marvin A. Address & Associates, Inc. At first, Millstone purchased, through Address's insurance brokerage, term life insurance policies but later, over a thirteen-year period, purchased eight whole life policies. Millstone retained ownership of seven of those policies and transferred ownership of the other to his two daughters; the seven policies retained by Millstone designated, as beneficiaries, either his daughters, his wife, or both, whereas the policies owned by the daughters named only them as beneficiaries.

Millstone had used the whole life insurance policies as a form of "forced savings." As the need arose in his capital-intensive scrap and recycling business, Millstone would borrow money against the cash value of his whole life insurance policies and use those funds in his business. Address was aware of Millstone's use of his whole life policies for this purpose. At the same time, however, as Millstone's net worth increased, Address suggested that Millstone should shift his financial focus toward estate planning. To facilitate this proposed estate plan, Address advised Millstone to create an insurance trust, known as an "ILIT" (irrevocable life insurance trust), and to purchase one or more new insurance policies, to be placed in the ILIT. The benefit of this arrangement was to shelter the proceeds payable to the beneficiaries, upon Millstone's death, under such life insurance, from estate taxes, because those proceeds would not be counted as belonging to Millstone's estate. The rationale for placing new policies in the ILIT rather than transferring existing policies was to avoid an IRS rule, known as the "three-year look-back," which would void the preferential estate tax treatment of the insurance proceeds if Millstone should die within three years of transferring existing policies to the ILIT. To finance the purchase of the new insurance policies, however, Millstone surrendered, in June 2001, the seven whole life policies which he owned. As a consequence, he received $275,121.25, as well as the cancellation of all of his existing policy loan balances, which amounted to an additional $614,215.97.

During the process of establishing the ILIT, Millstone was advised by his own counsel, Ron Lyons. Millstone directed Lyons to work with Address in creating the trust, and, after consulting with Address, Lyons drafted the necessary documents. Around the same time he surrendered his whole life policies, Millstone and his wife met in Lyons's office, where they signed the documents to create the ILIT.

Thereafter, Millstone became disenchanted with Address, as it dawned on him that there were disadvantages, as well as advantages, to the ILIT arrangement. For one thing, because Millstone did not own the life insurance policies in the ILIT, he could not easily borrow against them, as he had done in the past with his whole life policies. For another, and as a consequence of the fact that it was not intended for Millstone to be able to borrow against the insurance policies in the ILIT, the insurance policies placed in the ILIT were of a different, hybrid type, known as "universal life" insurance, which did not accumulate cash value as quickly as whole life policies. Eventually, in the spring of 2004, when Millstone wished to borrow against the insurance policies in the ILIT but was told that he could not do so, he directed that the ILIT be dissolved. Ownership of the universal life insurance policy, which was then in the ILIT, was transferred to Millstone's daughters.

The following year, Millstone and Address arranged for the surrender of both the universal life insurance policy and the one remaining whole life policy, which had been retained by his daughters when the ILIT was created in 2001. In their place, a new universal life policy, with a larger death benefit, was purchased, and the ownership was conveyed to Millstone's daughters. Two years after that transaction, Millstone wished to borrow against that universal life insurance policy and called Address to inquire about doing so. When Address replied that there was around $50,000 of available cash value, Millstone became angry, as the available cash value was considerably less than he had anticipated. Millstone directed Address to surrender the universal life insurance policy and ceased any further business dealings with either Address or his insurance brokerage.

Thereafter, Millstone brought suit against Address and his insurance brokerage, alleging negligence, breach of contract, negligent misrepresentation, intentional misrepresentation, and constructive fraud relating to the purchase and surrender of the life insurance policies. The gravamen of Millstone's complaint was that Address induced him to prematurely surrender whole life insurance policies, thereby foregoing substantial cash value, as well as giving inappropriate advice as to which insurance policies to purchase thereafter, which also resulted in the loss of substantial cash value. Among the defenses raised by Address, both in his answer and in his motions for judgment, was that Millstone lacked standing to sue based upon life insurance policies which were owned by either the ILIT or his daughters, but the trial court denied Address's motions. The case went to a jury, which found that Address was negligent and made negligent misrepresentations with respect to the transactions at issue but that Millstone was contributorily negligent; and that Address breached an express or implied contract with Millstone. It awarded Millstone $958,807.50 in damages. Address appealed.

Held: Reversed

The Court of Special Appeals reversed and remanded with instructions to enter judgment in favor of appellants. Where the defendants, in their answer, asserted that the plaintiff lacked standing, that the plaintiff did not have capacity to sue, and that the plaintiff did not have the authority to sue in a representative capacity, and thereafter, during argument on motions for

judgment, raised the same issues with respect to all counts, the issue of the plaintiff's standing to sue was adequately preserved for appeal, and it was not necessary for the defendants to object to the testimony of plaintiff's expert witnesses or to the jury instructions.

Millstone, as the settlor of the ILIT, permanently relinquished control of the gift property. Consequently, he lacked standing to bring suit based on either the alleged premature surrender of life insurance policies owned by the ILIT or any premiums paid for such policies, and it was error for the trial court to deny Address's motions for judgment. As to the surrender of the whole life policies, Millstone did have standing to sue. However, as he received all of the cash value upon surrender of those policies, and Millstone freely decided to establish the ILIT, with the advice of his own counsel, the evidence was insufficient to show that Address breached an express or implied contract with Millstone.

Samuel Antar, et al. v. The Mike Egan Insurance Agency, Inc., et al., No. 1481, September Term 2011, filed December 21, 2012. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2012/1481s11.pdf

STATUTE OF LIMITATIONS – TOLLING – VENUE – *FORUM NON CONVENIENS* – SAVING STATUTE – RULE 2-101(b)

Facts:

The appellants owned a building in Baltimore City. The building was insured by the appellees. The building was destroyed by fire on July 13, 2007. The appellants submitted a claim to the appellees. The appellees denied the claim because the building had not been equipped with the smoke and heat detectors the insurance policy required.

The appellants then brought a lawsuit against the appellees in a Pennsylvania state court on February 4, 2008. The parties agree that the cause of action accrued no later than the date suit was initially brought. On June 18, 2008, the appellees moved to dismiss on the ground of *forum non conveniens*. The Pennsylvania court granted the motion to dismiss on July 24, 2008, with leave to refile in Maryland. The appellants appealed to Pennsylvania's intermediate appellate court, which affirmed the dismissal on June 15, 2010.

On May 18, 2011, the appellants brought suit against the appellees in the Circuit Court for Baltimore City. The appellees moved to dismiss the suit as time-barred, as the Statute of Limitations had expired. The court granted the motion to dismiss on August 17, 2011. The appellants appealed the dismissal to the Court of Special Appeals.

The parties agree that the three-year Statute of Limitations began to run on February 4, 2008. It thus expired on February 4, 2011. The appellants filed their suit in Baltimore City on May 18, 2011, three months and two weeks past the deadline. The appellants contend, however, that the running of the limitations period in Maryland should have been tolled for the entire length of time that the suit was pending in Pennsylvania.

Held: Affirmed.

The Statute of Limitations is virtually an absolute bar that permits very little by way of exception. *See, e.g., Walko Corporation v. Burger Chef Systems, Inc.*, 281 Md. 207, 378 A.2d 1100 (1977); *Bragunier Masonry Contractors v. Catholic University of America*, 368 Md. 627, 796 A.2d 744 (2002); *Kumar v. Dhanda*, 426 Md. 185, 43 A.3d 1029 (2012).

The case of *Bertonazzi v. Hillman*, 241 Md. 361, 216 A.2d 723 (1966), carved out a narrow exception to the traditional rule against engrafting implied exceptions upon the Statute of

Limitations in certain situations where the sole reason for the dismissal of the prior action was improper venue. *See Walko*, 281 Md. at 214. The basis for the *Bertonazzi* decision was that, at that time, Maryland had neither a venue transfer statute that would allow a court to transfer a case to another jurisdiction nor a saving statute that would allow a plaintiff to file a second suit in another jurisdiction after a dismissal within a specified time. The Court of Appeals has since rectified this situation by enacting a venue transfer rule, the present Rule 2-327(b), and a saving rule, the present Rule 2-101(b). As such, *Bertonazzi* is now a lifeless hypothetical with no enduring precedential vitality.

Rule 2-101(b) provides that, in actions filed within the Maryland Statute of Limitations in a United States District Court or a court of another state that are dismissed for lack of jurisdiction, because the court declines to exercise jurisdiction, or because the action is barred by the applicable Statute of Limitations, the action shall be treated as timely filed if it is filed in a Maryland circuit court within 30 days after the entry of the dismissal order in the other forum. Rule 2-101(b) does not apply to this case because the Statute of Limitations expired only after the action had been dismissed in Pennsylvania. Even if it did, Rule 2-101(b) allows only a thirty-day grace period after the action is dismissed in the other forum. The appellants filed suit in Baltimore City eight months after the Pennsylvania intermediate appellate court affirmed the dismissal, and four months and eight days after the appellate order was entered on the docket of the Pennsylvania trial court.

This case does not implicate any of the policy concerns underlying the equitable class action tolling exception addressed in *Christensen v. Philip Morris*, 162 Md. App. 616, 875 A.2d 823 (2005), *aff'd*, 394 Md. 227, 905 A.2d 340 (2006), and *Swam v. Upper Chesapeake Medical Center*, 397 Md. 528, 919 A.2d 33 (2007).

If, even while a case is pending in one forum, there is the theoretical possibility that it may end up being tried at a later time in a different forum, the diligent litigant is obligated to guard against a running of the Statute of Limitations in that other forum by a protective filing of the claim in that possible future forum. *See Kumar v. Dhanda*, 198 Md. App. 337, 17 A.3d 744 (2011), *aff'd*, 426 Md. 185, 43 A.3d 1029 (2012).

In re: Earl F., No. 2434, September Term 2010**,** filed November 27, 2012. Opinion by Sharer, J.

http://mdcourts.gov/opinions/cosa/2012/2434s10.pdf

JUVENILE LAW – RESTITUTION

Facts:

Earl F. was adjudicated a delinquent child by the Circuit Court for Cecil County, sitting as a juvenile court, as a result of having been found to be involved in a robbery, theft, and assault. Earl F. and an accomplice assaulted a street vendor and took from him cash in amounts variously estimated to have been between $100 and $900 dollars. Following a restitution hearing, Earl F. was ordered to pay restitution in the amount of $600. Judgment was entered against Earl F. and his mother.

The juvenile petition filed against Earl F. provided:

1) Earl F. did ... rob [the victim] of one wallet ... and ten dollars....
2) Earl F. did steal one wallet ... and ten dollars ... having a value less than $100.00.

On appeal, Earl F. argued that the amount of restitution ordered must be limited to the amount of loss alleged in the juvenile petition, *viz*, "ten dollars." He made two arguments: (1) that he was ordered to make restitution for a crime of which he was not convicted, citing *Walczak v. State*, 302 Md. 422 (1985), and (2) that he was denied due process.

Held:

Distinguishing *Walczak*, the Court held that the juvenile court did not abuse its discretion in ordering restitution that was based on the victim's loss, and not limited to the sum alleged in the charging document. In so doing, the Court recognize the societal aspects of restitution as set out in *In re John M.*, 129 Md. App. 165 (1999), as well as the "broad discretion" vested in juvenile courts in ordering restitution, as stated in *In re Delric. H.*, 150 Md. App. 234 (2003). Moreover, because from the outset Earl F. and his mother were aware that the victim's claimed loss far exceeded "ten dollars" they were not without knowledge of the potential restitution amount, and were not denied due process in that respect.

Anthony Falls v. 1CI, Inc., et al., No. 2747, September Term 2010, filed December 19, 2012. Opinion by Salmon, J.

http://mdcourts.gov/opinions/cosa/2012/2747s10.pdf

ARBITRATION – SCOPE OF ARBITRATION CLAUSE.

Facts:

In the Fall of 2008, Anthony Falls ("Falls") was an employee of 1CI, Inc., a wholly owned subsidiary of Cape Fox Corporation ("Cape Fox"), an Alaskan Native Corporation. On January 1, 2009, Falls signed an employment agreement with 1CI in which he agreed to serve as its Chief Executive Officer. In addition to an annual salary of $120,000, the Agreement provided that Falls would be entitled to an incentive bonus equal to "40% of the sum total of [1CI's] profits before taxes but after payment of compensation to Falls." The Agreement also provided that "[a]ny dispute, claim, or controversy arising out of or relating to this Agreement shall be settled by arbitration by a single arbitrator." The Agreement also stated that the arbitration would be Seattle, Washington, that arbitration fees would be divided 50-50 between the parties and, that the law of Alaska would govern the resolution of all disputes. Lastly, the Agreement provided that the decision of the arbitrator would be "final, binding, and non-appealable."

Falls's employment with 1CI was terminated in January of 2010. Approximately six months later, Falls filed suit, in the Circuit Court for Montgomery County, Maryland, against 1CI and Cape Fox. In his one count complaint, Falls alleged that the defendants were employers, within the meaning of the Maryland Wage Payment and Collection Law as codified in Md. Code, Labor & Employment Article, § 3-501 through 3-509. According to the complaint. Falls's employers had failed to pay him the 40% bonus he was entitled to under the agreement even though the defendants had no legitimate reason for denying him the bonus. Falls contended that he was owed a bonus "in excess of $400,00. In addition, invoking § 3-507 of the Maryland Wage Payment and Collection Law, Falls asked for treble damages plus attorney's fees and costs. 1CI filed a motion to dismiss the complaint and to compel arbitration, which Falls opposed. The circuit court ordered that the matter be arbitrated as to both 1CI and Cape Fox. The court further ordered that the complaint filed by Falls against the defendants be dismissed.

On appeal, Falls contended: (1) That the agreement to arbitrate was not broad enough to cover statutory claims under the Maryland Wage Payment Act; (2) That the agreement to arbitrate was unconscionable because; a) It required the parties to arbitrate the claim in Seattle, Washington; (b) it required that each party pay 50% of the arbitrator's fee, and; (c) the Agreement provided that the decision of the arbitrator was "non-appealable."

Held: Affirmed.

The Court affirmed the trial judge's decision to enforce the arbitration provision. In regard to the first question presented, the Court pointed out that federal cases interpreting the Federal Arbitration Act ("FAA") have uniformly held that even ambiguous arbitration claims must be interpreted in favor of arbitration. Moreover, numerous federal cases with arbitration clauses similar in breadth as the one at issue, had been interpreted to be broad enough to encompass statutory claims.

In regard to the second issue, the court held that the mere fact that the case was required to be arbitrated in Seattle, Washington did not make the agreement to arbitrate unconscionable. In reaching that conclusion, the court stressed that in this case, as distinct from cases relied upon by Falls, the employee was not presented with the contract of employment as a prerequisite for employment. Instead, Falls, who had previously owned 1CI, was able to negotiate his contract. The court held that in order to show that the arbitration agreement was unconscionable, Falls was required to put forth evidence in the circuit court showing that the provisions were "unreasonable or grossly favorable" to the employer. He failed in that regard.

The court also rejected Falls's claim that the arbitration clause was unconscionable because it required that the parties split the arbitrator's fee. Although no Maryland case had previously considered the issue, numerous federal cases interpreting the FAA have held that a provision requiring the parties to split the arbitrator's fee does not make the agreement per se unreasonable. Instead, a case-by-case approach has been adopted in which the court must focus on whether the provision would make arbitration prohibitively expensive for either side. The Court adopted the federal rule and noted that Falls failed to meet that burden.

Lastly, the court rejected Falls's contention that the clause of the arbitration agreement that provided that the arbitrator's decision was "non-appealable" was unconscionable. The Court noted that other jurisdictions have uniformly held that provisions, such as the one found in the arbitration agreement at issue, have uniformly interpreted the phrase "non-appealable" to mean that a losing party can still move to vacate an award on grounds allowed by statute. The phrase "non-appealable" simply "reflects a contractual intent that the issue joined and resolved in the arbitration, may not be tried *de novo* in any court."

Franklin Credit Management Corporation v. Fred Nefflen, No. 989, September Term 2011, filed December 20, 2012. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/0989s11.pdf

MOTION TO STRIKE – DEFAULT JUDGMENTS – REQUIREMENTS FOR ENTRY OF DEFAULT JUDGMENT – MOTION TO VACATE DEFAULT JUDGMENT

Facts: Franklin Credit Management Corporation ("Franklin") was assigned the servicing rights of Fred Nefflen's mortgage loan. A dispute arose regarding the monthly payment due, and Franklin reported to credit agencies that Mr. Nefflen was delinquent in his payments.

Mr. Nefflen subsequently filed suit against Franklin. The parties settled the case, providing, among other agreements, that Franklin would " delete all derogatory information from any Credit Reports and report the Nefflen Loan as current and paid as agreed," and that "[t]he parties agree that there shall be no demand or requirement for flood insurance of any kind." On April 13, 2010, Mr. Nefflen filed another complaint against Franklin, contending that Franklin was in breach of these two provisions of the settlement agreement.

Franklin did not file an Answer and on October 6, 2010, the circuit court entered an Order of Default in favor of Mr. Nefflen. On April 7, 2011, the court held a default hearing. Mr. Nefflen was the only witness to testify; Franklin was not present. Mr. Nefflen testified that he was "physically . . . just a wreck sometimes," due to his credit report and the bills regarding flood insurance. His situation with Franklin had "caused a lot of damage to my family," due to "the medications my wife and son are on because of it," and because he and his wife were unable to go out because Mr. Nefflen paid cash for everything.

On April 29, 2011, the court issued a default judgment in favor of Mr. Nefflen, awarding him $203,301.84, plus attorneys' fees. Franklin subsequently filed a Motion for New Trial or to Alter or Amend Judgment, arguing that the court improperly issued a default judgment because Mr. Nefflen's complaint was insufficient to prove liability for the statutory and defamation counts. The court denied Franklin's motion.

Held: Affirmed.

In federal court, pursuant to Rule 55 of the Federal Rules of Civil Procedure, a court must determine whether the complaint states a legitimate cause of action before entering a default judgment. In Maryland, however, there is no such requirement.

Maryland Rule 2-613(d) provides an opportunity for the defendant to move to vacate an order of default and explain the legal and factual basis for any defense to the claim. If the defendant does so, the court must then determine whether "there is a substantial and sufficient basis for an actual

controversy as to the merits of the action," and whether "it is equitable to excuse the failure to plead." Rule 2-613(e). This is the defendant's opportunity to have the court assess the viability of the legal claims.

If the defendant does not file a motion to vacate the order of default, the court may grant a default judgment if two conditions are satisfied: (1) the court has jurisdiction to enter the judgment; and (2) the requisite notice was mailed. Once a default judgment has been entered, the court may not revisit the issue of liability, and the court's revisory power is limited to the relief granted. Franklin's argument on appeal was limited to liability; it argued that the circuit court abused its discretion in failing to grant the motion to alter or amend because the complaint did not state a basis for liability. Because the issue of liability was not subject to review after the default judgment was entered, the circuit court properly denied the motion to alter or amend.

Khana Soleimanzadeh, et al. v. Montgomery County, Maryland, No. 1433, September Term 2010, filed November 26, 2012. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2012/1433s10.pdf

EMINENT DOMAIN – CONSTITUTIONAL RIGHT TO JURY TRIAL ON ISSUE OF JUST COMPENSATION – SUMMARY JUDGMENT RULE, RULE 2-501, NOT APPLICABLE TO PRECLUDE JURY AWARD OF JUST COMPENSATION IN CONDEMNATION PROCEEDINGS

Facts:

On April 10, 2009, Montgomery County filed a complaint for condemnation in the Circuit Court for Montgomery County, seeking to acquire a portion of real property from Khana and Joseph Soleimanzadeh, in furtherance of a Montgomery County road improvement project. After requesting and being granted a 45-day extension in which to respond to Montgomery County's interrogatories and requests for production of documents, the Soleimanzadehs failed to produce the requested discovery. On January 21, 2010, the circuit court entered an order directing the Soleimanzadehs to provide the requested discovery to Montgomery County within ten (10) days. The order additionally provided that, if the Soleimanzadehs failed to produce the discovery within ten days, they would be precluded from introducing any evidence in support of their claims for just compensation and damages. At the conclusion of the ten-day period, the Soleimanzadehs failed to produce the requested discovery, and the circuit court imposed the aforementioned sanctions.

On May 3, 2010, Montgomery County filed a motion for summary judgment, arguing that, because of the sanctions imposed by the circuit court, the Soleimanzadehs were unable to generate a dispute of material fact concerning the issue of just compensation. The circuit court granted Montgomery County's motion for summary judgment on July 19, 2010, finding that there was no genuine dispute of material fact pursuant to Maryland Rule 2-501. Accordingly, on July 21, 2010, the circuit court vested title to the subject property in Montgomery County and, based exclusively on the County's appraisal of the property, ordered just compensation in the amount of $35,000 to be disbursed to the Soleimanzadehs.

Held: Reversed.

The Court of Special Appeals began its analysis by noting that the Maryland Constitution, Article III § 40, requires that a jury award just compensation in a condemnation proceeding. The Court then traced the history of the statutes and rules of procedure that were adopted to implement such jury trial right. The Court concluded with the present Maryland Rule 12-207(a), which requires a condemnation action be tried by a jury unless all parties agree to a court determination.

The Court distinguished the constitutional right to a jury trial in a condemnation proceeding from Article 23 of the Declaration of Rights, which preserves the common law right to a jury trial in civil proceedings. In the former, Article III § 40 and Rule 12-207(a) specify the tribunal, *i.e.*, the jury, that will decide the just compensation to be awarded a landowner, while in the latter, Article 23 and Rule 2-325 simply preserve the right to elect a jury trial on "issues of fact" in a civil proceeding.

The Court acknowledged that the rules of civil procedure apply to condemnation proceedings under Rule 1-101(b), "except as otherwise specifically provided or necessarily implied." The Court held that Article III § 40 and Rule 12-207(a) specifically provide an exception to the summary judgment rule, Rule 2-501, where the application of such rule would preclude the award of just compensation by a jury.

Finally, the Court observed that, despite the landowners' inability to adduce evidence on the issue of just compensation because of their discovery violations, the jury still had evidence separate and apart from the County's appraisal. In a condemnation proceeding, a landowner has the right to have the jury view the property subject to condemnation, and such view is a significant part of the evidence in the case. In addition, the jury is not bound to accept the conclusions of any expert, and can rely on any testimony of the expert elicited on cross-examination.

South Kaywood Community Association v. Rodney Long, et ux., No. 691, September Term 2010. Opinion by Salmon, J.

http://mdcourts.gov/opinions/cosa/2012/0691s10.pdf

RESTRICTIVE COVENANTS – MEANING OF THE PHRASE "SINGLE-FAMILY RESIDENCE."

Facts:

In 2006, Rodney and Melinda Long purchased a home in Salisbury, Maryland located at 1602 South Kaywood Drive. That property was subject to a restrictive covenant, recorded in the land records of Wicomico County, that among other things, restricted the properties use as follows: "[The property] shall never be used or occupied for any purpose except for that of a private residence exclusively, nor shall any part or portion thereof ever be used or occupied except solely as a single-family residence ....". The Longs subsequently, leased the house located at 1602 South Kaywood Drive to three female under graduate students at Salisbury University, who were not related by blood, marriage, or adoption. Upon learning of the familial status of the three students, South Kaywood Community Association sent letters to the Longs in which the Association asserted that rental to unrelated occupants constituted a violation of the covenants that governed the property. More specifically, the Association claimed that rental to three unrelated coeds violated the covenant restricting the use to "a single-family residence." According to the Association, a dwelling was not used as a "single-family residence," if it was occupied by persons who were not related by blood, marriage or adoption.

The Longs disagreed with the Association's interpretation of the covenant and as a result filed a declaratory judgment action in the Circuit Court for Wicomico County asking the court to declare that the covenant did not "require all individuals residing on [their] property within the Kaywood subdivision to be related ....". The Association filed an answer and the matter came on for an evidentiary hearing, that was held on April 22, 2010. The trial judge took the matter under advisement and later filed a written opinion in which he declared that the covenant did not "require residence of property within the Kaywood subdivision to be related by blood, marriage, or adoption." The court went on to declare however, that the occupation of the dwelling by three unrelated college students conform[ed] to the provisions of the covenants and restriction and is consistent with the applicable Wicomico County Zoning Regulations."

Held:

The Court of Appeals held that the trial court did not err when he ruled that the restricted covenant did not prevent the Longs from renting their property to persons not related by blood, marriage or adoption. The court noted that there were no previous reported Maryland appellate decisions that decided whether a restrictive covenant that governs a subdivision and limits the use of lots in that

subdivision to "single-families" but does not define the word family" nevertheless prohibits an owner of a lot in that subdivision from renting to persons who are not related by blood, marriage or adoption. But, as noted by the court, numerous cases from sister jurisdictions have decided that issue but have reached divergent results. The Court's survey of the decision from other jurisdictions caused the Court to conclude that the term "single-family" was ambiguous because it could mean that use of the property is restricted to occupation by persons related by blood, marriage, or adoption but, on the other hand, it could have a broader meaning such as the definition of "single-family" as set forth in Section 225-25B in the Wicomico Zoning code. The court stressed that while the zoning statute had no direct applicability to the covenant at issue, it provided at least some indication of the type of groups that might logically, as a matter of public policy, be included within the concept of a "single-family." Because the term "single-family" was ambiguous, the court applied the well established rule that "if an ambiguity is present, and if that ambiguity is not clearly resolved by resort to extrinsic evidence [here there was none], the general rule in favor of the unrestricted use of property will prevail and an ambiguity in a restriction will be resolved against the party seeking its enforcement."

The court vacated the portion of the trial judge's declaration in which the court declared that: (1) thee unrelated college students living together did not violate the restrictive covenant and (2) that the rental arrangement between the coeds and the Longs did not violate any provision of the Wicomico Zoning Ordinance. Those parts of the Court's declaration were vacated because the complaint filed by the Longs simply did not request that the Court make a declaration as to those matters.

Comptroller of the Treasury v. Gore Enterprise Holdings, Inc., and *Comptroller of the Treasury v. Future Value, Inc.*, Nos. 1696 & 1697, September Term 2011, filed January 24, 2013. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2013/1696s11.pdf

MARYLAND CORPORATE INCOME TAX – INTERSTATE TAXATION – DUE PROCESS – COMMERCE CLAUSE – UNITARY BUSINESS PRINCIPLE – STATUTE OF LIMITATIONS – APPORTIONMENT

Facts:

W.L. Gore & Associates, Inc. ("Gore, Inc."), a Delaware corporation, attributes income to Maryland based on its local product sales and on its manufacturing facilities, which employ over two-thousand people in this state.

Gore, Inc. formed Gore Enterprise Holdings, Inc. ("GEH") in 1983, contributing all Gore, Inc. patents in exchange for all of GEH's stock. GEH operated without any employees or rent expenses until 1995, when it hired one salaried employee and began to pay Gore, Inc. for rent and for various corporate, administrative, and legal services. GEH has never had an outside director and is managed by a panel of Gore, Inc. employees. At its inception, GEH granted Gore, Inc. an exclusive license to all present and future patents. In return, Gore, Inc. pays GEH a "reasonable fee" and deducts that expense from its Maryland taxable income. GEH recognizes these royalties as income, on which it pays no tax in Delaware

In 1996, Gore, Inc. exchanged its financial assets in return for all outstanding stock of its newly-formed subsidiary, Future Value, Inc. ("FVI"). Since its inception, FVI has been funded entirely by contributions from Gore, Inc. and GEH, and by reinvesting its investment income. A portion of that investment income is derived from loans FVI makes to Gore, Inc. As with GEH, Gore, Inc. deducts its interest payments to FVI, and FVI recognizes those payments as taxable income that is not subject to tax in Delaware.

In 2006, the Comptroller audited Gore, GEH, and FVI and determined that GEH and FVI were required to apportion income to Maryland. The Comptroller took the ratio that Gore used to apportion its Maryland income and expenses—including royalties and interest paid to its subsidiaries—and applied it to GEH's and FVI's federal taxable income derived from Gore. The Comptroller assessed against GEH $26,436,315, and assessed against FVI $2,608,895, both including interest and penalties. The Maryland Tax Court conducted a hearing and upheld the assessment, but the Circuit Court for Cecil County reversed, and the Comptroller appealed.

Held: Reversed.

The Court of Special Appeals reversed the judgment of the circuit court and reinstated the assessments. The purpose of Tax – General § 10-402 is to tax multi-state corporations doing business in this State to the full extent permitted by the United States Constitution. A state may tax an apportioned sum of the corporation's multi-state business if the business is "unitary." Where a parent corporation deducts payments to a subsidiary from its Maryland taxable income as business expenses, and the subsidiary recognizes those payments as income, the subsidiary's income is taxable in Maryland. There is no reason to distinguish patent management from trademark management for purposes of interstate taxation. Although the subsidiaries formed part of a unitary business for taxation purposes, they were required to file separate tax returns under Maryland's reporting statutes. The Comptroller's Office was not precluded from assessing past taxes even though prior audits of the parent company did not indicate that it should not have deducted expenses to its subsidiaries or that its subsidiaries were required to file tax returns. The Tax Court did not err when it applied the parent company's income apportionment factor to its subsidiaries' income generated by the parent's expenses.

Bernadine I. Smith v. Johns Hopkins Community Physicians, Inc., No. 1191, September Term 2012, filed January 23, 2013. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2013/1191s12.pdf

FORUM NON CONVENIENS – RULE 2-327(c) – TRANSFER OF VENUE – APPEALABILITY OF TRANSFER DECISION – PLAINTIFF'S CHOICE OF VENUE – ABUSE OF DISCRETION

Facts:

The appellants brought a wrongful death action against the appellee in the Circuit Court for Baltimore City alleging medical malpractice. Two of the plaintiffs, the decedent's widow and one of his children, live in Baltimore County; the other two plaintiffs live in Harford County and in Delaware. The office of the appellee where all of the allegedly negligent treatment took place is located in Baltimore County. The physician whose treatment of the decedent is at issue lives in Baltimore County.

The appellee moved to transfer the case from Baltimore City to the Circuit Court for Baltimore County on the ground of *forum non conveniens.* The court granted the motion. The appellants appealed the transfer decision to the Court of Special Appeals.

Held: Affirmed.

A court's decision to grant a motion to transfer venue is immediately appealable. *See Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 437-38, 816 A.2d 117 (2003); *Payton-Henderson v. Evans*, 180 Md. App. 267, 281, 949 A.2d 654 (2008).

Trial courts are vested with wide discretion in determining whether to transfer an action on the ground of *forum non conveniens*. The party requesting a transfer of venue bears the burden of persuading the court that the interests of justice would be best served by a transfer. If the factors for and against transfer are in equipoise, the plaintiff's choice of venue controls. *See Leung v. Nunes*, 354 Md. 21, 229, 729 A.2d 956 (1999).

In this case, the only factor arguably tilting against transfer of venue is the plaintiff's prerogative to choose a preferred proper venue. Where the plaintiff does not live in the venue he initially chooses, however, the plaintiff's choice of venue is entitled to "little deference and thus little weight." *See Stidham v. Morris*, 161 Md. App. 562, 569, 870 A.2d 1285 (2005). Moreover, the plaintiff's entitlement to choose the forum has already been figured into the transfer calculus by virtue of 1) allocating the burden of proof to the party requesting the transfer and 2) putting on that party "a heavy burden of persuasion." *See Payton-Henderson*, 180 Md. App. at 287. Thus, the plaintiff's choice of venue should not be considered a second time as a factor in favor of transfer.

Slight weight is given to the convenience of expert witnesses who are expected to testify. Moreover, the expert witnesses who have been identified in this case thus far both live in Baltimore County.

The court did not abuse its discretion by failing to hold a hearing and failing to articulate reasons for transferring the case to Baltimore County. A hearing is not required on a motion to transfer venue, and the appellants did not request one. A court's failure to articulate reasons for a decision that is clearly in line with proper procedure is not an abuse of discretion.

B-Line Medical, LLC v. Interactive Digital Solutions, Inc., No. 1085, September Term 2011, filed December 20, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/1085s11.pdf

TORT – JURY INSTRUCTIONS – INDIANA LAW

Facts:

Appellee, Interactive Digital Solutions ("IDS"), filed a claim for damages in the Circuit Court for Howard County against appellant, B-Line Medical, LLC ("B-Line"). IDS alleged that B-Line had breached the non-compete provision of a contract it had with IDS. IDS also alleged that B-Line had tortiously interfered with contract and business relations that existed between IDS and Clarian Health Partners, Inc. ("Clarian") through a subcontract agreement in place between IDS and AT&T Communications, Inc. ("AT&T").

At trial, the circuit court declined to give instructions regarding the validity of contracts restricting trade and on the Indiana Statute of Frauds, but did give jury instructions indicating that IDS could recover in tort as a third-party beneficiary to contracts that AT&T had with Clarian under Indiana law. B-Line argued that a third-party beneficiary cannot recover under either tort under Indiana law. A jury returned a verdict in favor of IDS, awarding undifferentiated damages in the amount of $769,422.

On June 20, 2011, B-Line timely filed a Motion to Revise Judgment, a Motion for Judgment Notwithstanding the Verdict ("JNOV"), and a Motion for a New Trial. On July 28, 2011, the circuit court denied the motions and this appeal followed.

Held: Affirmed.

The circuit court correctly submitted the case to the jury and did not err or abuse its discretion in giving jury instructions containing applicable and correct exposition of Indiana law. Indiana follows the Restatement (Second) of Torts, which allows a third-party beneficiary to recover in tort for intentional interference with contractual or business relations.

JAI Medical systems Managed Care Organization, Inc. v. Wilhelmina Bradford, No. 734, September Term 2011, filed December 20, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/0734s11.pdf

TORT – APPARENT AUTHORITY – MANAGED CARE ORGANIZATION

Facts:

Following a jury trial in the Circuit Court for Baltimore City, appellant JAI Medical Systems Managed Care Organization ("JAI") was found vicariously liable for the negligent medical care provided to appellee Wilhelmina Bradford by a provider in its network. Prior to trial, JAI filed a motion for summary judgment on the grounds that Dr. Steven W. Bennett was not an employee or agent of JAI, which was denied. JAI argued that Bradford's claim failed under both the subject and objective tests for apparent agency because JAI argued that it made no representations to Bradford regarding Dr. Bennett other than those required by the Maryland statutes governing Managed Care Organizations, Bradford did not rely on any representations by JAI in selecting Dr. Bennett, and a reasonable person knows that medical providers can participate in multiple insurance plans.

At the close of Bradford's case, JAI moved for judgment as a matter of law based on insufficient evidence of agency and the trial court deferred ruling on the motion. JAI renewed its motion at the close of all the evidence and the trial court denied the motion. The jury found in favor of Bradford and awarded damages of $3,064,000, and judgment was entered against JAI for $714,000. JAI filed post-trial motions for Judgment Notwithstanding the Verdict ("JNOV"), a new trial, and remitter under Md. Code (1973, 2006 Repl. Vol,) § 3-2A-09(b)(1)(ii) of the Courts and Judicial Proceedings Article ("CJP"). The trial court denied the motions for JNOV and a new trial and granted the motion for remitter.

Held: Reversed

The circuit court erred in submitting the issue of apparent authority to the jury because the test for apparent authority could not be satisfied as a matter of law. Under the "common knowledge test," a reasonable person would not believe that a health care provider in the network of a Managed Care Organization organized under Md. Code (1982, 2009 Repl. Vol.), Health-General Article §§ 15-101 et. seq. is an employee of the Managed Care Organization and therefore a Managed Care Organization cannot be held vicariously liable for the negligence of a health care provider in its network.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated January 2, 2013, the following attorney has been disbarred by consent:

SUPRIYA MIRIAM HARDING

*

By a Per Curiam Order of the Court of Appeals dated January 8, 2013, the following attorney has been disbarred:

JEFFREY DAVID KAHL

*

By an Order of the Court of Appeals dated January 8, 2013, the following attorney has been indefinitely suspended by consent:

MARTA BERTOLA

*

By an Order of the Court of Appeals dated December 12, 2012, the following attorney has been indefinitely suspended by consent, effective January 11, 2013:

MICHAEL THEODORE BROWN

*

This is to certify that

DENISE LEONA BELLAMY

has been replaced on the register of attorneys in this state as of January 15, 2013.

*

*

By an Opinion of the Court of Appeals dated January 31, 2013, the following attorney has been indefinitely suspended:

GERALD FREDERICK CHAPMAN

*

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JUDICIAL APPOINTMENTS

On December 28, 2012, the Governor announced the elevation of the **HON. CHRISTOPHER LOUIS PANOS** to the Circuit Court for Baltimore City. Judge Panos was sworn in on January 7, 2013 and fills the vacancy created by the elevation of the Honorable George L. Russell, III to the U.S. District Court..

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On December 28, 2012, the Governor announced the appointment of **DOUGLAS R.M. NAZARIAN** to the Court of Special Appeals. Judge Nazarian was sworn in on January 8, 2013 and fills the vacancy created by the retirement of the Honorable James R. Eyler.

*

On December 28, 2012, the Governor announced the appointment of **JULIE REBECCA RUBIN** to the Circuit Court for Baltimore City. Judge Rubin was sworn in on January 9, 2013 and fills the vacancy created by the retirement of the Honorable Gale E. Rasin.

*

On December 28, 2012, the Governor announced the appointment of **PHILIP SENAN JACKSON** to the Circuit Court for Baltimore City. Judge Jackson was sworn in on January 18, 2013 and fills the vacancy created by the retirement of the Honorable John P. Miller.

*

On December 28, 2012, the Governor announced the appointment of **MELISSA MARIE PHINN** to the Circuit Court for Baltimore City. Judge Phinn was sworn in on January 18, 2013 and fills the vacancy created by the retirement of the Honorable Evelyn Omega Cannon.

*

On December 28, 2012, the Governor announced the appointment of **KIMBERLY MICHELLE THOMAS** to the District Court of Maryland – Baltimore County. Judge Thomas was sworn in on January 23, 2013 and fills the vacancy created by the elevation of the Honorable Nancy Maggitti Purpura to the Circuit Court for Baltimore County.

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On December 28, 2012, the Governor announced the appointment of **MICHAEL THURSTON PATE** to the District Court of Maryland – Baltimore County. Judge Pate was sworn in on January 29, 2013 and fills the vacancy created by the retirement of the Honorable G. Darrell Russell.

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