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COURT OF APPEALS

ADMINISTRATIVE LAW - LIQUIDATED DAMAGES ON TEACHER CONTRACTS - -
JUDICIAL REVIEW OF STATE BOARD OF EDUCATION DECISION - PURE LEGAL
QUESTION - LIQUIDATED DAMAGES CLAUSE IN TEACHERS' CONTRACT OF
EMPLOYMENT

Facts: The Court considered whether a provision included in all employment contracts for primary and secondary public school teachers in the State of Maryland (as required specifically by the Code of Maryland Regulations (COMAR)), providing that, in the case of breach, "salary already accrued will be forfeited, in the discretion of the Local Board of Education," was a valid and enforceable liquidated damages clause or an unenforceable penalty.

James D. Heister and Christina L. Marvel, Appellees, teachers in the Talbot County Public Schools at the times relevant to this litigation, breached in 2003 their employment contracts with the Talbot County Board of Education (the "County Board") by failing to provide notice of their resignations prior to the contractually required May 1 deadline. Following their resignations, accrued, but unpaid, salary for the school year August 2002 through August 2003 for Mr. Heister and Ms. Marvel was withheld, pursuant to the forfeiture provision in their employment contracts. Professionally certificated employees in the public schools of Maryland are required to execute one or the other of two employment contracts, depending on his or her certification status. The Regular Teacher's Contract states that "[i]f any of the conditions of this contract shall be violated by the certificated employee named herein, salary already accrued will be forfeited, in the discretion of the Local Board of Education." COMAR 13A.07.02.01.B(2).

On appeal to Dr. Karen B. Salmon, the then Interim Superintendent of the Talbot County Public Schools, in accordance with § 4-205(c) of the Education Article of the Maryland Code (1978, 2001 Repl. Vol.), the forfeitures against Mr. Heister and Ms. Marvel were upheld. Mr. Heister and Ms. Marvel separately appealed the Superintendent's decisions to the County Board. The County Board, in written memoranda on 25 February 2004, affirmed the Superintendent's decision. Consolidating their cases, Appellees appealed the County Board's decisions to the Maryland State Board of Education (the "State Board").

Affirming the decisions of the County Board, the State Board determined that the forfeiture provision was valid and enforceable.

After acknowledging its broad statutory authority, the State Board noted that its "regulations are generally considered valid provided that the regulations do not contradict the statutory language or purpose." The State Board then highlighted that the purposes of the forfeiture provision not only included deterring late resignations, which makes it difficult for the local board to recruit and hire qualified teachers, but also attempts to reasonably compensate the local board for damages in recruiting and training replacement teachers as well as the cost of using substitute teachers. After examining the legal elements of an enforceable liquidated damages clause, the State Board determined that the forfeiture provision in the teachers' employment contracts satisfied those elements and thus was a valid liquidated damages clause.

Appellees sought judicial review in the Circuit Court for Talbot County of the State Board's decision. The Circuit Court reversed the decision of the State Board and remanded the case to the State Board for further proceedings consistent with its ruling. The trial court concluded that the salary forfeitures were not set forth to be imposed uniformly because the clause did not mandate its imposition in every case. Thus, the Circuit Court determined that the exercise of the discretion was arbitrary and thus the forfeiture provision was not valid and enforceable.

The County Board appealed the Circuit Court's judgment to the Court of Special Appeals. The Court of Appeals issued a writ of certiorari, before the intermediate appellate court could decide the case. *Board of Educ. v. Heister*, 388 Md. 404, 879 A.2d 1086 (2005).

Held: Reversed, and remanded with directions to affirm the decision of the Maryland State Board of Education. The Court of Appeals determined that the forfeiture provision was a valid and enforceable liquidated damages clause. Although the Court noted the very broad discretion afforded the State Board, which is consistent with the State Board's delegated statutory authority, it determined nonetheless that the present case fell within a category of the State Board's decision-making power involving a purely legal question, thus enabling more expansive judicial review. The Court concluded that the three essential elements of a valid and enforceable liquidated damages clause were satisfied. Specifically, the forfeiture provision specified an amount that was ascertainable and ascertained immediately upon the breach; the forfeiture provision reasonably compensated the school system for damages anticipated by the nature of the breach; and, the forfeiture provision was binding and could not be altered to correspond to actual damages.

Board of Education of Talbot County, Maryland v. James D. Heister, No. 56, September Term, 2005, filed April 13, 2006. Opinion by Harrell, J.

CRIMINAL LAW - FOURTH AMENDMENT - SEIZURE

Facts: Petitioner Swift was charged with several firearm and controlled dangerous substance offenses in the Circuit Court for Wicomico County. Prior to trial, Swift filed a motion to suppress evidence seized from him. Deputy Dykes was the sole witness at the suppression hearing. While on routine patrol in the early morning hours, he observed Swift walking in the street. He circled around Swift three times, within three to five minutes. Swift was walking in the street, five feet from the edge of the pavement, walking into the direction of what would be oncoming traffic, if there was any. The deputy stopped his car in front of Swift and got out from the car. Dykes asked Swift for permission to talk to him, in order to perform a field interview stop, and to obtain his information. The officer ran a warrants check and he was advised that Swift was "known for drugs and weapons." Deputy Dykes then asked petitioner if he had any weapons on him, and Swift said he did not. The officer asked for consent to search. Swift did not reply verbally, but put his hands on the hood of the patrol car, which Deputy Dykes viewed as consent. As Dykes approached Swift to pat him down, Swift pushed off the hood and ran. The deputy chased Swift and arrested him. During a search incident to arrest, drugs and some money were recovered. Deputy Dykes also retrieved a handgun which had been thrown under a bush by Swift.

Swift filed a motion to suppress the evidence on the ground that Swift was illegally detained. At the suppression hearing, Swift's counsel stipulated that the handgun had been abandoned, and that Swift lacked standing to challenge the gun's seizure. Before the motions court, he argued that, based on the totality of the circumstances, a reasonable person would not have felt free to leave the officer's presence and go about his business, and

therefore he was illegally detained by the officer. The Circuit Court ruled that, considering the totality of the circumstances, a reasonable person would have felt free to leave. The court held that the encounter between Swift and Deputy Dykes was a consensual encounter, outside of the purview of the Fourth Amendment.

Swift proceeded to trial on a not guilty, agreed statement of facts, and was convicted of possession of cocaine and wearing, carrying, or transporting a handgun upon his person. He noted a timely appeal to the Court of Special Appeals, arguing that the Circuit Court erred in failing to grant his motion to suppress. In an unreported opinion, that court affirmed the trial court.

Held: Affirmed in part and reversed in part. The Court reversed Swift's conviction for possession of a controlled dangerous substance, reasoning that under the circumstances of the encounter between petitioner and Deputy Dykes, a reasonable person would not have felt free to leave. The Court noted that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.

Based upon the record of the suppression hearing, the Court concluded that a reasonable person would not have felt free to leave under the circumstances of the encounter between the officer and petitioner, and thus petitioner was seized within the meaning of the Fourth Amendment. The Court observed that the interaction between petitioner and Deputy Dykes was in the nature of constructive restraint rather than a consensual encounter. In arriving at this conclusion, the Court considered the totality of the circumstances, focusing on the time of night of the encounter, the officer's conduct before he approached petitioner, the blocking of Swift's path with the patrol car, the patrol car's headlights shining on Swift, the officer's testimony that he was conducting an investigatory field stop, and the warrants check that Deputy Dykes conducted in Swift's presence. Based on these circumstances surrounding the encounter in this case, a seizure occurred.

The Court of Appeals affirmed Swift's conviction as to the gun charge. Based on the stipulation before the trial court that the gun had been abandoned and that Swift had no reasonable expectation of privacy as to the gun, the Fourth Amendment was not implicated.

Logan Hamilton Swift v. State of Maryland, No. 98, September Term, 2005, filed June 2, 2006. Opinion by Raker, J.

CRIMINAL LAW - JURY TRIAL WAIVER - CONSTITUTIONAL LAW - SIXTH AMENDMENT RIGHT TO JURY TRIAL - ARTICLES 5, 21, AND 24 OF THE MARYLAND DECLARATION OF RIGHTS - KNOWING AND VOLUNTARY WAIVER OF JURY TRIAL RIGHT - TRIAL PRACTICE - OBJECTION TO ADMISSIBILITY OF EVIDENCE - CONTINUING OBJECTION - PRESERVATION FOR APPELLATE REVIEW

Facts: The Court of Appeals considered whether the trial court properly accepted the Defendant's waiver of jury trial in a criminal proceeding where the trial judge did not include questions in the colloquy addressed specifically to the voluntariness of the Defendant's waiver, and where there was no special, heightened inquiry on the record regarding the Defendant's understanding of the purported waiver where he used the services of a Korean-English language interpreter. The Court considered also whether the Defendant's objection to the admissibility of testimonial evidence of prior consistent statements preserved the issue for appellate review where the trial judge never granted explicitly the Defendant's "offer" of a continuing objection interposed only as to the initial of three witnesses who testified consistently on the same subject.

In a bench trial in the Circuit Court for Montgomery County, Shin H. Kang, represented by counsel, was convicted of assaulting his wife by hanging her by the neck with a rope until she passed out. During trial, there was no dispute that a hanging incident occurred; however, Kang asserted that his wife had attempted to commit suicide out of shame for allegedly being involved in an extra-marital affair. The trial judge found Kang not guilty of attempted murder in the first or second degree, but convicted him of first-degree assault for the hanging of his wife and second-degree assault for another physical contact that occurred a number of days after the hanging incident. Kang was sentenced by the court to fifteen years of incarceration for the first-degree assault conviction and five years of incarceration, to be served consecutively, for the second-degree assault conviction.

The Court of Special Appeals, in a reported opinion, *Kang v. State*, 163 Md. App. 22, 877 A.2d 173 (2005), affirmed the judgments of conviction. In that appeal, Kang argued that his jury trial waiver in the Circuit Court was defective for two reasons. First, Kang allegedly lacked an understanding of the English language and therefore the trial court's failure to insure that a simultaneous translation of the waiver colloquy into Korean caused the resultant waiver to be invalid. Second, the trial judge's colloquy with Kang failed to inquire specifically into the voluntariness of his waiver. Kang argued also that testimony regarding prior consistent statements by Mrs. Kang to her pastor, her doctor, and two police officers were improperly admitted into evidence because Kang had

requested a continuing objection when he challenged the admissibility of the assertedly hearsay testimony by the initial witness.

As to the jury waiver, the Court of Special Appeals concluded that it was satisfied that "Mr. Kang's waiver of a trial by jury was not the product of any language difficulty." Moreover, "Mr. Kang never gave a response to any of the court's questions that would indicate that he was under duress or coerced into waiving his jury trial right," and therefore an explicit inquiry specifically into voluntariness of the waiver was not required. Consequently, the intermediate appellate court affirmed the trial court's conclusion that Kang knowingly and voluntarily waived his right to a trial by a jury. With regard to the admission of the prior consistent statements, the intermediate appellate court, agreeing with the State, concluded that the issue was not preserved effectively for appellate review because the trial judge never granted Kang a continuing objection and the witnesses, testifying consistently after the initial witness, testified without contemporaneous objection by Kang.

The Court of Appeals granted Kang's Petition for Writ of Certiorari, as well as the State's Conditional Cross-Petition. *Kang v. State*, 388 Md. 673, 882 A.2d 286 (2005).

Held: Affirmed. The Court of Appeals determined that the trial court properly accepted Kang's waiver of jury trial in a criminal proceeding. Recognizing that, under Maryland Rule 4-246(b), there is no specific ritual or fixed litany required of trial judges in assessing the voluntariness of a defendant's jury trial waiver, the Court concluded that there is no uniform requirement explicitly to ask a defendant whether his or her waiver decision was induced or coerced, unless there appears some factual trigger on the record that brings into legitimate question voluntariness. Kang's colloquy responses here did not trigger a requirement that the trial judge inquire further as to voluntariness. Additionally, the Court concluded that the substance of the colloquy conducted by the trial judge was adequate in informing Kang and ascertaining his awareness of his fundamental jury rights. Moreover, the Court determined that the record was persuasive that the jury trial waiver was likely not the result of language deficiency and thus Kang's waiver was knowing.

The Court concluded also that because the continuing objection sought when the initial witness testified was not granted on the record by the trial judge, in accordance with Maryland Rule 4-323(b), Kang waived any objection to the admissibility of subsequent references to testimonial evidence of prior consistent

statements through the testimony of the later witnesses.

Shin H. Kang v. State of Maryland, No. 59, September Term, 2005, filed June 2, 2006. Opinion by Harrell, J.

ESTATES AND TRUSTS - PROCEDURE - APPEALS FROM ORPHANS' COURT

Facts: In 2002, Mary Martha Isabella Knight died intestate while owning two parcels of real property in Anne Arundel County. When two prior personal representatives were unable to dispose of the property, the Orphans' Court for Anne Arundel County appointed a Successor Personal Representative.

The Personal Representative offered the real property for sale through a realtor and received a bid from Princess Builders. He informed the twelve heirs of the Estate of the bid and invited them to submit a counterbid, which Diana Knight did. The Personal Representative requested that she make the offer in writing. Three days later, Knight faxed an offer for \$1,000 more than the bid from Princess Builders. The Personal Representative responded by asking that the offer be made in the form of a contract, which Knight provided.

After receiving the contract from Knight, the Personal Representative accepted the bid from Princess Builders with respect to one of the pieces of property and informed the heirs that they could submit a bid for the remaining parcel. None of the heirs submitted a bid and the Personal Representative accepted an offer from Princess Builders to purchase both parcels. Thereafter, the Personal Representative filed a Petition to Sell Real Estate to obtain the approval of the Orphans' Court of the sale of both parcels to Princess Builders. The contracts with Princess Builders contained a contingency that required Princess Builders to obtain a building permit prior to August 31, 2003 or the contract would become null and void.

Knight filed an objection to the sale in the Orphans' Court and requested a hearing. She alleged that she should be permitted to purchase the property because she submitted a higher bid. Following a hearing, the Orphans' Court ordered the Personal Representative to sell the property to Knight unless he received a higher offer within ten days. No higher offer was received. Princess Builders filed a notice of appeal in the Circuit Court for Anne Arundel County.

Following a hearing, the Circuit Court reinstated the Estate's contracts with Princess Builders and reversed the decision of the Orphans' Court. Knight filed a motion to alter or amend judgment asserting that Princess Builders was not a proper party to appeal from an Orphans' Court ruling. The Circuit Court denied her motion and she appealed to the Court of Special Appeals.

The Court of Special Appeals determined that Princess Builders had standing to appeal from the Orphans' Court decision under the definition of "party" as used within the governing statute. Moreover, the intermediate appellate court concluded that because the contingency in the contract between Princess Builders and the Personal Representative was not included to benefit Knight, she could not use it as a means to avoid the contract.

Held: Affirmed. The Court of Appeals held that under the terms of the governing statute and its prior precedent on the issue, Princess Builders properly may be considered a party who may appeal from a decision of the Orphans' Court. The Court also determined that because the building permit contingency was not included in the contract for Knight's benefit and she was not prejudiced by Princess Builders's failure to satisfy its terms, she could not use it to nullify the agreement between Princess Builders and the Personal Representative. Therefore, the Court affirmed the decision of the Court of Special Appeals.

Diana Knight v. Princess Builders, Inc., No. 67, September Term, 2005, Opinion by Battaglia, J.

EVIDENCE - ADMISSIBILITY OF SCIENTIFIC EVIDENCE

Facts: On January 8, 2002, Kenya Bryant was shot outside his home in Suitland, Maryland. A witness notified the Prince George's County Police that she had witnessed the shooting and provided a description of the shooter although she did not know his name.

Two days after the shooting, District of Columbia Metropolitan Police Department officers seized a Lorcin nine-millimeter handgun and ammunition from a vehicle during a routine traffic stop. Gemar Clemons was a passenger in the vehicle and subsequently was charged with possessing an unregistered handgun and ammunition. He was acquitted of the charges.

Thereafter, police determined that the Lorcin handgun was consistent with the handgun used to kill Bryant. The witness to the shooting viewed a photographic array and identified Clemons as the shooter. Clemons was arrested and charged with various counts of murder, theft, robbery, and the use of a handgun in the commission of a crime of violence.

In a pre-trial motion before the Circuit Court of Prince George's County, Clemons sought to have the evidence of the gun excluded on double jeopardy grounds because he had been acquitted of possessing the handgun. He also asked the court to preclude the prosecution from relitigating the issue of whether he possessed the gun on January 10, 2002 based on collateral estoppel. The Circuit Court denied both motions. Clemons filed another motion *in limine* asking the court to exclude the testimony of the prosecution's expert witness, a forensic chemist, who would testify concerning Comparative Bullet Lead Analysis (CBLA). Clemons specifically challenged the admissibility of CBLA. The court deferred its decision on the admissibility of CBLA until trial.

At trial, the prosecution called its CBLA expert to testify as an expert witness. Clemons reasserted his objection to the testimony. The court permitted both the prosecution and defense to voir dire the expert and subsequently overruled Clemons's objection. Clemons introduced expert testimony to rebut the testimony of the prosecution's expert.

The jury convicted Clemons of second degree murder and use of a handgun in the commission of a felony and Clemons was sentenced to forty-two years imprisonment. He noted an appeal to the Court of Special Appeals, which, in an unreported opinion, determined that he failed to preserve the issue of the admissibility of CBLA for appellate review.

Held: Reversed. The Court of Appeals determined that the issue was adequately preserved on the record. The Court of Appeals also concluded that CBLA is not generally accepted within the relevant scientific community as valid and reliable. As such, CBLA does not satisfy the *Frye-Reed* test for the admissibility of scientific evidence. Therefore, the Court reversed the decisions of the Court of Special Appeals and the Circuit Court for Prince George's County.

Clemons v. State, No. 70, September Term, 2005, Opinion by Battaglia, J.

EVIDENCE - OPINION EVIDENCE - COMPETENCY OF EXPERTS - RELEVANCY OF EXPERT TESTIMONY - FACTUAL FOUNDATION FOR ADMISSIBILITY OF EXPERT TESTIMONY - DISCRETION FOR ADMISSIBILITY OF EXPERT TESTIMONY

WITNESSES - COMPETENCY - CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS - COMMUNICATIONS TO OR INFORMATION ACQUIRED BY PHYSICIAN OR SURGEON - RELATION OF PHYSICIAN AND PATIENT - PSYCHIATRIST OR PSYCHOLOGIST - MENTAL OR PHYSICAL CONDITION AND TREATMENT

Facts: On July 20, 2002, Ms. Donna Martin was stabbed to death in her townhouse. Approximately a year earlier, Ms. Marin's ex-husband, Michael Jerome Bryant, petitioner, had threatened her at a bond review hearing. Following that bond review hearing, petitioner was taken to the Montgomery County Detention Center where he was subjected to a routine medical intake screening. During that medical intake screening, petitioner stated that he planned to kill Ms. Martin, that he enjoyed seeing her blood and that he was obsessed with killing her. Two days after Ms. Martin's death, petitioner was arrested and later charged with first degree murder.

Petitioner was convicted by a jury of premeditated first degree murder and sentenced to life in prison without the

possibility of parole. During trial the petitioner attempted to exclude the intake screener's testimony regarding his comments from a year before the murder, claiming that they were privileged communications protected under Maryland Code (1973, 2002 Repl. Vol.), § 9-109 of the Courts & Judicial Proceedings Article ("C.J."). The trial court found that the communications were not made for the purpose of diagnosis or treatment and that the nurse to whom the statements were made was not working in consultation with or under the direct supervision of a psychologist or psychiatrist, as required by the statute. In addition, petitioner sought to have an expert testify that he suffered from an impulse control disorder, which negated the required *mens rea*, i.e., premeditation. The trial court denied the petitioner's request, finding that the expert's testimony was not relevant and that it would confuse rather than aid the jury on deciding the issue of premeditation.

Petitioner filed an appeal with the Court of Special Appeals, stating that the trial court erred in allowing the nurse to testify and denying petitioner's attempt to have an expert take the stand on his behalf. The intermediate appellate court affirmed the trial court's rulings. Bryant v. State, 163 Md. App. 451, 881 A.2d 669 (2005). Petitioner then filed a petition for writ of certiorari, asking the Court of Appeals to decide whether the trial court erred in allowing the nurse to testify and excluding the expert testimony because petitioner failed to testify. The Court of Appeals granted *certiorari* on December 19, 2005. Bryant v. State, 390 Md. 284, 888 A.2d 341 (2005).

Held: Affirmed. The psychologist/psychiatrist-patient privilege protected under C.J. § 9-109 must be narrowly construed. The definition of "patient" under the statute requires that the communication be for the purpose of diagnosis or treatment and that the person to whom the statements are made be directly related to the individual's diagnosis or treatment, working in consultation with or under the direct supervision of a psychologist or psychiatrist. A medical intake screening is not conducted for the purpose of diagnosis or treatment of the inmate, but to protect him or her and the general population from any possible medical or mental issues the inmate may have. In addition, the nurse to whom the statements are made is not, at the time of the medical intake screening, working directly or vitally on the diagnosis or treatment of the inmate, nor under direct supervision or in consultation with a psychologist or psychiatrist. The trial court, therefore, was correct in allowing the nurse to testify.

Trial courts have discretion in allowing or excluding expert testimony. Although a defendant does not have to waive his right

to self-incrimination as a condition precedent to the introduction of expert testimony, there must be a proper factual foundation supporting the expert testimony proffered. In the petitioner's case there was insufficient evidence to support the expert witness testimony, therefore, the trial court did not abuse its discretion in refusing to allow the expert to testify.

Michael Jerome Bryant v. State of Maryland, No 102, September Term, 2005, filed June 5, 2006. Opinion by Cathell, J.

FINES - PAYMENT - CLERKS OF THE COURT ARE REQUIRED TO ACCEPT PAYMENTS OF TRAFFIC FINES, AND SUCH PAYMENTS CONSTITUTE A CONVICTION BY CONSENT UPON REMITTANCE.

Facts: On June 12, 2004, David Louis Toth, appellant, was stopped by the police and charged with speeding and driving while impaired by alcohol. The case was originally scheduled to be tried in the District Court of Maryland but appellant prayed a jury trial and the case was transferred to the Circuit Court for Worcester County.

Appellant then filed a motion to suppress evidence in connection with the driving while impaired by alcohol charge. A hearing was held on February 2, 2005, and the motion was granted. The State immediately *nolle prossed* the driving while impaired by alcohol charge - leaving only the speeding violation. Appellant attempted to pay the \$75.00 fine enumerated on the citation issued for speeding at the hearing and the judge refused to accept payment. Trial was set for April 4, 2005.

Appellant then attempted to mail payment of the fine to the Clerk of the court. Appellant received his check back with a letter from the Clerk stating that he could not accept payment pursuant to orders from the presiding trial judge.

On April 4, 2005, at trial, appellant's counsel again

attempted to tender payment of the fine. The judge refused to accept payment, entered a guilty plea, and after hearing evidence from the State which was not objected to by appellant, found appellant guilty and entered the maximum penalty for speeding (\$500.00) plus costs of \$166.00, for a total fine of \$666.00.

Appellant timely noted an appeal to the Court of Special Appeals. The Court of Appeals, on its own initiative and prior to any proceedings in the intermediate appellate court, granted certiorari. *Toth v. State*, 390 Md. 90, 887 A.2d 655 (2005).

Held: Reversed. The Court of Appeals found that Maryland Code (1977, 2002 Repl. Vol.), § 26-204 of the Transportation Article, by its plain language, provides for compliance with a notice to appear contained in a traffic citation, summons, other writ, or trial notice issued by either the District Court or a circuit court by payment of a fine, if provided for in the citation. Clerks of the court are required to accept payment of such fine when tendered - the payment of which constitutes a conviction by consent.

David Louis Toth v. State of Maryland, No. 96 September Term, 2005, filed June 5, 2006. Opinion by Cathell, J.

INSURANCE - COVERAGE - AUTOMOBILE INSURANCE - UNINSURED OR UNDERINSURED MOTORIST COVERAGE - AMOUNTS PAYABLE IN GENERAL

Facts: On January 28, 2001, Richard DeHaan stopped at a gas station. He was driving his 1989 Chevrolet Blazer, which was insured by State Farm Mutual Automobile Insurance Company ("State Farm"). DeHaan left the vehicle and entered the convenience store portion of the station. Upon returning to his vehicle, DeHaan noticed an individual sitting in the driver's seat of his Blazer. He opened the door of the car and asked the stranger what he was doing. In response, the man shot DeHaan, started the vehicle and left the scene. DeHaan was taken to Maryland Shock Trauma Center and incurred approximately \$70,000.00 in medical expenses. The

assailant was later identified, arrested and convicted of attempted murder.

DeHaan submitted two claims to State Farm. The first claim sought recovery under the PIP portion of the insurance policy and the second claim was based upon the policy's uninsured motorist provision. State Farm initially denied both claims and DeHaan filed a complaint with the Circuit Court for Howard County. The Circuit Court found that DeHaan was entitled to recover under both the PIP and uninsured motorist provisions of the policy and granted his motion for summary judgment. State Farm eventually paid DeHaan the amount covered under PIP, but appealed the finding that the shooting was covered under the uninsured motorist provision of the policy. The Court of Special Appeals, in an unreported opinion, affirmed the findings of the Circuit Court. The Court of Appeals granted *certiorari* on December 5, 2005. State Farm Mut. Ins. Co. v. DeHaan, 390 Md. 90, 887 A.2d 655 (2005).

Held: Reversed. Under Maryland Code (1997, 2006 Repl. Vol.), § 19-509 of the Insurance Article, an insured person is entitled to coverage for injuries that "arise out of the ownership, maintenance, or use of an uninsured motor vehicle." In order to qualify for coverage, there must be a nexus between the injury and the use of the vehicle, i.e., the vehicle must be the instrumentality of the injury. Injuries resulting from the discharge of a gun by an assailant sitting behind the wheel of the driver's side of the insured's vehicle, while the insured is standing outside the vehicle, do not arise out of the use of a vehicle as contemplated by the statute. An insurance provision based upon this section of the Insurance Article will be interpreted in the same way as the statute. As a result, DeHaan's injuries do not come within the scope of coverage provided by the policy.

State Farm Mutual Automobile Insurance Company v. Richard DeHaan, No 93, September Term, 2005, filed June 5, 2006. Opinion by Cathell, J.

JURY INSTRUCTIONS - FLIGHT INSTRUCTIONS

Facts: On July 17, 2002, Noah Gottesman, William Beaver, and Bradley Kelly were walking back to their hotel near the Inner Harbor in Baltimore City after dinner. On the 1300 block of East Pratt Street, they were approached by two men on bicycles. One man told them to put their wallets on the ground. Mssrs. Gottesman, Beaver, and Kelly did not stop. The would-be robber pulled a gun, and the trio ran as at least five shots were fired, one of which struck Gottesman in the right arm. At the end of the block, Mssrs. Gottesman, Beaver, and Kelly accepted the offer from two men in a sports utility vehicle to take them to the hospital.

At the hospital, Gottesman, Beaver, and Kelly met with police, who then broadcasted that they were looking for an African-American male with corn rows, who was approximately twenty-five years old, wearing a baggy white t-shirt and jeans or jean shorts on a bicycle accompanied by another person.

Detective Frank Mundy arrived at the location of the shooting and saw Warren Thompson, the Petitioner, who fit the broadcast description, on a bicycle. Detective Mundy ran toward him, identified himself as a police officer, and yelled for him to stop. Thompson saw him and continued to pedal away from him. Thompson was apprehended within a mile of his interaction with Detective Mundy. When he was taken into custody, the police recovered a significant quantity of cocaine on him.

Thompson was charged with various counts of attempted murder, assault, use of a handgun in the commission of a felony or crime of violence, reckless endangerment, wearing, carrying, or transporting a handgun, illegal possession of a firearm, possession of a controlled dangerous substance, and possession of a controlled dangerous substance with intent to manufacture and distribute. At a pretrial hearing, the presiding judge in the Circuit Court for Baltimore City suppressed the evidence of the drugs and dismissed the charges relating to the possession of the controlled dangerous substances. At the close of trial, the jury acquitted Thompson of the counts of first degree assault and second degree assault relating to Beaver and Kelly, but was unable to reach a verdict on the remaining counts with respect to Beaver and Kelly and all of the counts concerning Gottesman.

The State elected to retry Thompson with respect to the charges relating to Gottesman. During the second trial, the State introduced evidence without objection that Thompson fled the scene of the shooting to avoid apprehension by the police. Subsequently, during the bench conference preceding the jury instructions, the

State requested a flight instruction be given. Thompson objected and argued that the instruction was misleading. The trial judge overruled the objection and instructed the jury on Thompson's flight. The jury convicted Thompson of first degree assault, second degree assault, reckless endangerment, use of a handgun in the commission of a felony or crime of violence, wearing, carrying, or transporting a handgun. and possession of regulated firearm after having been convicted of a disqualifying crime. The court denied Thompson's motion for a new trial and sentenced him to a forty-year term of imprisonment, with the first five years without eligibility for parole. Thompson noted his appeal.

The Court of Special Appeals concluded that flight instructions given in criminal cases are not *per se* improper and determined that the evidence of flight in the instant case was sufficient to support the giving of the instruction.

Held: Reversed. The Court of Appeals held that flight instructions are not *per se* improper in criminal cases, but concluded that the trial judge abused his discretion in providing a flight instruction to the jury in the case at bar. In the present case, because the jury was not presented with evidence of what may have been an alternative and at least a cogent motive for Thompson's flight, which would have resulted in prejudicing Thompson, the giving of the flight instruction was an abuse of discretion.

Warren Thompson v. State, No. 110, September Term, 2005, Opinion by Battaglia, J.

MUNICIPAL CORPORATIONS - CONDEMNATION

Facts: In 1982, Allen Pickett purchased a two-story brick home located at 20 West Fourth Street, Frederick, Maryland, lived there for approximately one week, and thereafter, leased it to a tenant until 1993, after which it was vacant. Beginning in 1996, the

Frederick City Police Department repeatedly filed complaints regarding the property's condition with the Frederick City Office of Code Enforcement, which the Office of Code Enforcement investigated and found to be supported. On January 20, 2000, the Office of Code Enforcement issued Pickett seventy-seven citations for violations dating from October 1999 to December 1999. The citations were returned by the United States Postal Service as undeliverable and subsequently were posted at the property.

On January 2, 2002, the property was inspected, and it was revealed that the rear foundation was sinking into the ground and that transients were using the building. One week later, the City reinforced the foundation and declared the building "an unsafe structure." On March 21, 2002, the Board of Aldermen of the City of Frederick passed Ordinance G-02-3, the purpose of which was to enable the City to acquire and dispose of blighted properties through the exercise of eminent domain. Immediately thereafter, the Board of Aldermen passed Ordinance ED-02-1, which authorized the City to acquire the property at 20 West Fourth Street through eminent domain. In the course of their discussions at the meeting, the Aldermen on the Board specifically found that the building located at 20 West Fourth Street constituted an growing danger to the general health and welfare, that it was likely to continue to do so unless it is corrected, that, if left uncorrected, the property would contribute to the blighting of the surrounding community, and that Pickett failed to correct the problems with the property. On March 25, 2002, the Mayor of the City of Frederick signed both ordinances.

On April 10, 2002, the City initiated condemnation proceedings in the Circuit Court for Frederick County. It attempted repeatedly to effect service upon Pickett over the course of a year. On July 7, 2003, having been unable to serve Pickett, the City was granted leave to use alternate service through posting the documents at the property. On October 10, 2003, the City obtained a default judgment against Pickett because he failed to respond to the complaint. One month later, Pickett filed a motion to vacate the default judgment and strike service. The Circuit Court vacated the default judgment but denied the motion to strike the service of process. Thereafter, Pickett filed an answer in which he raised the affirmative defenses of *ultra vires*, lack of *in personam* jurisdiction, collateral estoppel, estoppel, and illegality, and asserted that the complaint failed to state a claim upon which relief may be granted.

The Circuit Court held an evidentiary hearing and dismissed the City's condemnation proceeding because it determined that the City was not empowered to condemn a blighted property within a non-

blighted area. The City noted its appeal to the Court of Special Appeals; however, prior to any proceedings in that court, the Court of Appeals, on its own initiative, issued a writ of certiorari.

Held: Reversed. The Court of Appeals held that the Circuit Court erroneously dismissed the City's condemnation action based on an incorrect interpretation of the requirements of Section 2 (b) (37) of Article 26A, which governs the condemnation of blighted properties within non-blighted areas. The plain language of the statute indicated that the municipality is empowered to acquire blighted properties located within non-blighted areas through the exercise of eminent domain. The only prerequisites are that the municipality already have the authority to condemn blighted areas, and that the legislative body of the municipality find that the property is blighted, that it will contribute to the blighting of the surrounding area, that it will continue to be blighted, and that the property owner was informed of the condition of the property, but took no action to correct it. The City of Frederick fulfilled those requirements.

The Court also determined that the Board of Aldermen's approval of the ordinance permitting the condemnation of 20 West Fourth Street was not an *ultra vires* act. The Board was not required to pass an enabling ordinance. Moreover, even if it was required, the Board was authorized to engage in a fact-finding hearing and pass the ordinance in anticipation of the Mayor signing the enabling ordinance.

The remaining issues of bad faith and lack of *in rem* jurisdiction were not adequately developed in the record for the Court to address them. Therefore, the Court of Appeals reversed the decision of the Circuit Court of Frederick County and remanded the case back to that court for further proceedings.

City of Frederick v. Allen M. Pickett, No. 74, September Term, 2005, Opinion by Battaglia, J.

TORTS - LIABILITY FOR NEGLIGENCE OF POLICE OFFICER - LIABILITY FOR
COMMANDEERED VEHICLES USED IN A ROADBLOCK - MOTION FOR SUMMARY
JUDGMENT

Facts: A sports utility vehicle (SUV) was sighted traveling northbound in the southbound lanes of Route 301 at a high rate of speed through Charles County on 25 August 1999. Several state and county police units answered dispatcher calls to assist in the apprehension of the SUV driver. After an unsuccessful effort to stop the SUV, police designed to have officers employ stop sticks, a device used to terminate high speed automobile chases, at the intersection of Route 301 and Smallwood Drive, an entrance to the St. Charles community in Waldorf. Four police vehicles with activated emergency sirens and lights converged at the intersection and heard over the radio that the SUV was approaching the intersection traveling northbound on Route 301. Approximately 10 civilian vehicles were approaching the intersection on Route 301 northbound and came to a stop before the red traffic light. Accounts of the officers differed from the accounts of two civilian motorists stopped at the intersection in the northbound lanes of Route 301 as to whether the police vehicles blocked northbound traffic on Route 301.

Two officers attempted to set up stop sticks in the right shoulder of northbound Route 301 because it was the only "free lane" for the SUV due to the presence of civilian vehicles stopped in the traffic lanes of northbound Route 301. The driver of the SUV, however, did not direct his car to the free shoulder and instead collided with the civilian vehicles in the right traffic lane of northbound Route 301. Joseph Johnson, the driver of one of those vehicles, was fatally injured by the collision.

Mr. Johnson's wife and child (Petitioners) brought a cause of action in the Circuit Court for Charles County against the Charles County Commissioners, among other defendants, for violating Maryland Code (1977, 1999 Repl. Vol.), Transportation Article, §§ 19-101 (providing that the state or political subdivision, as the case may be, is liable for the negligence of its police officer where the officer directs the driver of a non-police vehicle to assist in the enforcement of the law or apprehension of a suspected criminal) and 102 (providing that a police officer may not direct any driver, owner, or passenger of a motor vehicle, other than a police vehicle, to participate in a roadblock and that the State or political subdivision, as the case may be, is liable for any injuries proximately caused therefrom), in addition to other claims.

The Circuit Court granted Petitioners' summary judgment motion

on the §§ 19-101 and 102 claims. The trial court held that Petitioners were not liable under § 19-101 because the court concluded that no police officer "directed" Mr. Johnson to assist them in any way. Furthermore, the trial court held that Petitioners were not liable under § 19-102, as a matter of law, because the "evidence clearly establishe[d] that no officer directed or commandeered any non-police vehicle so as to utilize a non-police vehicle in a roadblock." The Johnsons appealed.

In an unreported opinion, the Court of Special Appeals vacated the summary judgment by the Circuit Court on the Johnsons' §§ 19-101 and 102 claims. The intermediate appellate court reviewed the conflicting evidence on the record in a light most favorable to the Johnsons, including the evidence gathered from the account of a civilian motorist's deposition, where she stated that she stopped her vehicle at the intersection due to police vehicles blocking northbound Route 301 at the Smallwood Drive intersection. The court determined that this deposition testimony was sufficient to generate a jury determination of whether, under the *Keesling v. State*, 288 Md. 579, 420 A.2d 261 (1980), "totality of the circumstances test," Mr. Johnson was directed to assist the officers in apprehending the SUV driver.

Held: Affirmed. The Court of Appeals concluded that the trial court committed error when it granted Petitioners' summary judgment motion under the circumstances in the present case. A material factual dispute arose from the conflicting affidavits of the police officers involved in the efforts to stop the SUV and at least the deposition of one surviving civilian motorist. The Court concluded that the question of whether police vehicles actually blocked traffic traveling northbound on Route 301 (or appeared to block traffic from the civilian motorists' perspective) was a dispute for the fact-finder to resolve when evaluating the claims brought under §§ 19-101 and 102.

The Court concluded also that the record presented a jury question as to whether the objectively-viewed appearance of the police officers' conduct amounted to a direction or order for Mr. Johnson to participate in the apprehension of the SUV driver and/or in a roadblock for that purpose. Several marked police vehicles were gathered in some kind of formation in the intersection of Route 301 and Smallwood Drive. The vehicles' emergency equipment was activated and was visible to motorists approaching and stopping at the intersection. Two police officers exited their vehicles and were standing, walking, and/or running about the intersection within view of the motorists. The Court observed that civilian motorists, including Mr. Johnson, could have inferred reasonably from the presence of the stopped vehicles, police officers, and

activated emergency lights and sirens, a direction to remain stopped at the intersection, regardless of the color of the overhead traffic lights. The Court also highlighted that police officers tried to employ "stop sticks" on the shoulder of Route 301 because it was thought to be the only "free" area on Route 301 northbound for the SUV to use; that this necessarily may have been so was due in large measure to the stopped civilian vehicles in the northbound lanes. Citing *Keesling*, the Court opined that the trial judge, in granting summary judgment, construed incorrectly the meaning of §§ 19-101 and 102 when he, in effect, interpreted those statutes to require an affirmative vocal order to participate in the blockade or apprehension of a fleeing suspect.

Charles County Commissioners v. Johnson, No. 104, September Term, 2005, filed 9 June 2006. Opinion by Harrell, J.

COURT OF SPECIAL APPEALS

CONTRACTS - LIQUIDATED DAMAGES

Facts: An employer, Willard, brought an action against a former employee, Javier, for breach of contract, seeking to recover \$50,000 in liquidated damages, for violation of a covenant not to compete. Javier, and other employees of Willard Packaging Company, Inc., were required to sign a contract of employment containing a non-compete clause and a provision for liquidated damages in the event of a breach. Javier breached the agreement by becoming employed by a competitor of Willard within the restricted time and distance parameters provided for in the contract. The record showed that Willard had arrived at \$50,000 as liquidated damages by (1) recalling its experience (and expense) of litigating an earlier, similar breach; and (2) by copying from the employment contract of a "friendly competitor."

The Circuit Court for Montgomery County, sitting without a jury, ruled that Javier had breached the contract and awarded nominal damages in the amount of \$1.00, finding that the full amount of the liquidated damages clause constituted an unenforceable penalty. Cross-appeals were taken.

Held: Affirmed. In cases where gross inequality of bargaining power exists, a proponent seeking enforcement of a liquidated damages clause has the burden of proving that the clause is enforceable. Thus, where the parties are of unequal bargaining power, and the evidence reveals that the parties are not equally sophisticated, the party attempting to enforce the liquidated damages provision cannot merely rely on the contract, but must show a rational relationship to anticipated actual damage flowing from the breach. Because Willard offered insufficient proof of actual damage, and because the contract provision bore no rational relationship to any expected loss from a breach, stipulated damages of \$50,000 constituted an unenforceable penalty.

Willard Packaging Company Inc. v. Javier, No. 2097, September Term, 2004, filed June 1, 2006. Opinion by Sharer, J.

FAMILY LAW - CHILD SUPPORT - STANDARDS TO APPLY IN DETERMINING AMOUNT OF SUPPORT - COUNSEL FEES.

Facts: The parties, who have never been married, have two minor children together. In May 2004, Walker moved for a modification of child support. The circuit court found that Grow, who is a minority shareholder of a Subchapter S corporation, has a monthly actual income of \$12,442. Based on that figure, the court extrapolated from the guidelines and ordered child support in the amount of \$1,609 per month. Dissatisfied with that modification, Walker appeals, arguing that the court erred in calculating Grow's actual income, refusing to include certain expenses in the child support award, failing to ensure that child support reflects Grow's lifestyle, and refusing to award attorney's fees.

Held: It is within the discretion of the trier of fact to believe or disbelieve the testimony of an expert witness on matters that will assist the trier of fact in understanding the evidence. The circuit court did not err or abuse its discretion in its reliance on the testimony of the certified public accountant who prepared Grow's tax returns.

In an above-guidelines case, the amount of child support is within the discretion of the trial court. The court must first determine each parent's actual income under Md. Code (1984, 2004 Repl. Vol.) § 12-201(b) of the Family Law Article ("Fam. Law"). In the case of the owner of a Subchapter S corporation, pass-through income that is used to pay company taxes or for business investments, and which is not actually available for the parent's use, may properly be considered "ordinary and necessary business expenses" under Fam. Law § 12-201(b)(2). The actual income calculation includes dividend income and interest income, expense reimbursements or in-kind payments, and commissions, all of which the circuit court failed to properly consider in this case. The trial court may, at its discretion, consider capital gains as actual income, but there was insufficient evidence for the court to do so here. Unrealized gains or appreciation in asset value are not considered actual income for purposes of child support.

The cost of discretionary activities, such as summer camps, may be added to the child support obligation in an above-guidelines case. Child care expenses, however, must be included if "incurred on behalf of a child due to employment or job search of either parent." Fam. Law § 12-204(g)(1). In an above guidelines case, it is within the court's discretion to include the cost of family therapy.

Children are entitled to child support in an amount

commensurate with the parents' standard of living. The guidelines extrapolation used by the court to determine child support in this case was not an abuse of discretion, but, in light of the above considerations, may be reconsidered on remand.

In deciding whether to award counsel fees, the trial court must consider "(1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." Fam. Law § 12-103(b). It is not clear that the court properly considered the statutory factors.

Elinor Walker v. Ronald Grow, No. 2613, September Term, 2004, filed June 5, 2006. Opinion by Kenney, J.

JUDGMENTS - POST JUDGMENT INTEREST; MARYLAND RULE 2-604 (b)-
CARPENTER REALTY v. IMBESI, 369 MD. 549 (2002) - REJECTING
APPELLANT'S ARGUMENT THAT THE ACTION OF THE APPELLATE COURT DID NOT
OPERATE AS A REVERSAL OF THE JUDGMENT OF THE CIRCUIT COURT AND
HENCE WAS "THE ENTRY OF A JUDGMENT NISI" UNDER RULE 2-604, THE
TRIAL JUDGE PROPERLY ORDERED THAT POST JUDGMENT INTEREST ON THE
JUDGMENT AGAINST APPELLEE COMMENCE ACCRUING ON NOVEMBER 14, 2003,
WHEN ALL ISSUES GROWING OUT OF THE CONTROVERSY WERE FINALLY
RESOLVED ON APPEAL, RATHER THAN ON JANUARY 14, 2000, THE DATE OF
THE INITIAL ENTRY OF THE JUDGMENT, NISI.

Facts: Appellant and appellees were business partners engaged in the business of acquiring and selling for profit cellular licenses awarded by lottery by the Federal Communications Commission (FCC). The group, consisting of five members, applied to the first lottery and won several licenses, which were eventually sold for over eight million dollars. The profits from the first sale were divided evenly among the members of the group. The partnership, thereafter, entered a second lottery and one member, Kerry Hurlebus, received the rights to any cellular licenses. Between the time that the partnership was awarded the

second set of licenses and the sale of the licenses, the partners, excluding appellant, engaged in a second business venture, in which Hurlebus guaranteed the partners that they would not lose their investment. Two years after embarking on the second business, Hurlebus wired 1.56 million dollars, which it was assumed represented the profits from the sale of the cellular licenses, minus Hurlebus' one-fifth share. A further deduction of \$603,352 was made from the wired amount and the remaining balance was distributed evenly among all the partners. The \$603,352 deduction was used to repay those individuals who had engaged in the second business venture. Appellant then sued the partnership for her one-fourth share of the \$603,352 distribution.

The case was tried and appellant was awarded her one-fourth share including interest from December 1, 1993. The first of three appeals was taken, the judgment was vacated and the case was remanded for further findings. Following remand, the circuit court entered a judgment in favor of appellant with pre-judgment interest on November 13, 2003. Appellees', aggrieved by the order, filed their second appeal. We affirmed the trial court's decision on November 23, 2004. After we affirmed the decision of the trial court, appellees filed a Motion for Order of Satisfaction on January 13, 2005. Appellees claimed that appellant was owed \$268,362.70, including pre-judgment interest up to November 13, 2003, and post-judgment interest from November 14, 2003. Appellant contested appellees' motion, alleging the amount owed was \$306,505.73 and that the correct date to begin accruing post-judgment interest was January 14, 2003, the date of the court's original judgment *nisi*. A hearing was held on the motion and the court found that the date to begin the accrual of post-judgment interest was November 14, 2003. Appellant, thereafter, appealed that judgment.

Held: Affirmed. The proper date to begin the accrual of post-judgment interest was November 14, 2003. The mandate, which vacated the judgment entered on January 14, 2003, rendered the judgment void. The remand required the trial court to make findings of fact which could have changed the outcome of the case in favor of appellees. Following remand, the trial court entered an order in favor of appellant, which was docketed on November 13, 2003. On appeal, that judgment was affirmed, therefore, liability on the part of appellees attached when the judgment was entered.

Bernice Cohn v. Ernest Freeman et al., No. 611, September Term, 2005, filed June 6, 2006. Opinion by Davis, J.

JUVENILE COURTS - SUBJECT MATTER JURISDICTION - JUVENILE CAUSES ACT
- UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Facts: On August 17, 2005, the Washington County Department of Social Services ("Department") filed petitions in the Circuit Court for Washington County, seeking to have John F. Jr. and Shawn F. declared Children in Need of Assistance. The petitions alleged that Sherry F., the boys' mother, lived in an apartment in Hagerstown with them. The first report of alleged neglect set forth in the petitions occurred on June 7, 2005, while Sherry F. and the boys were living in Hagerstown, and the petitions set forth later interactions between the Department, Sherry F., and the boys that occurred while they lived in Hagerstown. The last interaction occurred on June 25, 2005. The petitions alleged that Sherry F. had told a Department social worker that she recently had moved back to Washington County. The court held a hearing on August 25, 2005. The social worker testified that she did not know where Sherry F. and the boys were residing at the time of the hearing. John F., the boys' father, resided in Maryland at all relevant times. At the close of the Department's case, Sherry F. moved to dismiss the petitions for lack of jurisdiction and the court denied her motion. She testified that she was living with the boys in Pennsylvania at the time of the hearing and had returned to Hagerstown from Pennsylvania two days before the social worker came to her home. Her counsel informed the court that Sherry F. had moved to Pennsylvania on August 16, 2005, and moved back and forth between Maryland and Pennsylvania. The circuit court adjudicated the boys CINA.

Held: Affirmed. The circuit court, sitting as the Juvenile Court deciding CINA cases, is a court of general jurisdiction with jurisdiction over special statutory causes of action. Because it is acting as a court of general jurisdiction, there is a presumption in favor of the court's having subject matter jurisdiction. Accordingly, Sherry F. bore the burden of proving that the Juvenile Court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. To meet that burden, she had to put forth evidence to show that another state had subject matter jurisdiction. Because she did not put forth such evidence, the Juvenile Court did not err by denying her motion to dismiss.

In re: John F. Jr and Shawn F., No. 1741, September Term, 2005, filed June 2, 2006. Opinion by Eyler, D. S., J.

WORKERS' COMPENSATION - WORSENING - ELEVATION OF DISABILITY FROM FIRST TIER TO SECOND TIER COMPENSATION - CREDIT TO EMPLOYER

Facts: After suffering an injury to his lower back, in his capacity as a master electrician with the Montgomery County Board of Education, Del Marr sought workers' compensation benefits. The Workers' Compensation Commission ("Commission") awarded benefits to Del Marr based upon a finding that he had suffered a permanent partial disability under the definition of "other cases" injuries provided in Md. Code Ann., Lab. & Empl. ("L.E.") § 9-627(k) (1999 Repl. Vol. & 2005 Supp.). The Commission's initial award ("Order I") compensated him for 20% loss of use of the body as a result of his injury, with 10% attributable to a pre-existing condition. Pursuant to L.E. § 9-627(k) (providing a maximum amount of 500 weeks of compensation for "other cases" injuries), this award fell under the "first-tier" level of compensation (10% injury multiplied by 500 weeks equals 50 weeks) pursuant to L.E. § 9-628, covering awards of 75 weeks or less, at a rate of \$114 per week. After an intervening award (increasing Del Marr's award to 70 weeks at the tier 1 level) Del Marr filed a petition to reopen his claim due to a worsening of his condition pursuant to L.E. § 9-736. After a hearing, the Commission awarded appellant 33% disability (23% due to accidental injury, 10% due to a pre-existing condition). Thus, Del Marr's compensation level increased to the "second-tier" level of compensation (23% injury multiplied by 500 weeks equals 115 weeks) under L.E. § 9-629, covering awards of more than 75 weeks, but less than 250 weeks, at a rate of \$223 per week. Under this last order, the Commission awarded the County an offsetting credit for the amount of *dollars* paid to Del Marr, \$7,980 (70 weeks multiplied by \$114 equals \$7,980) rather than a credit for the number of *weeks*, 70, Del Marr had already been paid.

The County sought judicial review of the Commission's award of a dollar-credit rather than a weeks-credit in the Circuit Court for Montgomery County. The circuit court granted summary judgment for the County holding that the County was entitled to a weeks-credit.

Held: Affirmed upon reliance on *Ametek v. O'Connor*, 364 Md. 143 (2001). The *Ametek* Court noted that a weeks-credit was appropriate in cases involving an increase from tier 1 benefits to tier 3 benefits. This holding was based upon: (1) the legislature's clear commitment to paying partial permanent disability benefits in a weeks-based framework; (2) equitable considerations militating in favor of the *employer* as well as the *employee*; and (3) the overall sway of the requirements of predictability and consistency in the law. Del Marr would have had this Court apply a dollar-credit in cases resulting in an increase to tier 2 level benefits in contradistinction to increases to tier 3 level benefits governed by

Ametek.

Paul Del Marr v. Montgomery County, Maryland, No. 2789, September Term, 2004, filed June 5, 2006. Opinion by Sharer, J.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated June 5, 2006, the following attorney has been placed on inactive status by consent, from the further practice of law in this State:

NORMAN H. KATZ

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JUDICIAL APPOINTMENTS

On May 8, 2006, the Governor announced the appointment of GARY LEWIS CRAWFORD to the District Court for Montgomery County. Judge Crawford was sworn in on May 30, 2006 and fills the vacancy created by the elevation of the Hon. Thomas L. Craven.

*

On May 12, 2006, the Governor announced the appointment of MARK D. THOMAS to the District Court for Washington County. Judge Thomas was sworn in on June 5, 2006 and fills the vacancy created by the elevation of the Hon. M. Kenneth Long, Jr.

*

On May 8, 2006, the Governor announced the appointment of JOHN MICHAEL CONROY to the District Court for Montgomery County. Judge Conroy was sworn in on June 9, 2006 and fills the vacancy created by the elevation of the Hon. Michael J. Algeo.

*

On May 8, 2006, the Governor announced the appointment of CHERYL ANN McCALLY to the District Court for Montgomery County. Judge McCally was sworn in on June 12, 2006 and fills the vacancy created by the retirement of Judge Harrington.

*

On June 6, 2006, the Governor announced the appointment of the HON. ALBERT W. NORTHROP to the Circuit Court for Prince George's County. Judge Northrop was sworn in on June 27, 2006 and fills the vacancy created by the retirement of Judge Lombardi.

*

On May 8, 2006, the Governor announced the appointment of WILLIAM GRAVES SIMMONS to the District Court for Montgomery County. Judge Simmons was sworn in on June 28, 2006 and fills the vacancy created by the retirement of Judge Vaughey.

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