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COURT OF APPEALS

ATTORNEYS - DISCIPLINE - CRIMINAL OFFENSES AND CONVICTION THEREOF - INDEFINITE SUSPENSION ORDERED WHERE ATTORNEY WILLFULLY FAILED TO FILE RETURNS AND/OR PAY BOTH HIS FEDERAL AND STATE INCOME TAXES FOR A PERIOD OF YEARS.

Facts: Matthew G. Tayback, a Maryland lawyer, failed to timely file and/or pay both his federal and state income tax returns for a period of years. On September 3, 1999, Tayback entered a guilty plea in the United States Court for the District of Maryland to willfully failing to file a timely federal income tax return for 1993. Tayback was sentenced by the federal court to probation for one year, a \$10,000 fine, and 200 hours of community service.

Tayback claimed that his failure to timely file his returns and/or pay his personal income taxes could be attributed to his suffering from Obsessive-Compulsive Disorder with Passive Aggressive Features. Tayback's contention was that this disorder caused his actions regarding his taxes to not be "willful." Evidentiary hearings were held before The Honorable Allen L. Schwait of the Circuit Court for Baltimore City. At the hearings, Tayback submitted a doctor's report into evidence, which stated that Tayback suffers from Obsessive-Compulsive Disorder and that the ailment caused him to have difficulty in filing his income tax returns. Another doctor's report was also submitted by the Attorney Grievance Commission, this report finding that Tayback's failure to file his income tax returns "did not stem from any primary psychiatric condition. His ongoing problems with taxes and other money issues come from his personality problems."

Held: Indefinite Suspension Ordered. The hearing court found that Tayback was in violation of Maryland Rules of Professional Conduct (MRPC) 8.4(b). The Court of Appeals, after an independent review of the record, concluded that the hearing court's findings of fact were supported by clear and convincing evidence and thus not clearly erroneous. The Court of Appeals upheld the hearing court's findings that Tayback violated MRPC 8.4(b), and the Court further held that Tayback's actions also violated MRPC 8.4(c) and (d). Tayback's actions violated MRPC 8.4(c) because the repeated willful failure to file income tax returns constitutes actions "involving dishonesty, fraud, deceit, or misrepresentation." Tayback's actions violated MRPC 8.4(d) because the Court found that such actions were "prejudicial to the administration of justice." The Court held that Tayback's repeated failure to timely file his income tax returns and/or pay his income taxes warranted a sanction of indefinite suspension.

Attorney Grievance Commission v. Matthew Gordon Tayback. AG No. 28, September Term, 2002, filed December 5, 2003. Opinion by

Cathell, J.

ATTORNEYS - MISCONDUCT - MARYLAND RULES OF PROFESSIONAL CONDUCT -
RULES 3.1 (MERITORIOUS CLAIMS AND CONTENTIONS), 3.6 (TRIAL
PUBLICITY), 3.8 (SPECIAL RESPONSIBILITIES OF A PROSECUTOR), and
8.4(a) & (d) (MISCONDUCT)

Facts: The Attorney Grievance Commission of Maryland, by Bar Counsel, filed a petition for disciplinary action, alleging that Douglas F. Gansler, Esq., violated the following Maryland Rules of Professional Conduct ("MRPC"): MRPC 3.1 (Meritorious Claims and Contentions), MRPC 3.6 (Trial Publicity), MRPC 3.8 (Special Responsibilities of a Prosecutor), and MRPC 8.4(a) & (d) (Misconduct). The charges arose from numerous extrajudicial statements made by Gansler, who has served as the State's Attorney for Montgomery County since January of 1999. The Court referred the petition to the Circuit Court for Frederick County for an evidentiary hearing and to make findings of fact and conclusions of law.

After the hearing, the Circuit Court presented findings of fact and conclusions of law. The court found that in the afternoon of June 5, 2001, police officials convened the media for a press conference to announce charges against Albert W. Cook, Jr. for the murder of Sue Wen Stottsmeister. Before the press conference began, a television station broadcasted a report that large sneaker footprints had been found at the scene of the murder and that Cook had large feet that might fit sneakers of that size. Gansler attended that press conference and made several statements to the media regarding the anticipated prosecution of Cook. He described Cook's confession and the circumstances surrounding his custodial statements to police. His comments indicated that the confession had been obtained consistent with Cook's constitutional rights and that the confession was very detailed, suggesting that the police had "apprehended the right person."

The Circuit Court also found that Gansler made statements regarding the arrest of Robert P. Lucas for the murder of Monsignor Thomas Martin Wells. The statement of charges against Lucas stated that the police had observed Lucas "wearing shoes having a shoe

print consistent with the ones found on the crime scene" and that after Lucas was arrested, he "admitted breaking into the church rectory and responsibility for Well's murder." At the police press conference announcing the arrest of Lucas, Gansler stated that the police "were able to determine definitively that indeed it was Mr. Lucas who had committed the crime." Gansler also discussed the evidence of the boot print match, Lucas's confession, and his criminal record of residential burglaries. Lucas's criminal record came out again later, when it was discussed at Lucas's bond hearing after the press conference.

Furthermore, the Circuit Court found that Gansler made statements about the case of James Edward Perry, who had been convicted of first-degree murder and sentenced to death. Although upheld on direct appeal, in post-conviction proceedings, Perry's conviction was reversed by the Court of Appeals. After the reversal and while preparing for Perry's retrial, Gansler made extrajudicial statements that announcing "he has decided to offer [Perry] a plea bargain" and that, "when the offer is formally presented, Perry would have six weeks to make a decision."

Finally, in its findings, the Circuit Court stated that the *Montgomery County Journal* had published an article reporting the dismissal of charges against two teenagers who had been accused of calling bomb threats to a high school. The article quoted the presiding judge, who in dismissing the charges, said, "I have no idea who did this" and "I have no evidence." The *Journal* account relayed Gansler's comments that "his office will continue to prosecute youths suspected of making bomb threats, even if the case is not strong enough to warrant a conviction." Gansler was quoted as saying, "We try hard cases. . . . Juveniles who phone in bomb threats will be prosecuted. It's more important to prosecute someone and have them acquitted[sic] than let them commit crimes with impunity."

The Circuit Court concluded that Bar Counsel had presented clear and convincing evidence that Gansler, by commenting on the possibility of Perry's plea bargain, had violated MRPC 3.6(a); however, in the Circuit Court's judgment, the evidence insufficiently supported Bar Counsel's charges that Gansler had violated MRPC 3.6(a) in other instances and had violated other MRPC provisions. Both Bar Counsel and Gansler filed exceptions to the Circuit Court's findings and conclusions.

Held: Respondent is reprimanded. MRPC 3.6 generally prohibits attorneys from making extrajudicial statements that "the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding." If the statement contains information in a public record, however, the prohibition of MRPC 3.6 does not apply. Respondent did not violate MRPC 3.6 by commenting extrajudicially on the physical evidence in the Cook and Lucas cases, the confession in the Lucas

case, and Lucas's criminal record, because that information was contained in a public record. Bar Counsel's exceptions with respect to these comments are overruled. Respondent, however, did violate MRPC 3.6, as the Circuit Court concluded, by making extrajudicial statements regarding the possibility of a plea of guilty because Gansler should have known that the statement would have prejudicial effect on a defendant's trial, and the information contained in that statement was not public. Gansler exception as to that comment is overruled. In addition, the details of Cook's confession and Gansler's opinion as to the guilt of Cook and Lucas were not part of the public record and were likely prejudicial; therefore Gansler's statements on those matters violated MRPC 3.6. Bar Counsel's exceptions regarding those comments are sustained.

Gansler did not violate MRPC 3.1 (Meritorious Claims and Contentions), 3.8 (Special Responsibilities of a Prosecutor), and 8.4 (Misconduct) by prosecuting two juveniles accused of telephoning bomb threats because the evidence was insufficient to establish that Gansler had an intent to prosecute without probable cause. Bar Counsel's exceptions as they pertain to those matters are overruled.

Attorney Grievance Commission v. Douglas F. Gansler, Misc. Docket AG No. 81, September Term 2002, filed November 12, 2003. Opinion by Battaglia, J.

ATTORNEYS - MISCONDUCT - MARYLAND RULES OF PROFESSIONAL CONDUCT - RULES 1.1 (COMPETENCE), 1.3 (DILIGENCE), 1.4(a) and (b) (COMMUNICATION), 1.16(d) (DECLINING OR TERMINATING REPRESENTATION) and 8.4(d) (MISCONDUCT)

Facts: The Attorney Grievance Commission, acting through Bar Counsel, filed two petitions for disciplinary action against Craig Robert Tinsky, alleging violations of the Maryland Rules of Professional Conduct ("MRPC"). In one petition, the Commission charged Respondent with violations of MRPC 1.1 (Competence), 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(d) (Misconduct) in Tinsky's representation of Behrooz Irani in connection with his bankruptcy case. In a separate petition, the Commission charged Tinsky with violations of MRPC 1.1 (Competence), 1.3 (Diligence), 1.16(d) (Declining or Terminating Representation), and 8.4(d) (Misconduct)

in Tinsky's representation of Robert Alonzo Taylor in connection with two criminal matters. The Court of Appeals referred the two petitions to the Circuit Court for Prince George's County to conduct an evidentiary hearing and make findings of fact and conclusions of law.

Petitioner served Respondent with process on both petitions through the Client Protection Fund, after attempts to serve Tinsky personally were unsuccessful. Thereafter, an Order of Default was entered as to both petitions, and notice of that Order was sent to Respondent at his last known address. The order allowed Respondent 30 days within which to move to vacate the order. No motion to vacate was filed.

The Circuit Court held a hearing on the Irani and Taylor matters, but Respondent neither attended nor participated. In a memorandum opinion addressing both matters, the Circuit Court made findings of fact and conclusions of law. The court found that Behrooz Irani retained Respondent in September of 1997 and was paid a total of \$925.00 for his fee and expenses. Although Mr. Irani cooperated with Respondent and provided him all the information and documentation he requested, Respondent did not file his Chapter 7 petition for discharge until February of 2000. Respondent failed to attach to the petition the required schedules and statement of financial affairs. The Bankruptcy Court notified Respondent of the deficiencies, but Respondent failed to amend the petition. The Bankruptcy Court dismissed Mr. Irani's bankruptcy petition, and Respondent filed a Motion to Strike the dismissal order. The Bankruptcy Court subsequently denied the Motion to Strike. Respondent's Motion to Strike was not timely filed, contained no legal basis, and failed to include the additional financial information required by the Court. Throughout the course of the representation, Respondent failed to return telephone calls from his client, and he did not keep him informed of developments in the case. Respondent never refunded his fee, although the services rendered to Mr. Irani were of no value to him. Respondent then closed his office in Upper Marlboro.

The Court concluded that this conduct constituted violations of MRPC 1.1, 1.3, 1.4, 1.16(d) and 8.4(d). Respondent acted incompetently in violation of MRPC 1.1 by failing to submit the required schedules and statement of financial affairs along with the bankruptcy petition, by failing to provide these materials when requested, and by failing to file a timely and appropriate opposition to the dismissal of bankruptcy petition. Respondent did not act with reasonable diligence in his representation of Irani, in violation of MRPC 1.3, by delaying the filing the bankruptcy petition after he had been retained, then not filing additional materials in a timely manner, and by failing to file the Motion to Strike within the time permitted. Respondent failed to keep his client informed of the status of the case and did not respond to his inquiries regarding the case in violation of MRPC 1.4. Respondent violated MRPC 1.16(d) by not refunding his unearned fee

and by abandoning his practice. Respondent's lack of any effective action on behalf of his client in connection with the bankruptcy case, particularly in failing to supply requested information and his untimely filing of the Motion to Strike, was conduct prejudicial to the administration of justice in violation of MRPC 8.4(d).

In the Taylor matter, the Circuit Court found that Respondent was retained by Robert Alonzo Taylor to represent him in two criminal matters. Respondent received a fee and entered his appearance in those two cases but failed to appear at trials scheduled for those matters. Without notice, Respondent closed his law office in Upper Marlboro.

The Circuit Court concluded that Respondent's failure to appear at his client's criminal trials was incompetent representation and showed lack of diligence, in violation of MRPC 1.1 and 1.3. His failure to notify his client of the closing of his office, his taking a fee without appearing at trial, and his disappearance while his client's criminal cases were pending violated MRPC 1.16. His failure to appear in court and the abandonment of his client was conduct prejudicial to the administration of justice, in violation of MRPC 1.6.

Respondent did not appear for oral argument before the Court of Appeals and did not file any exceptions to the Circuit Court's findings and conclusions.

Held: Disbarred. The Circuit Court's findings and conclusions were supported by clear and convincing evidence. Respondent violated MRPC 1.1 (Competence), 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(d) (Misconduct) by accepting fees and expenses for several matters but failing to take any effective action on behalf of his clients and by closing his law practice without notifying his clients.

Attorney Grievance Commission v. Tinsky, Misc. No. 7 & 20, September Term, 2002, filed November 10, 2003. Opinion by Battaglia, J.

BANKRUPTCY- AUTOMATIC STAY- EXEMPTIONS FOR DOMESTIC PROCEEDINGS -
EFFECT ON DISCOVERY REQUESTS

Facts: Petitioner, Lawrence Klass (Lawrence) and his wife Kathy separated in 1998. In April 1999, Kathy filed a complaint for a limited divorce and was awarded *pendente lite* relief. In September 2000, Lawrence filed a complaint for absolute divorce in the Circuit Court for Frederick County. One week prior to the January 3, 2001 trial date, Lawrence filed, in California, a *pro se* petition for voluntary bankruptcy under Chapter 7 of the Bankruptcy Code. The court became aware of the bankruptcy proceeding on January 2, 2001 and subsequently postponed the trial.

Notwithstanding the bankruptcy proceeding and automatic stay pursuant to 11 U.S.C. §362, activity continued in the Circuit Court. At trial date was set for April 30th and a subpoena *duces tecum* was sent to Lawrence in California. On April 9, 2001, Lawrence was granted a discharge by the bankruptcy court. The trial commenced and the court issued a judgment granting a divorce and awarding custody, alimony, child support, a monetary award, attorney's fees, arrearages, and the entire value of Lawrence's profit sharing plan to Kathy.

Lawrence appealed claiming that the Circuit Court erred in continuing the divorce litigation after the filing of his bankruptcy petition and that he did not receive adequate notice of the April 30th trial date.

The Court of Special Appeals dismissed petitioner's second argument based on inadequate notice and resolved the bankruptcy issue on the grounds that: (1) actions to establish or modify alimony or child support are not subject to the §362 stay and the fees ordered paid to the children's guardian were in the nature of child support; (2) the stay does not preclude all judicial proceedings, but only those that affect or touch on the debtor's property, and the discovery requests and subpoena sent by or on behalf of Kathy did not have that quality; and (3) a discharge terminates the §362 stay, and, as the judgment entered by the court occurred after that date, it was not precluded by the stay.

Held: Affirmed in part, reversed in part. First, the Court explained that it did have jurisdiction to determine whether and how a matter properly pending before it was affected by a §362 stay.

The Court then concluded that pursuant to the exceptions in 11 U.S.C. §362(b), the fixing of the alimony and child support amounts as well as the determination of *pendente lite* relief were not precluded by the bankruptcy stay.

The Court went on to conclude that for the purposes of §362(b), the fees payable to the guardian *ad litem*, as well as the

judgment entered against Lawrence for Kathy's attorney's fees, fell within the statutory exception to the bankruptcy stay in that the former was in the nature of child support and the latter was a form of spousal support. With respect to the provisions of the judgment dissolving the marriage, awarding custody of the children, and limiting visitation with the children, the Court aligned itself with the view of the Bankruptcy Courts and concluded that those non-financial judgments were also not precluded by the bankruptcy stay.

The Court then held that the aspects of the judgment dealing with the grant of a monetary award, the entry of an order directing a lump sum distribution from Lawrence's profit sharing plan, and the grant of use and possession of a jointly-titled automobile, were subject to the stay and were thus void *ab initio*.

Finally, the Court explained that because of the expenses involved in responding, the filing of discovery requests constituted an impermissible continuation of the proceedings in violation of the bankruptcy stay and that any resulting admissions were inadmissible. Due to that error, all other aspects of the judgment other than the divorce, custody and visitation provisions, alimony and child support provisions, the fees payable to guardian *ad litem* and to Kathy's attorney, and the determination of alimony and child support arrearages were reversed and remanded. Furthermore, the Court explained that the issue regarding the sufficiency of the subpoena was irrelevant in that appellant inured no detriment.

Klass v. Klass, No.125, September Term, 2002, filed September 8, 2003. Opinion by Wilner, J.

CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL

Facts: Lawrence Mosley robbed two women, holding a weapon that appeared to be a gun to one of the women's back and threatening to kill both women if they did not cooperate. After they gave him their food, a purse, and a back-pack, they began walking away. Mosley approached the women again, waving the weapon

in the air, and began walking with them because he noticed that two other people were approaching them through the parking lot. These two people turned out to be plainclothes police officers who had witnessed the events of the robbery and had called for backup.

When the backup arrived, Mosley released the women and began to run with the weapon in his hand toward one of the plainclothes officers. Mosley dropped the weapon, which was admitted as State's Exhibit 1-A at trial. The officers both identified State's Exhibit 1-A as the weapon used by Mosley, which they characterized as an "air gun." One of the officers testified that he realized the weapon was plastic when Mosley dropped it. Exhibit 1-A was available to the jurors during their deliberations.

On March 7, 2002, Lawrence Mosley was convicted in the Circuit Court for Baltimore City of two counts of second degree assault, two counts of robbery, two counts of wearing or carrying a dangerous weapon, and two counts of robbery with a dangerous or deadly weapon. He was sentenced to two thirteen-year terms of imprisonment, which were to be served concurrently.

Mosley appealed to the Court of Special Appeals on March 11, 2002, raising a single issue for review. He argued that he had been denied effective assistance of counsel because his counsel had failed to state with particularity the grounds for the motion for judgment of acquittal made at the close of all the evidence. The evidence regarding the air gun, Mosley maintained, was insufficient to support his convictions for robbery with a dangerous or deadly weapon and wearing or carrying a dangerous weapon, and he argued that his counsel had failed to raise this point specifically, with the result that the issue of the insufficiency of the evidence relating to the dangerousness of the air gun was not preserved for appellate review. The State opposed Mosley's appeal, arguing that the issue of ineffective counsel should be resolved in a post-conviction proceeding.

When the record was transmitted to the Court of Special Appeals on May 10, 2002, however, the air gun was not included. Mosley filed a motion to correct the record, which the Court of Special Appeals granted. The air gun, which was to be transmitted to the Court of Special Appeals, had been stolen from the trunk of Agent Allis's car. With the gun now lost, in support of his appeal, Mosley secured and filed affidavits of the Assistant State's Attorney, Mosley's trial counsel, and the trial judge as to their recollections of the gun's physical characteristics. Only the Assistant State's Attorney remembered the gun, stating in his affidavit that it was a "plastic air gun," "heavy," "weighed approximately ten pounds," and was "between seven and nine inches in length."

The Court of Special Appeals, in an unreported opinion, held that "the evidence was sufficient to sustain [Mosley's] convictions for robbery with a deadly weapon and wearing and carrying a

concealed dangerous weapon" as well as concluded that Mosley's ineffective assistance of counsel claim "must be decided in a post-conviction proceeding."

The Court of Appeals granted Mosley's petition for writ of certiorari. Although the State opposed direct review of Mosley's claim in the Court of Special Appeals, the State argued that the Court of Special Appeals correctly found that Mosley was not denied effective assistance of counsel. The State also maintained that the Court of Special Appeals properly based its decision on the affidavit of the Assistant State's Attorney.

Held: The Court of Special Appeals should not have heard defendant's ineffective assistance claim based on counsel's failure to support a motion for judgment of acquittal with particularity because the record was not sufficiently developed and the critical facts were in dispute. The Court of Appeals explained that a post-conviction proceeding pursuant to the Maryland Uniform Post Conviction Procedure Act is the most appropriate way to raise the claim of ineffective assistance of counsel. Direct review is appropriate only when the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim.

In this case, the Court concluded that the critical facts were, without a doubt, in dispute and, thus, a post-conviction proceeding rather than direct review was appropriate. First, the weapon itself was missing from the record. Second, after requesting affidavits to supplement the record at the Court of Special Appeals, Mosley disputed the contents of one of those affidavits, disagreeing with the Assistant State's Attorney's description of the lost air gun's characteristics. Explaining that, because they could not conclude with confidence that the evidence was insufficient to sustain Mosley's conviction under the circumstances in this case, the Court concluded that it could not determine that his counsel provided ineffective assistance by not making a motion for judgment for acquittal with particularity. As long as the sufficiency of the evidence was at issue, the possibility remained that Mosley's counsel lacked grounds to make the motion in the first place.

Lawrence Mosley v. State of Maryland, No. 16, September Term 2003, filed November 26, 2003, opinion by Battaglia, J.

EDUCATION LAW - CRIMINAL OFFENSES - ELEMENTS OF THE SCHOOL DISRUPTION CRIMINAL OFFENSE OF §26-101(a) OF THE EDUCATION ARTICLE OF THE ANNOTATED CODE OF MARYLAND.

Facts: On the morning of December 13, 2001, a teacher at Clear Spring Middle School in Clear Spring, Maryland observed a student, Jason W., scribbling on the wall of the school stairway. As the teacher approached, Jason began to erase the penciled writing. However, the teacher could see the statement, "There is a bomb." The teacher escorted Jason to the principal's office, where Jason was subsequently interviewed by a local deputy sheriff who had been called by the principal. After being given his *Miranda* rights, Jason admitted to having written, "There is a bomb" on the wall.

The State's Attorney for Washington County filed an amended Juvenile Petition against Jason alleging delinquency because he violated two criminal statutes - former Maryland Code, Article 27, §151A, and §26-101(a) of the Education Article of the Annotated Code of Maryland. The Juvenile Court found Jason not guilty of the alleged violation of former Article 27, §151A. However, the court was persuaded that Jason willfully disturbed the normal operation of a school because the school administration's efforts to investigate and clean the wall were out of the ordinary course of school operations. The Court of Special Appeals reversed the conviction by noting that no evidence of an actual disruption was ever presented by the State, and that Jason's writing on the school was not the kind of disruption contemplated by §26-101(a). The Court of Appeals subsequently granted *certiorari*.

Held: Affirmed. A statute must be given a reasonable interpretation, not one that is illogical or absurd so as to be inconsistent with legislative intent. If §26-101(a) was literally construed, every minor school disruption would constitute a criminal offense. Such a result would be absurd. Moreover, this absurd result was not intended by the legislature when it adopted §26-101(a) during the height of riotous school disruptions in the 1970's. Therefore, the State must show that there has been both an actual and significant disturbance of a school before a §26-101(a) violation can be established. Both elements were missing in this case.

In Re: Jason W., No. 23, September Term, 2003, filed December 5, 2003. Opinion by Wilner, J.

HOSPITALS - CONTRACT AND TORT LIABILITY - STANDARD OF REVIEW - THE TRIAL COURT, ON A MOTION FOR SUMMARY JUDGMENT AS TO CONTRACT AND TORT CLAIMS, MAY NOT DEFER TO THE RESULTS OF THE HOSPITAL'S CREDENTIALING PROCESS THROUGH APPLICATION OF A "SUBSTANTIAL EVIDENCE" STANDARD. RATHER, IN ACCORDANCE WITH MARYLAND RULE 2-501(E), A MOTION FOR SUMMARY JUDGMENT IS APPROPRIATE ONLY WHEN THERE IS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Facts: Petitioner, a licensed physician in the State of Maryland with a specialty in obstetrics and gynecology (OB/GYN), applied for privileges at Prince George's Health Center, which is owned and operated by Dimensions Health Corporation, a non-profit corporation. After first granting petitioner provisional privileges, the hospital subsequently carried out a review process of petitioner's cases. The investigation was carried out, pursuant to the hospital bylaws, over a prolonged period and involved the hospital's credentialing committee and Medical Executive Committee. In addition, the hospital retained physicians from another hospital to perform a review of petitioner's patient charts. As a result of this investigation, the Medical Executive Committee terminated petitioner's privileges.

Petitioner appealed, pursuant to the bylaws, to the Ad Hoc Committee. Over the following year, the hearing committee convened on nine days, hearing testimony from a variety of witnesses. The witnesses included the individual respondents in the present case, as well as petitioner and a number of additional witnesses called by petitioner. Witnesses provided testimony and presented exhibits. All were subject to cross-examination by counsel for the hospital and petitioner.

The committee recommended that the decision to terminate privileges be upheld, providing its findings in a thirty page report. Petitioner exercised her right under the hospital bylaws for appellate review by the Board of Directors of the hospital which, after hearing oral argument, affirmed the credentialing decision.

Petitioner brought suit against the hospital, members of the credentialing committee, and the doctors who performed the outside review, alleging contract and tort claims. Petitioner subsequently amended her complaint to include an action for declaratory judgment. Respondents filed a motion for summary judgment, seeking dismissal for a variety of reasons including immunity under both state and federal law. The trial court granted the motion for summary judgment, finding, based on "substantial evidence" that the credentialing decision had been made in compliance with the hospital bylaws.

Petitioner noted a timely appeal to the Court of Special Appeals. That court affirmed, holding, *inter alia*, that the trial

court did not err in granting the motion.

Held: Reversed. The Court of Appeals held that, with respect to motion for summary judgment on common law tort and contract claims, the trial court cannot simply defer to the decision of the hospital. The Court reviewed the historical development of court involvement in hospital credentialing decisions. It noted that, for employment decisions of a private hospital, both the business judgment rule and public policy favor granting hospitals broad discretion in staffing decisions. Therefore, deference is applicable where a physician seeks injunctive relief, in the form of asking a court simply to overturn a peer review committee's decision. A court should not be called upon to second-guess the credentialing committee, and force a hospital to retain a physician the hospital deemed unqualified.

Where the action is not seeking to overturn the hospital's decision, but rather, to recompense the physician for tortious conduct or a breach of contract, however, the deference to the hospital is not warranted. A private, non-profit hospital is not a public agency, and thus, is not entitled to administrative review by the courts. Administrative agencies, because they are created and maintained under the executive branch, are subject to only limited review by the courts. The hospital, on the other hand, is a private entity, governed not by statute, but by its bylaws. The Board of Directors are not officials appointed by the executive branch of government, and their actions are not the actions of the executive. Thus, the constitutional rationale to defer to the actions of an agency does not arise under the present circumstances.

Furthermore, neither public policy nor the business judgment rule will shield the hospital from liability in such circumstances. Instead, both State and federal law create broad immunity for credentialing committee members, as well as the hospitals they serve. Where the Legislature has intended to protect the medical profession from liability for credentialing, it has done so through express legislation. The Court found no evidence of an intent on the part of the Legislature to limit the court's traditional ability to consider such claims pursuant to the normal rules of civil procedure.

Sadler v. Dimensions Health, No. 12, September Term, 2002, filed November 26, 2003. Opinion by Raker, J.

MARYLAND PUBLIC INFORMATION ACT (MPIA) - EXEMPTION - LOCAL COUNTY ORDINANCE - A COUNTY ORDINANCE ALONE MAY NOT BE THE BASIS FOR AN EXEMPTION TO THE GENERAL PUBLIC DISCLOSURE OBLIGATIONS OF THE MPIA.

Facts: Prince George's County (the County) requires, by ordinance, the registration of every electronic building alarm system in the county. Police Patrol, a corporation that installs and operates building alarm systems, requested from the County the

name, address, and telephone number of every resident or business that maintained a building alarm system. The County denied Police Patrol's MPIA request, declaring that the local ordinance requiring that every alarm system be registered also requires that the registration information be kept confidential. Police Patrol brought suit in the Circuit Court for Prince George's County. During the pendency of the Circuit Court action, the General Assembly passed an amendment to the MPIA entitled "Public Security Documents". The amendment gave records custodians greater discretion to deny requests related to building security systems. The parties did not address the new amendment in arguments before the circuit court, and the circuit judge did not consider the new amendment. Instead, the circuit judge found that the confidentiality requirements of the local ordinance alone justified the County's denial of the MPIA request. Police Patrol appealed to the Court of Special Appeals. Before that court could decide the case, the Court of Appeals, on its initiative, granted certiorari.

Held: Reversed. The General Assembly did not intend to allow home rule counties to create exemptions to the MPIA. To the extent that they conflict with the general disclosure requirements of the MPIA, the confidentiality requirements of the County's ordinance are preempted. The Circuit Court's finding that the local ordinance provided the County with a basis for denying Police Patrol's request was erroneous. There are no discrete "public interest," "personal information," or "unwarranted invasion of privacy" exemptions in the MPIA that would provide alternative rationales for affirming the Circuit Court.

Although the "Public Security Documents" amendment to the MPIA was enacted after Police Patrol made its initial request for information, Prince George's County must still consider the amendment when it considers Police Patrol's unfulfilled request anew. Police Patrol agreed in oral argument that it seeks to obtain the information it requested as it currently exists rather than as it existed when the request was made. Thus, the application of the amendment to this case should not be characterized as retrospective. Even were it to be characterized as retrospective, the amendment would still be relevant. The General Assembly passed the amendment as an emergency measure in response to the attacks of 11 September 2001 on the United States. Retrospective application of the amendment to any MPIA requests that have not already been granted would be consistent with the Legislature's goal to prevent the release of information that could facilitate further attacks. There are no constitutional impediments to giving the amendment this retrospective effect.

Police Patrol v. Prince George's County, No. 29, September Term 2003, filed 18 December 2003. Opinion by Harrell, J.

REAL PROPERTY - LANDLORD & TENANT - RESIDENTIAL LEASES - § 8-203(e)(4) OF THE REAL PROPERTY ARTICLE IS REMEDIAL IN NATURE, THUS GIVING A TRIAL COURT THE DISCRETION TO AWARD SUPPLEMENTAL ATTORNEY'S FEES EARNED IN ENFORCING A JUDGMENT RENDERED UNDER THE STATUTE, INCLUDING FEES EARNED PURSUANT TO APPEALS AND POST-JUDGMENT MOTIONS.

Facts: In December of 1999, Minh-Vu Hoang, landlord, filed a complaint in the District Court of Maryland for Montgomery County, against Ho and Lisa Pak, tenants, seeking \$25,000.00 in damages for a breach of the tenants' lease of the landlord's townhouse.

The case was transferred to the Circuit Court for Montgomery County for a jury trial and the tenants filed counterclaims alleging that the landlord had breached the lease and had not returned their security deposit in violation of the Maryland Security Deposit Act, Md. Code (1974, 2003 Repl. Vol.), § 8-203 of the Real Property Article. In July of 2000, the Circuit Court granted the tenants' motion for summary judgment, dismissed with prejudice the landlord's claim and entered judgment against the landlord as to the tenants' counterclaims. On October 31, 2000, after a damages hearing, the Circuit Court entered a judgment of \$7,378.91, including attorney's fees up to that point, in favor of the tenants.

In an effort to aid in the recovery of their judgment against the landlord, the tenants filed post-judgment discovery motions, which were granted by the court. The landlord failed to respond. The tenants thereafter filed a Petition for Civil Contempt and for the Entry of Appropriate Relief in response. Following a hearing, the trial court entered another order directing the landlord to fully and completely respond to the tenants' discovery requests. After the landlord failed to appear at a compliance review hearing, the trial court issued a writ of body attachment for her arrest. The landlord was arrested and released on her own recognizance.

On December 6, 2001, there was a hearing regarding the Petition for Civil Contempt. The landlord was found in civil contempt and sanctioned with thirty days of incarceration subject to a purge provision, where the landlord could purge the contempt with her complete compliance with the court's order. On the same day, the tenants filed a Motion for Supplemental Award of Attorney's Fees.

The landlord delivered a check to the tenants' counsel, thus paying the original judgment and all interest then due, on January 11, 2002, one business day before the compliance hearing was to take place. The trial court denied the tenants' Motion for a Supplemental Award of Attorney's Fees, finding that § 8-203(e)(4) did not give the court the power to award supplemental attorney's fees after the judgment had been paid.

Held: The Court of Appeals held that, pursuant to the Maryland Security Deposit Act, the trial court has the authority to award attorney's fees earned in enforcing a judgment rendered under that statute. In addition, the trial court also has the authority to award attorney's fees in respect to appeals defending any such judgment. While § 8-203(e)(4) is silent as to whether "reasonable attorney's fees" includes fees earned in the pursuit of post-judgment motions to collect the judgment from a landlord and appeals incurred in an effort to defend and collect a judgment in favor of a tenant, the remedial nature of § 8-203(e)(4) necessitates that a court has the power to include such fees in the award. Thus, the Court of Appeals held that attorney's fees earned in the filing of post-judgment motions and appeals fit within § 8-203(e)(4)'s phrase "reasonable attorney's fees" of the remedial Maryland Security Deposit Act and the trial courts have discretion to award such fees.

Pak v. Hoang, No. 14, September Term, 2003, filed November 18, 2003. Opinion by Cathell, J.

REAL PROPERTY - SECONDARY MORTGAGE LAW - BALLOON PAYMENT DISCLOSURE.

Facts: This case came to the Court of Appeals by means of a Certified Question from the United States District Court, District of Maryland. The question of Maryland law set forth in the Certification Order was as follows: Whether Md. Code Ann. Com. Law II, Section 12-404(c)(2) (2002) mandates that a lender or a seller who takes a mortgage or a deed of trust to secure all or a portion of the purchase price of a residence and who creates a balloon payment must state in writing on the loan documents that the lender or seller must postpone the maturity of the balloon payment one time at the borrower's request, for a period not to exceed six (6) months, provided that the borrower continues to make the monthly installments provided for in the original loan agreement; and if the answer to the certified question of law is in the affirmative, whether Section 12-413 is then applicable to the loan.

Alton and Verne Drew purchased a new home in Frederick, Maryland, from Ryan Homes. Part of the purchase price was issued in the form of a loan, signed on December 15, 2000, secured by a

secondary mortgage, subsequently held by Wilshire Credit Corporation, with a balloon payment of an amount that approximated 92% of the principal of the secondary mortgage after payments for 15 years. Under the balloon payment disclosure, the amount due at maturity was estimated to be \$54,063.30. The balloon payment provision was disclosed to the Drews in writing, and they inscribed their agreement to the provision. The balloon payment was not due until 2016, and the Drews did not request an extension.

The borrowers, the Drews, argued the Secondary Mortgage Loan Law required the lender to disclose to the borrower that a lender is required to postpone a balloon payment at maturity without charge at the borrower's request. Otherwise, the Secondary Mortgage Law is violated and its penalty provisions apply. Wilshire Credit Corporation argued that the Secondary Mortgage Law did not require the lender to disclose to the borrower the one-time postponement right.

Held: Section 12-404(c)(2) does not require a seller or lender, who takes a secondary mortgage or a deed of trust securing all or a portion of a residence's purchase price and creating a balloon payment, to state in writing that the statutory postponement period of six months is available to borrowers. After analyzing the statute's language and the legislative intent underlying the statute, the Court of Appeals concluded that, because the General Assembly expressly required written notice in the first two parts of the statute, the fact that it did not expressly require written notice in part (iii), the section at issue, revealed an intent to exclude notice for that provision, particularly in view of the fact that the provision was enacted at a later time than the other provisions. Moreover, because the Court found that the Legislature had not clearly manifested any intention to read the disclosure provisions found in parts (i) and (ii) into part (iii), the Court held that Section 12-404(c)(2)(iii) did not require the lender to notify the borrower in writing about the statutory one-time postponement right.

Drew v. First Guaranty Mortgage Corp., et. al. ,No.1, September Term 2003, Filed November 12, 2003, opinion by Battaglia, J.

TORTS - RESPONDENT SUPERIOR AND IRRECONCILABLY INCONSISTENT VERDICTS

Facts: Southern Management Corporation ("SMC") hired Taha to work as a Maintenance Technician at the Silver Spring Towers apartment complex, one of the apartment facilities managed by SMC.

In the course of performing his regular job duties, Taha moved a heavy barrel with the maintenance supervisor, Michael McGovern, and two other SMC maintenance employees. Taha later reported to Debra Wylie-Forth, the property manager of the apartment complex, that while moving the heavy barrel, McGovern had intentionally let the barrel slip causing Taha to injure his back. Thereafter, he sought medical treatment and spent nearly two months on disability leave. When Taha returned to work, problems developed with his work performance, and his employment was terminated.

Shortly after Taha was terminated, McGovern and maintenance employee Wilfredo Martinez notified Wylie-Forth that several items were missing from a locked maintenance tool and supply area. Martinez informed Wylie-Forth that he had witnessed Taha shaking and pulling on the lock to the maintenance area on a day that Taha was not assigned to work. Anya Udit, a leasing consultant at Silver Spring Towers, also reported to Wylie-Forth that she spotted Taha in Wylie-Forth's locked office while Taha continued to be on disability leave. Thereafter, Wylie-Forth contacted the Montgomery County Police Department to report the missing items. While investigating the incidents, Officer Grims interviewed McGovern, Martinez, Wylie-Forth, and Udit. Based on these interviews, Officer Grims concluded that Taha was the only suspect in connection with the stolen property.

As a result of this investigation, Officer Grims arrested Taha who was charged with various crimes. Prior to the scheduled trial, Taha produced alibi evidence that placed him out of town during the dates in question. Thereafter, the State entered a *nolle prosequi* to the charges.

Asserting a claim of malicious prosecution, Taha sued SMC under a theory of respondeat superior and also named as defendants two of SMC's employees, McGovern and Wylie-Forth. At trial, Taha asserted that Wylie-Forth had an unfavorable bias against him and his work and alleged that McGovern, a white, hearing-impaired individual, made racially disparaging comments towards Taha, in an effort to establish malice on the part of Wylie-Forth and McGovern. Taha did not present evidence at trial to show that other SMC agents or employees, other than Wylie-Forth and McGovern, could be liable for malicious prosecution.

The jury returned a verdict in favor of defendants Wylie-Forth and McGovern, finding that Taha had not been the victim of

malicious prosecution by either employee, but found against SMC. The jury awarded Taha \$25,000 in economic damages, \$75,000 in non-economic damages, and \$100,000 in punitive damages. SMC filed a motion for judgment notwithstanding the verdict, a motion for remittitur, and a motion to strike the punitive damages award. The court denied SMC's motion for judgment notwithstanding the verdict.

This Court issued a writ of certiorari to review whether the Circuit Court erred in denying SMC's Motion for Judgment Notwithstanding the Verdict for malicious prosecution because the jury found that its agents, the other named defendants, did not commit that tort.

Held: Reversed. The Circuit Court erred in denying SMC's post-judgment motion to set aside the jury's verdicts as to SMC and its employees because they were irreconcilably inconsistent. Where a plaintiff brings a tort claim, naming a corporation and several of its employees as defendants, and the claim is based entirely on a theory of respondeat superior liability, a jury verdict against the corporation but in favor of the named employees is irreconcilably inconsistent and cannot stand.

Southern Management Corporation v. Mukhtar Taha, No. 136, September Term, 2002, filed November 25, 2003. Opinion by Battaglia, J.

COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - APPEAL OF AN ADMINISTRATIVE DECISION - NOTICE OF APPEAL - ARBITRARY AND CAPRICIOUS STANDARD - FINDINGS OF FACT AND CONCLUSIONS OF LAW - SUFFICIENCY OF THE EVIDENCE

Facts: Southern Resources Management, Inc. and Robert Gallahon, appellees and cross appellants, sought to obtain subdivision approval for a parcel of land in St. Mary's County zoned "rural preservation district." The property was previously owned by two corporations that manufactured and tested ordnance for the United States Navy. As a result, detonators, igniters, fuse boosters, and similar items containing small amounts of explosives had been manufactured and disposed of on about 100 acres of the property and the property was later placed on the State's list of potential Hazardous Waste Sites for evaluation. After assessment, the property owner, Thiokol Chemical Corporation (Thiokol), decided to pursue remedial action to locate and remove any buried ordnance and debris. The property was surveyed and excavated and a total of 1,360 pounds of material was removed. Appellees and cross appellants then purchased the property and began plans for a residential subdivision, which included another cleanup project where about 82 pounds of material was removed. Appellees and cross appellants then applied for subdivision approval. The St. Mary's County Planning Commission (the Planning Commission) approved the subdivision plan for a portion of the property and approved a phasing plan for the remainder of the parcel. This permitted development on the approved portion, subject to appeal, but approval of the phasing plan portion of the property was not a final subdivision approval. The St. Mary's County Board of County Commissioners (the County Commissioners), appellant and cross appellee, and the St. Mary's County Health Department appealed to the St. Mary's County Board of Appeals (the Board). The Board reversed the Planning Commission's approval. Appellees and cross appellants filed a petition for judicial review in the Circuit Court for St. Mary's County. The circuit court reversed the Board and reinstated the decision of the Planning Commission and the County Commissioners appealed to this Court.

Held: Reversed. Case remanded to the Circuit Court for St. Mary's County with instructions to vacate the Board's decision and remand to the Board for further proceedings.

On appeal, this Court reviews the decision of the Board to determine whether the Board applied the correct legal standard in making its determination and whether the Board's conclusions were supported by a sufficiency of the evidence. Where either an incorrect legal standard is used or the conclusion is not supported by the evidence, the decision is considered arbitrary and capricious and must be reversed.

As a preliminary matter, this Court found the notices of appeal adequate to reach the Board as the parties involved understood that the safety of the property was the contested issue being reviewed under a *de novo* standard. Additionally, the Board had jurisdiction and authority under both the Maryland Code and the St. Mary's County Subdivision Regulations to consider public safety as one factor in its determination whether to approve development of the property.

Upon review of the record, this Court found that the Board committed several errors, including applying an incorrect standard of review. The Board's standard of review generally provides the Board with all the powers of the administrative officer on appeal, therefore, the Board's review was *de novo* with respect to the issue of the safety of the property.

The Board also erred by requiring 100% certainty that the property was suitable for residential development. The 100% certainty standard was arbitrary because it is impossible to demonstrate to a 100% certainty that any parcel of land is completely safe.

The Board failed to provide specific findings of fact to explain its conclusion that the property was not safe as required such that a reviewing court may have an understanding of the findings of fact on all material issues. Here, the Board made no specific findings of fact regarding its conclusion that the property was unsafe for residential development. The Board made no specific findings as to what portions of the property might be unsafe or what evidence it found to be credible. The Board also concluded that the Planning Commission erred in approving the *phasing plan* without adequately addressing safety, but reversed the Planning Commission's decision approving a portion of the property for residential development. The Board made no distinction between the safety of the two portions of the property. Failure to provide specific findings of fact constitutes legal error and prevents a reviewing court from fully understanding the administrative decision and constitutes a reversible error of law.

Finally, the evidence was sufficient to raise questions regarding the safety of the property, but insufficient to support a conclusion that the property was unsafe. The evidence indicated that there was ordnance on a portion of the property which at some point was dangerous. The evidence also indicated that a substantial effort was made to identify the location of the ordnance and substantial remediation efforts were undertaken by knowledgeable persons with the assistance and oversight of governmental agencies. While the Board was certainly justified in being concerned with the safety of citizens, there was no affirmative evidence that the efforts to make the property safe were not successful. The Board found only that it was not convinced that the property was safe, not that the property was unsafe. As the evidence was insufficient to support a finding that the property was not unsafe, the evidence was insufficient to reverse the decision of the Planning Commission without further proceedings.

Accordingly, the decision of the Board must be vacated and the case remanded to the Board. The Board may then either remand the case to the Planning Commission or conduct further proceedings itself. On remand, the Board must permit further proceedings to determine whether the property is suitable for development, and if so, under what restrictions. Additionally, it must include specific findings of fact and conclusions in its opinion.

Board of County Commissioners for St. Mary's County v. Southern Resources Management, Inc. et. al., No. 2587 September Term 2002, filed December 10, 2003. Opinion by Eyler, James R., J.

ADMINISTRATIVE LAW - JUDICIAL REVIEW OF ADMINISTRATIVE DECISION - ATTORNEY'S FEES - MONTGOMERY COUNTY MERIT SYSTEM

Facts: Two employees of the Montgomery County merit system, Gregory Jamsa and Wayne D. Fisher, appellees, filed grievances against Montgomery County, appellant, after being directed by their supervisor to cut grass and perform other lawn maintenance activities, on the basis that these activities were not within their duties and responsibilities as firefighters.

Appellees filed grievances pursuant to the merit system grievance procedure. Appellant, the Montgomery County Merit System Protection Board (the Board) and the Circuit Court for Montgomery County each determined the complaints were not grievable. In an unreported opinion, this Court held that the complaints were grievable, reversing the circuit court and the Board, and remanded the case to the Board for further proceedings. Jamsa v. Montgomery County, No. 1547, Sept. Term 1998, filed November 16, 1999. The Board then remanded the case to appellant's Office of Human Resources. Appellant again denied appellee's grievances, appellees appealed to the Board, and the Board dismissed the appeal.

Appellees requested the Board to (1) reconsider its decision on the merits and (2) award reasonable attorney's fees with respect to the successful appeal of the Board's first decision. The Board denied appellee's first request, but granted the second, stating the Board required a detailed statement of fees and the request would be considered in accordance with the Montgomery County Code section dealing with judicial review of decisions by the Board.

Appellees submitted a request for fees in the amount of \$20,740.00 and expenses in the amount of \$297.39. The Board awarded \$3,225.00 in fees and \$70.86 in expenses. The Board denied appellees' request for fees with respect to appeals to the circuit court and this Court on the ground that it lacked authority under the Montgomery County Code to award fees incurred in judicial review.

Appellees filed a petition for judicial review in the Circuit Court for Montgomery County, and the circuit court reversed and remanded the Board's decision, holding that the Board did have the authority to award fees for services relating to judicial review.

Held: Affirmed. The Montgomery County Merit System Protection Board, on remand after judicial review of a prior decision, has legislative authority to award attorney's fees to employees with respect to services rendered during judicial review of the Board's decision.

The language, context, and purpose of the relevant statutory provisions of the Montgomery County Code gives the Board legislative authority to award attorney's fees for services rendered on judicial review of Board decisions in appropriate circumstances. The net effect of the relevant statutory provisions is that the Board, in general, has discretion over whether or not to award attorney's fees under such circumstances. This discretionary power includes when an employee seeks judicial review, but when the County seeks judicial review, the County must pay reasonable attorney's fees.

Montgomery County, Maryland v. Gregory Jamsa, et al., No. 141 September Term 2003, filed December 1, 2003. Opinion by Eyler, James R., J.

CONSTITUTIONAL LAW - FIRST AMENDMENT RELIGIOUS FREEDOM - THE FIRST AMENDMENT BARS LITIGATION AGAINST CHURCHES, THEIR EMPLOYEES, AND NON-PROFIT ORGANIZATIONS ASSOCIATED WITH CHURCHES, EVEN ON SECULAR MATTERS, WHEN THE ISSUES ARE UNQUESTIONABLY INTERTWINED WITH RELIGIOUS PRACTICE.

Facts: In March of 1999, Hayden Bourne accepted a position as a church pastor with the Washington District Church of the Nazarene ("The Church"),¹ responsible for organizing and forming a new Church in Baltimore City. Mr. Bourne began this mission under the supervision of Reverend Donald Allison, an ordained minister with the Church.

In February of 2001, Mr. Bourne applied for ordination with the Church. As part of the application process, Mr. Bourne was interviewed by the Washington District's Board of Credentials (Board of Credentials), which was initially in favor of granting Mr. Bourne's ordination.

In March or April of 2001, a member of Mr. Bourne's church complained to Reverend Allison about Mr. Bourne's ministerial style. Reverend Allison discussed these complaints with his supervisor, Dr. Kenneth Mills, a member of the Board of Credentials.

Thereafter, Dr. Mills approached Mr. Bourne to discuss these complaints. Mr. Bourne became very upset, and was particularly displeased with Dr. Mill's refusal to inform him who had lodged the complaint against him. Although Dr. Mills was not initially concerned about the complaint against Mr. Bourne, Mr. Bourne's reaction to the situation caused him to reconsider. Thereafter, the Board of Credentials recommended that Mr. Bourne wait an additional year before becoming ordained, during which time he would undergo Church counseling.

¹ The Washington District Church of the Nazarene is the regional supervisory body of an international Christian religious denomination, responsible for overseeing the denomination's churches, ministers, and ministries within the region, including Baltimore.

Mr. Bourne rejected this recommendation and his relationship with Church leaders quickly deteriorated. On September 14, 2001, Mr Bourne was reassigned to a church in Trinidad, his home country. Mr. Bourne rejected this reassignment and refused to vacate his Church housing.

In October of 2001, Mr. Bourne filed a lawsuit in the Circuit Court for Baltimore City against the Church, Reverend Allison, Dr. Mills, and the Center on Children, a non-profit organization associated with the church, claiming breach of employment contract, defamation, and false light. His wife, Rhonda Bourne, was added to the suit by amendment, claiming loss of consortium.

The defendants collectively filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction due to, among other things, constitutional religious freedom provisions. Mr. Bourne argued that his purely secular contract and tort claims were not barred by First Amendment religious protections. Alternatively, because two of the defendants were individuals, and a third defendant was a non-profit organization associated with the church, Mr. Bourne claimed they were not protected by the First Amendment at all.

Defendants' motion was initially denied. On October 30, 2002, defendants filed a motion for summary judgment, again arguing that Mr. Bourne's claims inescapably involve the court's exercise of jurisdiction over religious determinations. On December 30, 2002, the circuit court granted summary judgment in favor of all defendants on all claims. Mr. Bourne's subsequent motion to amend or alter judgment was also denied.

Held: The Court of Special Appeals affirmed the judgment of the circuit court, finding that Mr. Bourne's claims were barred for want of subject matter jurisdiction. The Court determined that as a church pastor, Mr. Bourne's primary duties consisted of teaching, spreading the faith, and participating in religious worship. Therefore, the state lacked jurisdiction to interfere in the employment decisions of the Church.

Moreover, the Court recognized that consideration of Mr. Bourne's supposedly secular contract and tort claims would necessarily require it to delve into religious considerations. Assuming there was a valid employment contract, the Court would have to consider, among other things, whether Mr. Bourne was committed to the Church, faithfully attended church services, and maintained a proper spiritual relationship with other congregants and the Lord. Although Mr. Bourne arguably engaged in some secular duties, the Court held that his primary duties were clearly religious, and therefore the Court was prevented from reviewing his employment contract.

Similarly, the Court held that Mr. Bourne's tort claims were based upon the same operative facts concerning his employment,

ordination, and relocation. Therefore, even if the defendants made defamatory statements regarding Mr. Bourne and placed him in a false light, the Court could not consider the claims because they relate to Mr. Bourne's performance as a minister and are protected by the First Amendment.

Finally, the court held that Reverend Allison, Dr. Mills, and the Center on Children, as employees of the church and a non-profit organization associated with the church, are similarly protected under the First Amendment against Mr. Bourne's contract and tort claims. Such individuals and organizations must be protected by the First Amendment in order to carry-out their religious mission without fear of reprisal from the government. A Church is nothing without the people and organizations who lead it and further its goals, and consideration of Mr. Bourne's claims against them would be akin to judging the actions of the Church itself.

Bourne v. Center on Children, Inc., et al., No. 2698, September Term 2002, filed December 11, 2003. Opinion by Eyler, James R., J.

CONTRACTS - INTERPRETATION - WHETHER "OPERATING PARTNERSHIP" IS A LIMITED LIABILITY COMPANY AS CONTEMPLATED BY PARTNERSHIP AGREEMENT IS A MIXED QUESTION OF FACT AND LAW; CONSTRUCTION OF PARTNERSHIP AGREEMENT UNDER LAW OF OBJECTIVE CONTRACT CONSTRUCTION.

MD. CODE, CORPS. & ASS'NS - LIMITED PARTNERSHIPS AND LIMITED LIABILITY COMPANIES ARE NOT THE SAME ENTITIES; EXISTENCE OF LIMITED PARTNERSHIP DETERMINED BY STATUTORY CRITERIA, NOT BY HOW PARTIES TREAT THE ENTITY FOR INCOME TAX OR OTHER PURPOSES.

ATTORNEYS FEES - MARYLAND FOLLOWS "AMERICAN RULE" FOR DETERMINATION OF ATTORNEYS FEES; APPLICATION OF COMMON-FUND DOCTRINE AS EXCEPTION TO AMERICAN RULE; AWARD OF ATTORNEYS FEES SUSTAINED WHERE ORIGINAL PLAINTIFF WAS AWARDED JUDGMENT TO THE BENEFIT OF A PARTNERSHIP IN WHICH HE HELD ONLY A MINOR INTEREST.

Facts: Garcia, a former salaried employee of Foulger Pratt, entered into a partnership agreement, in lieu of salary from the Foulger entities, for his services to identify and process new commercial real estate projects. The partnership agreement

contemplated that new "limited partnerships" would be created to oversee development of each individual phase in the overall project site. The new entities would be known as "Operating Partnerships." Garcia identified a project site, and the Partnership formed a limited liability company rather than creating a limited partnership as anticipated by the partnership agreement.

Garcia brought this action against the Foulger entities alleging, among other things, that the general partner (Foulger Investments, Inc.) of F.P. Rockville Limited Partnership had breached the partnership agreement and wrongfully taken a \$934,000 investment fee that should have enured to the Partnership. The circuit court agreed with Garcia that the Partnership was entitled to the development fee. The court, however, concluded that Garcia was not entitled to an interest in the limited liability company because he failed to prove that the limited liability company constituted an "Operating Agreement" as contemplated by the agreement.

The cross-appeal related to the award of attorneys fees to Garcia related to recovery of the development fee for the Partnership. The court awarded Garcia attorneys' fees, and denied Foulger-Pratt's request for attorneys' fees under Maryland Rule 1-341.

Held: Affirmed. The circuit court was correct in treating the question of whether the operating partnership was a limited liability company, as contemplated by the parties' agreement, as one of a mixed question of fact and law. By applying the doctrine of objective contract interpretation, the Court of Special Appeals agreed that the operating partnership was not a limited liability company. Limited partnerships and limited liability companies are different entities under Maryland law. The legal effect of a particular entity is determined by reference to the law, not by the status conferred upon it by the parties, or how it is treated for tax purposes.

Maryland follows the "American Rule" for the determination of an award of attorneys fees, but applies the common fund exception where appropriate. Here, the circuit court awarded fees to Garcia based upon his effort in recovering the development fee, for the benefit of the partnership in which he held a minority interest, that had been mis-directed. The Court of Special Appeals agreed, noting that attorneys representing limited partners may receive their fees from a common fund recovered as a result of their efforts. The trial court correctly separated fees generated by Garcia's counsel's efforts at recovering the development fee from fees for other aspects of their representation of him.

Garcia v. Foulger Pratt Development, Inc., et al., No. 1772, Sept. Term, 2002, filed December 4, 2003 - Opinion by Sharer, J.

FAMILY LAW - DIVORCE - VOLUNTARY IMPOVERISHMENT - CHILD SUPPORT -
REHABILITATIVE ALIMONEY - 26 U.S.C. § 71; 26 U.S.C. § 2150.

Facts: Murray J. Malin, M.D., appellant, married Marcie Beth Mininberg, appellee, in November 1996. The parties separated three years later in November 1999. At the time of the marriage, appellant was employed as an anesthesiologist. Appellee, a law school graduate who had not passed the bar exam, worked part-time for her father, a physician, doing bookkeeping work. Appellant earned a substantial salary as an anesthesiologist. The couple's only child, a son, was born on July 25, 1998. He was diagnosed with "pervasive developmental disorder, not otherwise specified." Appellee eventually reduced her work hours from 30 to 15 hours per week to care for the child.

Prior to the marriage, appellant disclosed to appellee a past history of substance abuse problems. Appellant began using Valium during his medical residency in 1987 and during that year spent two months at a treatment facility. However, appellant remained sober from 1987 until 1999.

In January 1998, appellant was terminated from his employment, with Columbia Anesthesia Services, because he allegedly tampered with patient medical charts for financial gain. Thereafter, through contacts secured by his father-in-law, appellant began working part-time at various outpatient surgery centers. Appellant applied for another anesthesiology position and also applied to a pain management residency, but was not hired.

In the Spring of 1999, appellant relapsed when he resumed his use of alcohol and drugs. Appellant's relapse culminated in his arrest on November 3, 1999, for writing a prescription using another doctor's name. After his arrest, appellant spent twenty-eight days at an inpatient drug treatment program in Florida. The criminal charge was then statted.

After completing his drug treatment program in 1999, appellant decided not to continue to work as an anesthesiologist. Instead, appellant enrolled in an MBA program at George Washington University. During this time, appellant was receiving \$10,000 a month in non-taxable disability benefits from three insurance policies.

Appellee left the marital home in November 1999, and moved to her parent's home with the couple's son and nanny. She initiated divorce proceedings in June 2000. After the marital home was eventually sold, the parties put some money into a medical account for their son's needs and deposited the remainder of the money into a joint escrow account.

The trial judge found appellant voluntarily impoverished; awarded appellee rehabilitative monthly alimony of \$3,500 for a period of five years; ordered appellant to pay \$1,500 per month in child support; and ordered the parties to place a total of \$60,000 from their marital home escrow account into a medical fund for their child, but required appellant to deposit most of that money. In addition, the court's divorce decree provided that the alimony payments would be "non-taxable" to appellee.

Held: Affirmed in part and vacated in part, and remanded for further proceedings.

The Court of Special Appeals held that the circuit court erred in finding appellant voluntarily impoverished. The Court recognized appellant's history of addiction problems and noted that there was no evidence that appellant gave up his medical career to avoid his duty of parental support. Nor was there any evidence that appellant would be able to secure employment as a physician and, if so, what appellant could reasonably expect to earn. The Court observed that there are limits on the extent to which a trial court can require a parent to remain in the same career, when to do so might jeopardize the parent's health or liberty. Here, appellant had a legitimate basis to relinquish his career as a physician and pursue retraining, and he was able to provide adequate support because of his receipt of \$120,000 annually in non-taxable disability benefits.

Further, in regard to child support and alimony, the court erred in failing to consider whether the wife, who is relatively young, well educated, and has child care, is capable of working more than fifteen hours a week.

As to alimony, the Court concluded that the trial court did not abuse its discretion in regard to the duration of alimony when it ordered appellant to pay rehabilitative alimony for five years, even though the parties separated after just three years of marriage. As to the amount of alimony, however, the Court vacated the award, because the trial court may have been influenced in its calculation as to the appropriate amount of alimony by its finding that appellant was voluntarily impoverished.

The court also erred in defining appellant's alimony payment as non-taxable income to the wife. Under 26 U.S.C. §§ 71 and 215, if the payment is designated as "alimony," it constitutes "gross income" to the payee and is deductible by the payor for federal income tax purposes.

Section 12-204 of the Family Law Article authorizes the court to supplement the child support obligation for certain categories of expenses, including extraordinary medical expenses. It is clear that the parties' child has significant needs. The Court upheld the trial court's decision to create a medical fund for the child because the parents had agreed to it. But, the Court noted that the trial court failed to make allocations to the fund based on the parties' respective incomes. In particular, the trial court did not take into account the alimony paid by appellant to appellee.

Murray J. Malin v. Marcie Beth Mininberg, No. 2520, September Term, 2001, filed December 1, 2003. Opinion by Hollander, J.

JUDGMENTS - FULL FAITH AND CREDIT CLAUSE - FULL FAITH AND CREDIT - FOREIGN JUDGMENT - CHILD SUPPORT - PATERNITY DECREE - UNIFORM INTERSTATE FAMILY SUPPORT ACT - MARYLAND CODE §§ 10-301 ET SET. OF THE FAMILY LAW ARTICLE - DUE PROCESS.

Facts: In 1991, the Superior Court of California, County of Stanislaus, Family Support Division O/B/O Joeann Jones, appellant, brought a paternity action against Scott Ricketts, appellee, in California. The California court subsequently granted a default paternity judgment against appellee. In 1998, the California court obtained a child support judgment against appellee by default. In February 1999, appellant attempted to register and enforce the 1998 child support judgment in the Circuit Court for Carroll County, pursuant to the Uniform Interstate Family Support Act ("UIFSA") and the Full Faith and Credit Clause.

The proceedings that gave rise to the UIFSA action began in 1991, when appellee was served in Maryland with a paternity suit filed in California. Eighteen days after the service of the paternity suit, appellee, *pro se*, signed and mailed a motion to dismiss. The motion was returned by the clerk of the California court for failure to sign it before a notary, with a notation suggesting that it would be set for a hearing or dismissed. Thereafter, appellee followed the clerk's instructions and re-submitted his motion to dismiss. By that point, however, the response was not timely. A Stanislaus County judge subsequently signed a default paternity judgment against appellee based on appellee's "failure to appear or answer the complaint filed herein, or take any other proceedings within the time allowed by law...."

In December 1997, the District Attorney for the County of Stanislaus filed in the Superior Court of California a "Complaint Regarding Parental Obligations," seeking child support from appellee. Appellee attempted to complete the Answer form enclosed with the Complaint, but disputed paternity. Through a Maryland attorney, appellee also wrote a letter to the District Attorney, denying paternity and requesting a blood test. The District Attorney never responded to the letter. On April 30, 1998,

appellant filed a first amended complaint which merely revised the amount of arrearages. Although appellee signed a form to obtain a waiver of court fees and costs, he did not file another answer.

On September 1, 1998, the California Superior Court, County of Stanislaus, entered a "Judgment Regarding Parental Obligations" against appellee, by default. The judgment ordered appellee to pay \$370 in monthly child support and arrearages from January 1996 through April 1998.

Appellant then filed a Request for Registration of Foreign Child Support Order in the Circuit Court for Carroll County, seeking to enforce the California child support judgment. Appellee requested a hearing, which was held by a master in January 2000. On May 17, 2000, the circuit court entered an Order registering in Maryland the 1998 California "Judgment Regarding Parental Obligations." However, the court stayed the enforcement of the Registered Order, pending further proceedings. In the meantime, the court ordered both parents and the child to submit to genetic testing. Ms. Jones refused to cooperate with the genetic testing.

Appellee filed a motion to vacate the registration. The master held another hearing on August 8, 2001, and concluded, pursuant to Section 10-346(a) of the Family Law Article, that appellee raised defenses available to him in regard to the 1998 California child support judgment. In its report, the master recommended that the court grant appellee's motion to vacate the registration.

The circuit court held a hearing on October 3, 2001. Thereafter, the court denied appellant's exceptions and granted appellee's motion to vacate the California order.

Held: Affirmed. The Court of Special Appeals concluded that the circuit court properly denied full faith and credit to the California child support order. It reasoned that appellee was not afforded due process in California, because he was not provided with an adequate opportunity to be heard.

The Court acknowledged that both Maryland and California must abide by the tenets of the Full Faith and Credit Clause. Moreover, the Court explained that the UIFSA and the Full Faith and Credit for Child Support Orders Act work together to facilitate the enforcement of foreign child support orders among the states. Nevertheless, there are limitations. Significantly, the proceedings in another state must satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause.

Although California acquired jurisdiction over appellee pursuant to its long arm statute, appellee did not relinquish his due process rights. The Court of Special Appeals determined that both the District Attorney and California court were aware of appellee's position as early as 1991, yet, without the benefit of

a hearing or a ruling on appellee's motion to dismiss, the California court entered a paternity judgment, by default, declaring appellee the father of an unborn child. Six years later, that judgment led to the child support order.

The Court of Special Appeals noted that appellee has consistently maintained that the paternity judgment was not valid and repeatedly sought to challenge paternity and child support. But, the California court did not provide him with an opportunity to be heard in regard to the 1991 paternity judgment or the 1998 child support judgment, as due process requires.

Superior Court of California, County of Stanislaus, Family Support Division O/B/O Joeann A. Jones v. Scott A. Ricketts, No. 2677, September Term, 2001, filed December 1, 2003. Opinion by Hollander, J.

ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals of Maryland dated November 24, 2003, the following attorney has been disbarred from the further practice of law in this State effective immediately:

JAMES F. BRASKEY

*

By an Order of the Court of Appeals of Maryland dated December 3, 2003, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State effective immediately:

ROBERT A. DiCICCO

*

By an Opinion and Order of the Court of Appeals of Maryland dated December 5, 2003, the following attorney has been indefinitely suspended from the further practice of law in this State effective immediately:

MATTHEW GORDON TAYBACK

*

By an Order of the Court of Appeals of Maryland dated December 9, 2003, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

MARSDEN S. COATES

*

By an Order of the Court of Appeals of Maryland dated December 9, 2003, the following attorney has been suspended for six months by consent, from the further practice of law in this State:

CHARLES F. WAGAMAN, JR.

*

By a Per Curiam Opinion of the Court of Appeals of Maryland dated December 18, 2003, the following attorney has been disbarred,

effective immediately, from the further practice of law in this State:

ADRIAN PAUL IFILL

*

By an Order of the Court of Appeals of Maryland dated November 18, 2003, the following attorney has been suspended for ninety days by consent, effective immediately, from the further practice of law in this State:

DONALD JOSEPH MAY