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Facts: In 1992, Wesley Eugene Baker was tried and convicted of first degree murder in the Circuit Court for Harford County for the June 6, 1991 murder of Jane Tyson. After voluntarily waiving his right to jury sentencing, Baker received a sentence of death from the sentencing judge. The sentencing judge explained to Baker that a sentence of death was required because the murder was committed in the commission of a felony (robbery), which was an aggravating factor found to exist beyond a reasonable doubt by the jury, and no mitigating circumstances existed. The sentencing judge explained his finding that no mitigating circumstances existed, discussing each mitigating circumstance listed in the then-applicable statute, Md. Code (1957, 1987 Repl. Vol., 1991 Cum.Supp.), § 413(g), and explaining why each of the mitigating factors was inapplicable to Baker.

On his fourth appeal to the Court of Appeals, Baker argued that his "Motion to Correct Illegal Sentence and For New Sentencing Based Upon Mistake or Irregularity," brought under Md. Rule 4-345, was wrongfully denied by the Circuit Court for Harford County. Baker claimed that the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), overruled, *sub silentio*, the Court of Appeals' ruling in one of Baker's earlier appeals and made the preponderance of the evidence standard used when weighing aggravating against mitigating factors unconstitutional.

Held: The Court of Appeals held that Baker's challenge to the preponderance of evidence standard that is used when weighing aggravating circumstances against mitigating circumstances during the sentencing proceeding in death penalty cases was not properly brought. The Court noted that the sentencing judge had found that no mitigating circumstances existed and, therefore, there was no need for a balancing of aggravating circumstances against mitigating circumstances. The Court held that Baker could not challenge a weighing standard that never played a role in his sentencing.

The Court of Appeals further held that, for the same reasons

it had recently stated in *Oken v. State*, 378 Md. 179, 835 A.2d 1105 (2003), Maryland's use of a preponderance of the evidence standard in the weighing of aggravating against mitigating circumstances, even assuming *arguendo* that such a weighing occurred before Baker received a sentence of death, is not unconstitutional and does not invalidate the State's capital punishment law.

Wesley Eugene Baker v. State of Maryland. No. 14, September Term, 2004, filed October 8, 2004. Opinion by Cathell, J.

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CRIMINAL LAW - SENTENCING AND PUNISHMENT – HABITUAL AND CAREER OFFENDERS – IN GENERAL – PURPOSE OF REPEAT OFFENDER SENTENCING

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Facts: Clifton Collins was convicted of being a drug-felon in possession of a firearm under Md. Code (1957, 1996 Repl. Vol., 2001 Cum. Supp.), Art. 27, § 291A (since recodified without substantive change as § 5-622 of the Criminal Law Article). The maximum term of imprisonment provided for under § 291A is five years. Nevertheless, the Circuit Court for Queen Anne's County sentenced Collins to ten years imprisonment, finding that Collins's prior conviction rendered his current crime a "second or subsequent" controlled dangerous substances offense, and hence subject to doubling under Md. Code (1957, 1996 Repl. Vol., 2001 Cum. Supp.), Art. 27, § 293 (since recodified without substantive change as § 5-905 of the Criminal Law Article.)

Collins appealed his sentence to the Court of Special Appeals. The Court of Appeals, on its own initiative, issued a writ of certiorari before the intermediate appellate court decided the

appeal.

Held: Sentence vacated and case remanded for resentencing. The court found that while the plain language of § 293 renders it applicable to all offenses under the Controlled Dangerous Substances subheading, applying it to § 291A would render the phrase "for not more than 5 years" in § 291A nugatory. This is so because § 291A can only be violated by persons with prior felony drug convictions, and hence all violators would be subject to ten-year maximum sentences.

Because textual analysis of the statutes produced an ambiguous result, the Court looked to the legislative purpose behind the statutory scheme. It held that the purpose of any repeat-offender penalty enhancement is to create a differential in the potential punishments imposed upon first-time and repeat offenders. Whether justified by deterrence, incapacitation, or retribution, it is axiomatic that such statutes serve their ends only when they are enhancements, *i.e.*, only when they actually differentiate among classes of offenders. Applying § 293 to § 291A would not effectuate these ends, because by its terms § 293 would group all persons convicted under § 291A into a single class, and not "enhance" their sentences relative to those of any other offender.

The Court stated that it ordinarily presumes the Legislature to have acted with full knowledge of prior and existing law. In this instance, however, the Court noted the potential for confusion arising from the codification of an essentially "pure" firearms possession statute under a subheading of the Code otherwise given to the classification and regulation of controlled substances. It also observed that applying this interpretive canon would require the Court to believe that the Legislature had employed the rather unusual technique of drafting a criminal statute such that every offender would be subject to a separate penalty-doubling statute, and then specifying a penalty one-half the amount actually intended. A review of the legislative history revealed no reference to such an anomalous drafting technique, and several references to a maximum penalty of five years imprisonment.

Clifton Collins v. State of Maryland, No. 24, September Term, 2004, filed November 16, 2004. Opinion by Raker, J.

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DECLARATORY JUDGMENT - APPROPRIATENESS IN FACE OF PENDING ENFORCEMENT ACTION AGAINST PETITIONER BY ADMINISTRATIVE AGENCY - INTERPLAY WITH PRIMARY JURISDICTION DOCTRINE

Facts: This case considers the interplay between the Maryland Declaratory Judgment Act, Md. Code (1973, 2002 Repl. Vol.), § 3-401, *et seq.*, of the Courts and Judicial Proceedings Article and the doctrine of primary jurisdiction where a competing administrative enforcement action is pending.

Converge Services Group, LLC, d/b/a SureDeposit, Inc. ("SureDeposit"), began selling a surety bond product to residential tenants in Maryland in 2001. This product was intended to be used in lieu of traditional security deposits given by tenants to landlords. By June 2002, the Consumer Protection Division of the office of the Attorney General of Maryland began investigating SureDeposit's activities for possible violations of the Consumer Protection Act, §13-101, *et seq.*, of the Commercial Law Article of the Maryland Code, and the Security Deposit Law and Application Fee Law, §§ 8-203 and 8-213, of the Real Property Article. After some administrative discovery and negotiation, but before the Division formally could issue administrative charges against SureDeposit, SureDeposit filed for declaratory judgment in the Circuit Court for Baltimore County on 25 October 2003 seeking a declaration that it did not violate §§ 13-301(a) and 13-301(c) of the Consumer Protection Act or §§ 8-203 and 8-213 of the Real Property Article.

The Division filed an administrative statement of charges on 26 November (one day after it was served with SureDeposit's complaint) against SureDeposit and two of its officers. The charges alleged numerous violations of §§ 8-203 and 8-213 of the Real Property Article and §§ 13-301(a) and 13-301(c) of the Consumer Protection Act.

After both parties exchanged some mutual paper discovery regarding SureDeposit's complaint, the Division filed a motion for dismissal of the declaratory judgment action. The Division alleged that declaratory relief was inappropriate because it would not terminate necessarily either the entire controversy, as it did not address all of the alleged Consumer Protection Act violations, nor provide final relief to SureDeposit's officers, who were named defendants in the administrative proceeding, but not in SureDeposit's complaint. The Division also alleged that declaratory relief was inappropriate under the doctrine of primary jurisdiction because the Circuit Court should defer to the administrative agency's area of specific expertise, interpreting the Consumer Protection Act, and only subject the Division's eventual final administrative decision to judicial review, if

sought.

SureDeposit responded that its complaint sought declaratory relief solely from the claimed §§ 8-203 and 8-213 violations. The Division, as SureDeposit explained, had no special expertise in interpreting or enforcing the Real Property Article and therefore no primary jurisdiction over those claims. Only the Division's administrative statement of charges, filed after the complaint, implicated interpretation of the Consumer Protection Act. Alternatively, SureDeposit retorted that a declaration that the Security Deposit Law did not apply to SureDeposit would dispose also of the alleged violations of the Consumer Protection Act in the Division's administrative statement of charges. Lastly, it stated that even if SureDeposit's complaint did not name its own officers as parties, judgment in its favor in the Circuit Court action would resolve by necessity any claims by the Division against SureDeposit's officers.

The Circuit Court granted the Division's motion to dismiss and SureDeposit noted an appeal to the Court of Special Appeals. The Court of Appeals issued a writ of certiorari, on its own initiative, before the intermediate appellate court could decide the appeal.

Held: Affirmed. The Court of Appeals determined that declaratory relief would have been inappropriate where an administrative agency could determine all issues within its particular area of expertise, as well as related claims that might involve interpretation of other laws for which it had no recognized special expertise, and a declaratory order would not terminate necessarily the entire controversy.

SureDeposit's complaint clearly stated that it sought declaratory relief from the allegations as to both the Consumer Protection Act and §§ 8-201 and 8-213 of the Real Property Article. Under the Consumer Protection Act, the Division has been ceded by the Legislature primary jurisdiction to decide the alleged violations of the Consumer Protection Act and make appropriate administrative findings of fact and conclusions of law after a hearing.

Even if the request for declaratory relief from the alleged violations of the Security Deposit Law could be separated from the Consumer Protection Act charges, a declaratory judgment as to the former would not dispose necessarily of the alleged violations of the latter. As a result, a unified administrative hearing and disposition on all of the issues was a more effective and appropriate process for which global judicial review of all of the

claims against SureDeposit thereafter would be more appropriate.

Converge Services Group, LLC v. Curran, No. 13, September Term 2004, filed November 8, 2004. Opinion by Harrell, J.

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ELECTIONS – CONTESTS – PERSONS ENTITLED TO BRING PROCEEDINGS – ANY REGISTERED VOTER HAS STANDING TO SUE UNDER MARYLAND CODE § 12-202 OF THE ELECTION ARTICLE. ONE NEED NOT BE A REGISTERED VOTER IN A PARTICULAR POLITICAL PARTY TO BE CONSIDERED A REGISTERED VOTER UNDER THE STATUTE.

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Facts: Appellants Michael B. Suessmann and Gregory Care

challenged the constitutionality of excluding unaffiliated voters from the Democratic and Republican Parties' primary elections for circuit court judicial candidates.

Appellants respectively challenged the March 2, 2004 primary elections for judicial offices held in St. Mary's and Anne Arundel County. Suessmann filed his initial complaint in the Circuit Court for St. Mary's County and later amended the complaint to include Care. Appellants requested and were granted a special three-judge panel to hear their claims, pursuant to §12-203 of the Election Law Article.

The Circuit Court denied all relief requested. In relevant parts, the Circuit Court held that appellants lacked standing and that the primary election did not violate either the State or Federal Constitutions.

Pursuant to §12-203, appellants appealed directly to the Court of Appeals, which granted the petition for writ of certiorari. The Court issued a per curiam Order on April 2, 2004 (1) affirming the Circuit Court's denial of the request for a preliminary injunction and invalidation of the primary elections and (2) reserving judgment on appellants request for a declaratory judgment on the constitutionality of the elections. The Court then issued an opinion explaining the Order and addressing the reserved issues.

Held: Affirmed. The Court held that appellants had standing under § 12-202, because any registered voter can sue under the statute, irregardless of whether the voter is affiliated with a particular political party. The Court, though, held that appellants had not satisfied the elements of the cause of action under § 12-202. Section 12-202(a) sets forth four elements to a judicial challenge to an election outcome: (1) no other "timely and adequate remedy" under the statute; (2) an "act or omission relating to an election"; (3) a showing that the act or omission is unlawful according to "law applicable to the election process"; and (4) a showing that the act or omission "may change or has changed the outcome" of the election being challenged. To meet the fourth element, the litigant must prove by clear and convincing evidence a substantial probability that the outcome would have been different but for the illegality. The Court assumed *arguendo* that the appellants had met the first three elements and held that they had failed to meet the fourth because they had not presented any evidence regarding the likelihood of a changed election outcome.

The Court then held that excluding unaffiliated voters from

primary elections for judicial officials does not violate the Maryland or Federal Constitutions. The Court rejected appellants' assertion that Maryland's judicial elections are nonpartisan. The Court held that the State and Federal Constitutions do not bar Maryland from evincing a policy of nonpartisanship in judicial elections while keeping the election process itself inherently partisan. Finally, the Court held that voters do not have a fundamental right to vote in the primary elections of a party to which they do not belong. The State, thus, did not violate the Maryland or Federal Constitutions' equal protection provisions when it pursued its legitimate interest in keeping partisanship out of judicial elections as far as possible without abandoning the long-established infrastructure of political party primaries.

Michael B. Suessmann et al. v. Linda H. Lamone et al, No. 140, September Term 2003, filed November 17, 2004. Opinion by Raker, J.

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INSURANCE - SELF-INSURANCE - DUTY TO DEFEND - THE POTENTIALITY RULE APPLIES TO SELF-INSURANCE AGREEMENTS ENTERED INTO BY COUNTY BOARDS OF EDUCATION UNDER § 4-105 OF THE EDUCATION ARTICLE AS WELL AS TO § 4-104's DUTY TO DEFEND PROVISION

Facts: In 1998, a former male student at Wood Middle School filed suit against his former female teacher who had served as his mentor as part of a school program. The complaint alleged that the teacher had abused her special role as mentor by sexually abusing him and by having done other things such as sending him various "love" notes and letters; buying him food; and calling his house.

The teacher requested the Montgomery County Board of Education (Board) to provide her with a defense to the suit. The Board's Self-Insurance Agreement, created under § 4-105 of the Education Article, provides that the Board will defend its employees for non-malicious acts performed in the scope of

employment. Section 4-105(c) requires self-insurance agreements to "conform with ... comprehensive liability insurance policies available in the private market." Additionally, § 4-104(d) requires county boards of education to provide a defense for its employees who are sued for such acts.

The Board refused to defend the teacher and as a result the Horace Mann Insurance Company provided the teacher's defense under a separate policy. Horace Mann settled the student's suit and then filed a declaratory judgment action to recover its expenses. The Circuit Court for Montgomery County declared that the Board had wrongfully denied the teacher a defense and the Court of Special Appeals affirmed.

Held: Affirmed. Section 4-105(c) makes applicable to self-insurance agreements, the rule that a duty to defend is triggered if there is a potentiality that the underlying claims will result in coverage. *Brohawn* v. *Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975). Similarly, § 4-104(d) renders the same result, despite its ambiguous wording which appears to give the Board absolute discretion to decide what actions are potentially within the scope of employment. As remedial legislation related to § 4-105(c), § 4-104(d) must be construed liberally and harmoniously with § 4-105(c) to mean that the Board must use an objective standard in these cases, subject to review by a court.

Because the complaint contained at least two counts that incorporated the allegations of non-sexual conduct, which were then bolstered by the extrinsic evidence produced by the Board's own internal investigation and properly considered under *Aetna* v. *Cochran*, 337 Md. 98, 651 A.2d 859 (1995), a possibility existed that liability could have been imposed on the teacher for acts within the scope of her employment.

Montgomery County Board of Education v. Horace Mann Insurance Company, No. 11, September Term, 2004, filed November 10, 2004. Opinion by Wilner, J.

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LABOR AND EMPLOYMENT — TERMINATION OF EMPLOYEE - IN GENERAL — TERM, DURATION, AND TERMINATION — DEFINITE OR INDEFINITE TERM; EMPLOYMENT AT-WILL — IN JUST CAUSE EMPLOYMENT, A JURY'S ROLE IN A WRONGFUL DISCHARGE CASE DOES NOT INCLUDE THAT OF ULTIMATE FACT-FINDER. IN SUCH CASES, A JURY MUST DETERMINE THE OBJECTIVE REASONABLENESS OF AN EMPLOYER'S DECISION TO DISCHARGE BASED ON THE EMPLOYER'S OBJECTIVE GOOD FAITH AND THE REASONED CONCLUSIONS BELIEVED TRUE BY THE EMPLOYER.

STATUTES — CONSTRUCTION AND OPERATION — GENERAL RULES OF CONSTRUCTION — MEANING OF LANGUAGE — WHERE THE LANGUAGE OF A CONTRACT DOES NOT EXPRESSLY OR IMPLIEDLY LIMIT THE CAUSES FOR TERMINATION, LISTED TERMS WITHIN SUCH A CONTRACT ARE NOT EXCLUSIVE.

Facts: Following his termination, respondent, Michael Conte, claimed breach of his employment contract by petitioner, Towson University.

Petitioner was originally employed respondent under an employment contract which enumerated, in part, terms upon which respondent could be discharged. Several events later came to the attention of petitioner and led to the decision to terminate respondent. Petitioner alleged "incompetence" and "willful neglect of duty" — two of the just causes for termination in respondent's employment contract — as the basis for discharging respondent. Respondent disputed these allegations, and after a hearing before the University president, respondent was formally terminated from his position.

Petitioner filed a complaint in the Circuit Court for Baltimore County against respondent, alleging that respondent had wrongfully discharged him and breached his employment contract. The trial judge instructed the jury that petitioner had the burden to prove, by a preponderance of evidence, that one or more of the causes within respondent's contract existed for his termination to be valid. The jury returned a verdict in favor of respondent.

The Court of Special Appeals affirmed the Circuit Court's decision. The Court of Appeals granted the petition for writ of certiorari to address two issues. Primarily, the Court sought to determine whether or to what extent a jury may examine or review the factual bases of an employer's decision to terminate an employee for just cause. The Court also ruled on whether respondent's employment contract was exclusive in its enumeration of just causes for termination.

Held: Reversed and case remanded with directions for a new

trial before the Circuit Court. The Court held that an employer presumptively retains the right to interpret whether facts of a just cause employment necessitate termination. This is so whether an employer expressly retains the right to determine facts regarding termination, or if a contract is ambiguous regarding the fact-finding prerogative. Absent some express indication otherwise, an employer does not contract away his core function as ultimate fact-finder with regard to an employer's workplace function.

The Court stated that in regards to just cause employment, the proper role of the jury is to review the objective motivation of an employer when he decides to terminate an employee. In this situation, a jury may not review whether the factual bases for termination actually occurred or if such bases were proved by a preponderance of the evidence submitted for its review.

The Court determined that because the language in respondent's contract did not expressly or impliedly limit the causes for termination, those listed terms were not exclusive. This conclusion was based on the textual context of the termination clause, which indicated discretion on the part of petitioner in regards to deciding the proper causes of termination. The Court held that such discretion did not transform a contract requiring just cause for termination into at-will employment.

Towson University v. Michael Conte, No. 55, September Term 2003, filed November 17, 2004. Opinion by Raker, J.

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REAL PROPERTY - MORTGAGES - FORECLOSURE - FORECLOSURE BY EXERCISE OF POWER OF SALE - RESALE - A DEFAULTING PURCHASER IS NOT ENTITLED TO RECEIVE THE EXCESS OF THE RESALE PROCEEDS OVER THE PRICE BID AT THE FIRST FORECLOSURE SALE. ABSENT FRAUD OR EXTRAORDINARY CIRCUMSTANCES A DEFAULTING PURCHASER WILL NOT BE ENTITLED TO REIMBURSEMENT FOR IMPROVEMENTS OR REPAIRS MADE TO THE PROPERTY

PRIOR TO THE RESALE.

Facts: In April 1999 David Simard (petitioner) placed the high bid at a foreclosure sale on property located in Prince George's County. The trustees (respondents) who conducted the foreclosure sale had placed in the sale's advertisement a statement indicating that if the purchaser failed to comply with the sale's terms, the resale would take place at the risk and cost of the defaulting purchaser and the defaulting purchaser would "not be entitled to any surplus proceeds or profits resulting from any resale of the property." Simard failed to consummate his purchase, and the trustees subsequently conducted a resale in February 2000. Simard bid at the resale and again submitted the highest price, though his second bid, while higher than his bid at the first sale, still fell short of satisfying the mortgage debt. Simard again failed to complete settlement of the resale, but the circuit court approved his assignment of his purchaser rights to a third party. The circuit court properly referred the matter to an auditor who recommended that, although the property at the resale was sold "at the risk and cost of the defaulting purchaser," in light of the exclusion found in the foreclosure sales' advertisements, the excess at the second sale should not be awarded to Simard.

Simard filed exceptions to the auditor's report in the Circuit Court for Prince George's County, and following a hearing, the circuit court found that the language in the advertisement of sale, without some consideration, could not alter a provision of Maryland's alleged common-law purportedly holding that the defaulting purchaser is entitled to the surplus of the second bid over the initial bid. The circuit court remanded the case, and the trustees filed exceptions to the auditor's subsequent report which had credited petitioner with the excess proceeds of the resale and awarded attorneys' fees to respondents. The circuit court granted the trustees' request to pay the excess into the court's registry.

The parties filed cross-appeals with the Court of Special Appeals. In reversing the circuit court's decision and remanding the matter, the Court of Special Appeals held that petitioner was not entitled to the excess proceeds because the advertisement of sale had contractually waived Simard's alleged common-law entitlement to those proceeds. That court did not address the issue of attorneys' fees.

Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals which was granted in order to address whether the parties could "contract-out" the alleged common-law rule that the

defaulting purchaser was entitled to the excess proceeds arising from the resale. After initial briefing and argument the Court of Appeals requested that the parties address two additional questions: First, whether the supposed common-law rule entitling the defaulting purchaser to the excess should be modified or abolished, and second, where a surplus occurs, whether a court should authorize reimbursement to a defaulting purchaser for the costs of repairs or improvements made to the property prior to the resale.

Held: The language of *Aukam v. Zantzinger*, 94 Md. 421, 51 A. 93 (1902), on which petitioner had based his claim for the excess funds, did not establish a common-law rule in Maryland entitling a defaulting purchaser at a mortgage foreclosure sale to any of the excess funds resulting from a higher bid at the resale caused by the default. Further, the Court held that if the bid at the second sale both exceeded that of the initial sale and was sufficient to satisfy the mortgage debt, the defaulting purchaser at the first sale, absent fraud or extraordinary circumstances, was not entitled to receive any such excess funds in respect to any costs or expenses incurred in making improvements and/or repairs to the property prior to the resale.

For clarity of reference the Court used "excess" to denote the difference resulting from a higher bid at the resale than the bid at the initial sale, and used "surplus" to indicate any positive difference between the foreclosure sale(s) price and the outstanding lien instrument debt.

The Court undertook an extensive examination of the history of mortgage foreclosure sales, concluding that the mortgage foreclosure process is intended to protect the interests of the mortgagee, the mortgagor and other lien holders. The Court determined that *Aukam*, and the cases relying on its dicta, dealt primarily with judicial sales arising from estate matters, and were not concerned with protecting debtor, creditor or other lien parties' interests. The Court concluded that the bid price that might result in excess funds reflects the true value of the property, and normally the original mortgagor, or those claiming through him, are entitled to that value.

As the defaulting purchaser is technically a wrongdoer who has failed to fulfill his obligation to complete the purchase and receive a conveyance of the property, he will not normally be entitled to reimbursement of expenses incurred in making pre-resale improvements-or even necessary repairs-to the property.

David J. Simard v. Elizabeth A. White, et al. No. 96, September Term, 2003, filed October 7, 2004. Opinion by Cathell, J.

REAL PROPERTY - RULE AGAINST PERPETUITIES - RIGHT OF FIRST REFUSAL

Facts: On July 28, 1960, Camille Marie and his wife conveyed a parcel of land in Baltimore County to the Arundel Corporation as well as a right of first refusal in the portion of land that the Maries retained. The Maries agreed that whenever they, their heirs, executors, administrators or assigns decided to sell the property, they would first offer it to the Arundel Corporation for a price of $2,250 per acre. Mr. Marie, having survived his wife, died intestate in November 2002 and his children, Richard Marie and Olivia Green, were named personal representatives of his estate. The following September, the personal representatives requested that the Arundel Corporation disclaim its interest in the Marie property since it was void under the common law rule against perpetuities. The Arundel Corporation refused to comply with the request, claiming that its interest was saved under the legislative modification to the rule against perpetuities in § 11-103 of the Estates & Trusts Article of the Maryland Code. Observing that the personal representatives had indicated their intent to sell the property, the Arundel Corporation claimed that its interest had vested and that it wished to exercise its right of first refusal. When the personal representatives rejected the offer, the Arundel Corporation filed suit for specific performance in the Circuit Court for Baltimore County. The court granted the personal representatives' motion for summary judgment, holding that the Arundel Corporation's right of first refusal was void under the common law rule against perpetuities and could not be saved under the plain meaning of the statute. The Arundel Corporation appealed and the Court of Appeals granted *certiorari* on its own initiative while the appeal was pending in the Court of Special Appeals.

Held: Affirmed. The Arundel Corporation's right of first refusal is void under the traditional common law rule against perpetuities. Under the common law rule, no interest is good (including a right of first refusal) unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. Furthermore, the Arundel Corporation's right of first refusal is not saved under the legislative modification to the common law rule as codified in § 11-103 of the Estates & Trusts Article of the Maryland Code. In enacting the statute, the Maryland legislature chose to adopt the limited "wait and see" approach originally promulgated by the Massachusetts legislature, which only applies to interests that are limited to vest at the end of a particular life estate or life. The right of first refusal granted to the Arundel Corporation by the Maries was not limited to vest at the end of a life estate or life; it could have vested during the Maries' lives or the life of the survivor of them. The Court of Appeals

declined the invitation to abrogate the common law rule against perpetuities, since to do so would be contrary to public policy. The Legislature has affirmatively codified the common rule law against perpetuities, subject to a few statutory exceptions, and has declined to modify the rule to accommodate a broader "wait and see" approach or to dilute the rule with respect to interests such as that of the Arundel Corporation.

The Arundel Corporation v. Richard Marie and Olivia Green, Personal Representatives of the Estate of Camille S. Marie, Deceased, No. 1, September Term 2004, filed Nov. 9, 2004. Opinion by Wilner, J.

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TRADE SECRETS ACT - MISAPPROPRIATION OF TRADE SECRETS - INEVITABLE DISCLOSURE THEORY

Facts: Coin Acceptors, Inc. ("Coinco") is in the business of designing, manufacturing, and servicing coin acceptors, coin changers, bill validators, and similar machines. Coinco divides its efforts to market and sell these machines into three separate "channels": "Vending," "Amusement," and "Specialty Markets."

LeJeune began his employment with Coinco in 1993 as a "Sales and Field Service Representative," and he later became an Area Account Manager ("AAM") in 2002. As an AAM, LeJeune was responsible for regional sales of Coinco's vending products. While employed with Coinco, LeJeune never entered into a non-compete or confidentiality agreement with Coinco. Although he worked in sales and was not involved in manufacturing or research and development, he did, however, develop an extensive understanding of Coinco's products through his service and sales experience. He also learned of Coinco's pricing, pricing strategies, marketing and business initiatives, and selling strategies.

Considering new employment in May and June of 2003, LeJuene had several interviews with Mars, Coinco's primary competitor in the currency acceptor industry. During one of the interviews, one

of the interviewers twice explained to LeJeune that no confidential Coinco information should be discussed during the interview. On July 7, 2003, LeJeune signed a job-offer letter from Mars and accepted a position as an Amusement OEM (Original Equipment Manufacturer) Manager. The new position would require LeJeune to focus on selling to the amusement industry, although he would have some contact with "full line distributors" that serve both the amusement and vending markets.

On July 14, 2003, LeJeune informed his supervisor, William Morgan, that he was leaving Coinco to work for Mars. On July 16, 2003, Morgan and LeJeune met for several hours to review the status of LeJeune's accounts. During his conversations with Morgan, LeJeune stated that he would be in a "unique" position at Mars because of his experience at Coinco. Morgan understood this to mean that LeJeune intended to use his knowledge of Coinco's business strategies. That same day, LeJeune returned his laptop computer to Morgan along with a box of Coinco documents and materials.

Prior to this meeting with Morgan, LeJeune, on three separate occasions, had transferred or "burned" digital copies of numerous documents from his Coinco laptop to a compact disc ("CD"). On July 8, LeJeune copied, among other documents, Coinco's Executable Budgeting Software, which includes Coinco's manufacturing costs and profit margins. LeJeune conducted a second "burn"on July 8, transferring numerous personal files that had been saved on the Coinco laptop. On July 16, LeJeune again copied various files from the laptop, one of which contained pricing information related to Coinco's Specialty Markets Strategic Plan. Sometime after copying all of the files onto the CD, LeJeune created a second copy of the disc.

LeJeune explained that he had done this because he wanted to retain personal files, such as wedding photographs, that had been saved under the "My Documents" file on the laptop. An expert in computer forensics testifying on behalf of Coinco, however, stated that, when LeJeune copied the Executable Budgeting Software, that file was not part of the "My Documents" folder. The expert also discovered that LeJeune had erased information from the Coinco laptop in an effort to hide the downloads.

In addition to the computer files, LeJeune also retained hard copies of a number of other Coinco documents, including Coinco's price and cost information, Coinco's service pricing, a list of Coinco's preferred distributors, and detailed technical specifications relating to a Coinco's amusement product, the MC2600, and a Coinco vending product, the Bill Pro Validator.

Coinco attempted to maintain the confidentiality of company information by limiting access to company documents, guarding the computer files on its mainframe computer with a password system, and negotiating "non-disclosure" agreements with many of its clients. In addition, Coinco's "Employee Handbook" states that its business methods are "proprietary," and employees should protect such information as confidential. Many of Coinco's pricing documents and other strategic information, including information at issue in this case, were marked "confidential."

On July 24, 2003, in the Circuit Court for Anne Arundel County, Coinco filed a Complaint for Injunctive and Other Relief and a Motion for a Temporary Restraining Order against LeJeune. Coinco claimed that it was entitled to injunctive relief under Maryland Uniform Trade Secrets Act ("MUTSA") because LeJeune had misappropriated Coinco's trade secrets. The Circuit Court concluded that Coinco had presented sufficient evidence that LeJeune had possession of Coinco's "technical information" and "overall strategy" that qualified as trade secrets under the MUTSA. The Court found that Coinco had presented sufficient evidence that the trade secrets had been misappropriated when LeJeune downloaded Coinco's business documents. The trial judge additionally found that, "with the knowledge [LeJeune] has, it would be inconceivable . . . how he could do his job as [Mars's] national accounts representative for the amusement industry without considering or weighing . . . the information that he acquired while he was employed with Coinco . . . ." The Circuit Court, therefore, granted Coinco's motion and issued an order enjoining LeJeune from using or disclosing any of Coinco's confidential and trade secret information and from "working for Mars in . . . the Vending Industry, Amusement Industry, and/or the Specialty Markets Industries, and also including, specifically, as Mars's National Accounts Representative for the Amusement Industry . . . . ."

LeJeune appealed the Circuit Court's order, and this Court, acting on its own initiative, issued a writ of certiorari to review whether, under MUTSA, LeJeune misappropriated Coinco's trade secrets and whether he should be enjoined from working because he would inevitably disclose knowledge of Coinco's trade secrets to Mars.

Held: Preliminary injunction vacated. The evidence was sufficient to support the trial judge's finding that LeJeune misappropriated company trade secrets by selectively downloading pricing documents onto a CD for his personal use and by retaining pricing and technical information after he had told his supervisor that he had returned "everything." The trial judge, however, erred in issuing an injunction that restricted LeJeune's

employment and that was grounded on the theory that the company's trade secrets would be "inevitably disclosed." The theory of "inevitable disclosure" is based on "the original employer's claim that a former employee who is permitted to work for a competitor will – even if acting in the utmost good faith – inevitably be required to use or disclose the former employer's trade secrets in order to perform the new job." The theory does not apply in Maryland because it would allow a former employer the benefit of influencing an employee's future employment relationships even though the former employer chose not to negotiate a restrictive covenant or confidentiality agreement with the employee.

William LeJeune v. Coin Acceptors, Inc., No. 111 September Term, 2003, filed May 13, 2004. Opinion by Battaglia, J.

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COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - PROCEDURE.

Facts: Corporal Steven Kerpelman, a 20-year veteran of the Prince George's County Police Department who suffers from hypertension, applied for service-connected disability retirement benefits under the Prince George's County Police Department Pension Plan (the "Plan"). In accordance with section 4.2 of the Plan, he requested that the Medical Advisory Board ("MAB") review his medical records in order to establish his right to disability retirement. The MAB reviewed Kerpelman's medical records and determined that he was not a candidate for retirement because he did not have a disabling condition. Kerpelman was subsequently ordered to return to full duty. Upon request, the MAB again met to consider Kerpelman's fitness for duty. The MAB again found Kerpelman fit for full duty. Kerpelman demanded a written statement of the MAB's findings. Following an independent medical evaluation Kerpelman was again found fit for full duty. When Kerpelman requested a formal hearing before the Disability Review Board ("DRB"), the Agency denied his request and informed him that a hearing can be had only after the DRB renders a preliminary determination, which it cannot do until it receives a written opinion from the MAB regarding the nature of the disability in question. The Agency explained, however, that the MAB is not required to issue a written opinion unless it finds a disabling condition. Because the MAB found that Kerpelman did not have a disabling condition, it was not required to issue a written report from which the DRB could render a preliminary determination. The DRB could not, therefore, grant Kerpelman's request for a hearing. Kerpelman filed a complaint in the Circuit Court for Prince George's County for a writ of mandamus to the MAB and DRB directing the reversal of their decision that he is not entitled to disability retirement under the Plan. The Agency filed a motion to dismiss for failure to state a claim upon which relief can be granted. The motion court granted the motion to dismiss after finding that it did not have jurisdiction to hear the case under Md. Code (1984, 1994 Repl. Vol.) Section 10-222(a) of the State Government Article, because the administrative agency had not rendered a final decision.

Held: Reversed. An applicant for disability retirement under the Prince George's County Police Pension Plan is entitled to the procedural protections set forth in the Plan. In accordance with the rules of procedure established by the Disability Review Board and set forth in section 4.2(b) of the Plan, the Medical Advisory Board must, in all cases, forward a written opinion to the

Disability Review Board after it determines whether the applicant has a qualifying disability under section 4.2(a) of the Plan. The Disability Review Board will render a preliminary determination after receipt of the written opinion of the Medical Advisory Board. The applicant is then entitled to a hearing before the Disability Review Board to present evidence and cross-examine witnesses prior to the rendering of a final determination by the Disability Review Board.

Kerpelman v. Disability Review Bd. Of Prince George's County, No. 2946, Sept. Term 2002, filed March 4, 2004. Opinion by Adkins, J.

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ARBITRATION - FUNCTUS OFFICIO PRINCIPLE - CONCEPTS OF FINALITY AND COMPLETENESS OF AWARD - MOTION TO MODIFY AWARD WITH ARBITRATOR - PETITION TO VACATE - TIME FOR FILING.

Facts: Sue Bailey, M.D., the appellee, and Alexander J. Mandl, the appellant, married on April 21, 1991. Both are highly accomplished in their respective fields and lived an exceptionally affluent life together. The parties separated on September 15, 1996. On January 17, 1997, Mandl and Bailey executed a separation agreement that comprehensively resolved the financial issues arising out of the demise of their marriage. In Paragraph 2 of the Agreement, Mandl promised to pay certain sums as alimony. Paragraph 2 payments were subject to modification downward if Mandl suffered a material change in circumstances. If the parties could not successfully renegotiate alimony, they would submit to binding arbitration. Mandl made Paragraph 2 payments to Bailey in 1997, 1998, 1999, and 2000.

In April 2001, Mandl notified Bailey that he had suffered a material change in circumstances and asked that his Paragraph 2 payments be reduced. He had been terminated by his employer. Bailey disputed Mandl's claim of a material change in circumstances and claimed she was owed an arrearage. Unable to resolve their disputes, the parties selected an arbitrator.

The arbitration was conducted under the AAA Commercial Arbitration Rules. The issues for decision were defined as whether Mandl had suffered a material change in circumstances affecting his ability to make the Paragraph 2 payments, so as to warrant a downward modification of those payments and, if so, the amount by which the Paragraph 2 payments would be reduced; and whether Bailey was entitled to an arrearage and, if so, the amount of the arrearage. The hearing was conducted over four non-consecutive days in May 2002. Mandl testified that he had been unemployed since his termination and, though actively seeking employment, had been unable to find a position and was unlikely to do so.

On June 27, 2002, the Arbitrator issued the Award. He found that Mandl had proven a material change in circumstances and thus reduced the amounts of Paragraph 2 payments. He also determined that Bailey was entitled to an arrearage because Mandl had stopped making Paragraph 2 payments without an agreement between the parties to that effect. He calculated the amount of the arrearage and concluded by stating that "[t]his award is in full settlement of all claims submitted to this Arbitration."

On July 12, 2002, Mandl filed a motion to modify the award, challenging two findings respecting the arrearage, on the ground that they were miscalculations. He asserted that the starting date for calculating the arrearage was March 3, 1997, not January 1, 1997, the date the Arbitrator had used. Bailey contested his motion. The Arbitrator held a conference between the parties and issued an Award on August 6 stating that the parties agreed that Paragraph 2 was ambiguous. The August 6 Award also provided that the Arbitrator would make a final determination and award regarding the arrearage and would modify the June 27 Award accordingly.

On August 30, Bailey learned from an article in the *Washington Post* that Mandl had been named CEO of a major French technology company and, on August 31, Bailey asked the Arbitrator to reopen the hearing for limited discovery about the terms of Mandl's new employment. She suggested that the Arbitrator should re-decide the material change in circumstances claim. On September 3, 2002, the Arbitrator granted the motion to reopen the arbitration hearing and issued an Award, a decision which Mandl contested, arguing that the Arbitrator lacked authority to reopen the hearing. On October 7, 2002 the Arbitrator issued an Award vacating the September 3 Award reopening the hearing, noting that the AAA Rules "prohibit[ed] him from reopening the Hearing unless a court of competent jurisdiction so direct[ed]." The October 7 Award also decided the arrearage issue, modifying the June 27 Award to start calculating the arrearage from March 3, 1997, not

January 1, 1997.

On November 6, 2002, Bailey filed in court a three-count petition to vacate the June 27 Award and the October 7 Award, alleging that both awards had been procured by corruption, fraud or other undue means (count I); the Arbitrator had refused to hear evidence material to the parties' controversy regarding when Mandl first took part in the process that resulted in his new employment (count II); and the court should vacate the portion of the October 7 Award modifying the arrearage (count III). Bailey then moved for summary judgment on count II and requested a hearing. Mandl filed a motion to dismiss the petition on a number of grounds, including that it was not timely filed. The court held a hearing on May 22, 2003, and announced that it was granting summary judgment in favor of Bailey on count II, and that it was dismissing courts I and III as moot because of its ruling on count II. It denied Mandl's motion to dismiss. On June 11, 2003, the court issued an Order and Final Judgment granting summary judgment in favor of Bailey on count II, vacating the October 7 Award, and directing that the Arbitrator should conduct further arbitration proceedings consistent with the court's oral ruling; dismissing counts I and III as moot; and denying Mandl's motion to dismiss.

Held: Judgments affirmed in part, reversed and remanded in part. The Court of Special Appeals first held that the circuit court's ruling on count II, that, as a matter of law, the Arbitrator refused to hear evidence material to the parties' controversy, was legally incorrect. To the contrary, as a matter of law, the Arbitrator properly refused to reopen the arbitration hearing to hear further evidence as requested by Bailey because he did not have the authority to do so. Under the *functus officio* doctrine, an arbitrator cannot re-decide an already-decided claim. Further, a motion to modify the arrearage claim, regardless of its merits, did not revive the Arbitrator's authority to decide the already-decided material change in circumstances claim, to which the motion did not apply. The Court vacated the circuit court's granting of summary judgement on that ground and remanded the case with instructions to enter summary judgment in favor of the defendant on count II.

The Court also held that, because the circuit court incorrectly vacated the arbitration award for failure of the Arbitrator to hear evidence material to the parties' controversy, it incorrectly dismissed appellee's petition to vacate on the ground of fraud (count I). Thus, the petition to vacate on that basis was reinstated and will proceed in circuit court.

Additionally, the Court held that an award, otherwise final and complete when issued, was no longer final on the issue on

which a motion to modify was filed. Therefore, the Arbitrator had the authority to decide the issue presented in the motion to modify; that is, whether an arrearage award that included a double recovery should be modified. The Court affirmed the circuit court's dismissal of count III.

Finally, the Court held that the appellee timely filed her petition to vacate within 30 days of the October 7 Award and affirmed the circuit court's denial of the appellant's motion to dismiss. Mandl's filing a motion to modify on July 12, 2002, resulting as it did in a non-final and non-complete award, tolled the time for filing a petition to vacate.

Mandl v. Bailey, No. 1055, September Term, 2003, filed September 29, 2004. Opinion by Eyler, Deborah S., J.

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CIVIL PROCEDURE - REMOVAL - CIVIL CONSPIRACY TO DEFRAUD - FRAUD - MARYLAND CONSUMER PROTECTION ACT ("MCPA") VIOLATION - NON-ECONOMIC DAMAGES FOR FRAUD - ECONOMIC DAMAGES FOR FRAUD - PUNITIVE DAMAGES.

Facts: In a civil action in the Circuit Court for Baltimore City, a jury found Robert Beeman, Suzanne Beeman, and their company, A Home of Your Own, Inc. ("AHOYO"), liable for conspiracy to defraud, fraud, and violations of the MCPA, for perpetrating a scheme to sell dilapidated residential properties at grossly inflated prices to the nine buyer/plaintiffs ("buyers") in the case. In what is known colloquially as "flipping," AHOYO, through Robert Beeman, purchased the properties for small sums of money and then quickly resold them to the buyers, each of whom had never owned real property or had any experience buying or selling real property, at huge profits. The Beemans and AHOYO did not appeal, however, and their fraud and consequent liability in tort to the buyers were not in question. The appellants in the Court of Special Appeals were three co-defendants who were tried jointly with the Beemans and AHOYO: Irwin Mortgage Corporation ("Irwin"), the lender that extended FHA financing to each buyer; Joyce Wood, the loan officer employed by Irwin who handled the financing for

each transaction; and Arthur J. Hoffman, the appraiser who performed a property valuation for each transaction.

At trial, Irwin, Wood, and Hoffman claimed to have known nothing about Beeman's scheme and to have been his unwitting victims. To the contrary, the buyers argued that Wood and Hoffman (and Irwin, through Wood) not only knew about but also participated in Beeman's fraudulent scheme. The jury ultimately found Irwin, Wood, and Hoffman liable for conspiracy to defraud, fraud, and violation of the MCPA.

The buyers were awarded a total of $129,020.03, in economic damages, and $1,305,000, in non-economic damages, against all of the defendants. Because the trial court had granted a motion for judgment that kept the issue of punitive damages against Irwin, Wood, and Hoffman from the jury's consideration, that issue went to the jury only as to the Beemans and AHOYO. In a separate proceeding, the jury awarded the buyers $1,800,000 in punitive damages against the Beemans and AHOYO.

Held: Judgements affirmed in part and reversed in part. The Court of Special Appeals first held that the trial court did not err in denying a motion by Hoffman for removal on the basis of adverse media coverage about "flipping" schemes in Baltimore City. The Court concluded that the publicity Hoffman cited did not concern or refer to the case in particular or the parties, and the *voir dire* process was sufficient to weed out potential jurors who might have general prejudices caused by media coverage that were not case specific.

The Court also held that the evidence was sufficient to support a jury finding, by clear and convincing evidence, that Beeman, Hoffman, and Wood (and Irwin) entered into a conspiratorial agreement to defraud the buyers into purchasing dilapidated houses at grossly inflated prices. The Court found that the jurors reasonably could conclude that the conduct of those defendants (in Wood's case, *inter alia*, by treating Beeman at each of the initial meetings with the buyers as if he were representing them when, in fact, he was the seller; and in Hoffman's case, by his interactions with Beeman in appraising each of the properties) showed a unity of action consistent with and evidencing a pre-existing agreement to defraud the plaintiffs.

The Court also held that the evidence was sufficient to support a jury finding, by clear and convincing evidence, that Hoffman and Wood (and Irwin) defrauded the buyers. The Court found that Wood misled the buyers, through her words and conduct at initial meetings with them, by giving enough information about the process of using gift letters to obtain FHA financing, but not

enough information for them to know that it was improper for Beeman, as the seller, to be involved in that process. The Court also concluded that the buyers relied on Hoffman's misrepresentations about the values of the properties sufficient to
support a finding of fraud.

In addition, the Court held that the buyers were not required to present proof of objective manifestations of emotional distress to support their non-economic damages claim for emotional distress injuries. The Court explained that the "physical injury rule" applies to claims for emotional distress damages in negligence cases, where there is a need to guard against feigned claims, not to intentional tort cases, where the tortious conduct itself gives reassurance that the claimed emotional distress is not feigned. The buyers put on evidence that the scheme to defraud caused them actual damage in the form of economic loss. Having so shown, they could recover damages for emotional distress proximately caused by the fraud without introducing evidence of objective manifestations of the harm.

Finally, the Court concluded that there was evidence that could have supported a finding by the jury, by clear and convincing evidence, that Hoffman and Wood (and Irwin) engaged in fraud with actual malice, that is, conscious knowledge of their wrongful conduct. Thus, the question of whether punitive damages were warranted against those defendants should have been submitted to the jury. Accordingly, the Court awarded a partial new trial on that issue.

Hoffman, et al. v. Stamper, et al., No. 560, September Term, 2002, filed February 27, 2004. Opinion by Eyler, Deborah S., J.

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CIVIL PROCEDURE- SHERIFF'S SALE- ENFORCEMENT & EXECUTION- ADEQUACY OF NEWSPAPER ADVERTISEMENT.

Facts: In 1997, Lewis Shapiro obtained a judgment by confession in the amount of $74,108.61 plus interest against Rebecca Griffin in the Circuit Court for Baltimore City. The

judgment was also entered in Baltimore County. Thereafter, the Baltimore County Sheriff's Office levied and attached the property, but no sale was conducted. Seven months later, Griffin filed a suggestion of bankruptcy in the circuit court.

In 1999, the parties executed an "Interim Forbearance Agreement," which was approved by the United States Bankruptcy Court for the District of Maryland. During this time, Griffin paid $27,196.42 to Shapiro under the Interim Forebearance Agreement.

In 2003, the Sheriff levied and attached the property. An advertisement was placed in The Jeffersonian, a weekly newspaper, and ran once a week for three successive weeks prior to the sale on July 9, 2003. The advertisement listed the zip code as 21207, as set forth in the conveying documents. The zip code had later been changed to 21244. The property was purchased for $70,000.

Griffin filed "Exceptions to the Sale," requesting that it be set aside because, *inter alia*, the sale price was grossly inadequate and the wrong zip code in the advertisement led its readers to believe the property was "in an area of lesser economic value." The circuit court found that the purchase price was not grossly inadequate and overruled the exceptions and approved the sale.

Held: Affirmed. The circuit court did not err in denying the exceptions and approving the sale. The sale price in this case represented approximately 45% of the property's value, based on an appraisal, and 53% based on the tax assessment. The sale price coupled with the incorrect zip code did not establish unfair circumstances that required the sale to be set aside. Although the zip code was incorrect, the address was accurate. Thus, the advertisement described the property in such terms that it could be easily located by the exercise of ordinary intelligence.

Griffin v. Shapiro, No. 1786, September Term, 2003, filed September 3, 2004. Opinion by Kenney, J.

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CONTRACTS - CONSTRUCTION CONTRACT - BIDDING - DETRIMENTAL RELIANCE IN CONTEXT OF RELATIONSHIP BETWEEN GENERAL CONTRACTOR AND PROSPECTIVE SUBCONTRACTOR

Facts: In March 2000, Tech Contracting Co., Inc., appellee and general contractor, submitted a bid to Baltimore County for a

construction project. Tech solicited proposals from potential subcontractors, and received a bid from appellant Citiroof Corp. for the roofing portion of the project. Based only on roofing specifications without dimensions, Citiroof faxed bids to a number of general contractors, including Tech. Tech received a second, significantly higher, bid for the roofing work from Jottan, Inc.

Tech's president realized, given the difference between the two prices, that on of the prices was incorrect and informed Citiroof that its price was "rather low". Citiroof amended its bid once to accomodate the appropriate wage scale, but dimensions were not discussed. Tech informed Citiroof that it planned to use its bid in Tech's bid to the county if it remained the lowest price.

Upon being notified it was awarded the contract, Tech faxed a "Letter of Intent" to Citiroof, followed by a full set of specifications. Citiroof then realized that the wrong dimensions had been used to calculate its bid, and attempted to withdraw. After Citiroof declined to perform, Tech sent a letter of intent to Jottan and filed suit to recover the difference in cost between Jottan and the price submitted by Citiroof. Judgment was entered for Tech on the basis of detrimental reliance.

Held: Affirmed. The theory of detrimental reliance applies in the construction bidding setting, and Maryland courts have adopted the four-part test set forth in Restatement (Second) of Contracts Sec. 90(1). Both parties agreed Citiroof's bid was a clear and definite promise, thus meeting the first element. The second and third elements requiring the promisor to have a reasonable expectation that the offer will induce action or forbearance on the part of the promisee, and actual and reasonable action or forbearance by the promisee is induced, were met as there was no evidence Tech waited an unreasonable period of time before accepting Citiroof's bid, and further, Tech advised Citiroof that if its price was the lowest, it would be used in Tech's bid. Fourth and final element was met as Citiroof's withdrawal created a detriment, which could only be avoided by the enforcement of the promise, causing damage to Tech in the amount of the difference between the prices submitted by Jottan and Citiroof. Trial Court's finding of detrimental reliance was not error.

Citiroof Corporation v. Tech Contracting Co., No. 3322, September Term 2003, filed October 29, 2003. Opinion by Sharer.

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CRIMINAL LAW - CONSPIRACY - JURY INSTRUCTION - "SINGLE BUYER-SELLER TRANSACTION" THEORY

JURY SELECTION; EXERCISE OF PEREMPTORY CHALLENGES; *BATSON v. KENTUCKY*

PRESERVATION; TIMELINESS OF OBJECTIONS

HARMLESS ERROR DOCTRINE

WAIVER OF OBJECTION; HARMLESS ERROR

PROSECUTORIAL MISCONDUCT/NON-PRESERVATION

MARYLAND DECLARATION OF RIGHTS/ FOURTH AMENDMENT/AUTOMOBILE EXCEPTION

CONSPIRACY; MERGER OF CONVICTIONS

MD. RULE 4-324'S PARTICULARITY REQUIREMENT/NON-PRESERVATION OF CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE

Facts: In the summer and fall of 2000, Baltimore City police were investigating a narcotics distribution organization. The investigation and subsequent series of raids led to the arrest of appellants Derrick Berry, Eric Berry, Eric Buckson, William Downing, and Raul Varela. Appellants were tried jointly and all were convicted of multiple counts of conspiracy: to distribute cocaine, to possess cocaine with the intent to distribute it, and to possess cocaine. Appellant Varela was also convicted of being a drug kingpin in the conspiracy, two counts of possession of cocaine, importing cocaine into Maryland, and possession of 448 grams or more of cocaine with the intent to distribute it.

Held: Judgments of the Circuit Court for Baltimore City of the convictions of conspiracy to possess with the intent to distribute cocaine, and conspiracy to possess cocaine vacated as to all appellants; judgment of the conviction of conspiracy to distribute cocaine vacated as to Appellant Varela; judgments otherwise affirmed.

The trial court did not err by refusing to instruct the jury that evidence of a single buyer-seller transaction does not constitute a conspiracy. The court otherwise properly instructed the jury on the elements of conspiracy, and the facts of the case did not plausibly support an instruction on the buyer-seller doctrine.

The trial court did not abuse its discretion in reseating a juror stricken by the defense, after the court concluded that the defense's purported race-neutral explanation for exercising the peremptory challenge was not credible, and that the juror was, in fact, stricken on the basis of race.

An assertion of error in the trial court's exclusion of evidence
was waived when counsel for one of several jointly tried co-defendants acquiesced to the court's ruling on the State's motion *in limine*, and counsel for the remaining co-defendants did not pursue the matter after having received the court's permission to do so.

The admission of objected-to evidence that two individuals had been arrested and charged as the result of a police investigation, but were not joined for trial with the six co-defendants, was harmless error. The jury heard evidence, without objection, that a third person had also been arrested and not tried with the defendants, and the jury also heard a great deal of evidence concerning persons with whom the co-defendants had interacted in the course of their drug trade.

Defense counsel's failure to object each and every time the challenged evidence was elicited is a waiver of the right to appellate review of the court's overruling the single objection that was made to the evidence. Moreover, the objection that was lodged related to the relevance of the evidence to all but one of six co-defendants, and a limiting instruction that the evidence was not admissible as to these co-defendants cured any unfair prejudice to them.

The prosecutor's comment, in the jury's presence, that "it is within this expert witness's testimony that firearms are used by drug organizations" is not subject to review on appeal, because, following defense counsel's objection, the court admonished the prosecutor to desist from making such statements in the jury's presence, and no further relief was requested.

When a verdict results in multiple conspiracy convictions arising out of a single conspiracy with multiple objectives, only one conspiracy conviction can stand. Merger of the convictions

and sentences on counts charging the "lesser" conspiracies into the conviction of the "greater" conspiracy is required.

Article 26 of the Maryland Declaration of Rights is read *in pari materia* with the Fourth Amendment to the United States Constitution; consequently, the Maryland courts follow the United States Supreme Court's "search and seizure" jurisprudence. The automobile exception to the warrant requirement does not have a requirement of exigency. The State, therefore, was not required to show that it had no time to secure a search warrant before performing a search. Moreover, the fact that the police had "boxed in" the vehicle that was the subject of the search did not negate the vehicle's "ready mobility" for purposes of the automobile exception.

Appellant failed to preserve for appellate review his challenge to the legal sufficiency of the evidence to establish his status as a "drug kingpin," because he did not argue the ground in his motion for judgment of acquittal at the close of all of the evidence.

Derrick Berry, et al. v. State, No. 2094, September Term, 2001, filed February 26, 2004. Opinion by Barbera, J.

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CRIMINAL LAW - DISCOVERY VIOLATION - MARYLAND RULE 4-263(a)(2)(C); PRETRIAL DISCOVERY OF DEFENDANT BY A WITNESS FOR THE STATE; *WILLIAMS V. STATE*, 364 MD. 160 (2001); UNDER THE RATIONALE AND POLICY CONSIDERATIONS ESPOUSED IN *WILLIAMS*, TRIAL COURT ERRED IN DETERMINATION THAT TESTIMONY OF WITNESS THAT SHE SAW APPELLANT AND ACCOMPLICE LOITERING AROUND VICTIM'S APARTMENT AT THE TIME OF THE BREAK-IN DID NOT CONSTITUTE AN IDENTIFICATION REQUIRING DISCOVERY IN CONTEMPLATION OF MD. RULE 4-263(a)(2)(C), WHICH IS INTENDED TO PROVIDE ADEQUATE INFORMATION TO BOTH PARTIES, TO FACILITATE INFORMED PLEAS, ENSURE THOROUGH AND EFFECTIVE CROSS EXAMINATION AND EXPEDITE TRIAL PROCESS BY DIMINISHING NEED FOR CONTINUANCES TO DEAL WITH UNFAMILIAR INFORMATION PRESENTED AT TRIAL; SUCH POLICY CONSIDERATIONS REQUIRE A MORE EXPANSIVE DEFINITION OF WHAT

CONSTITUTES AN "IDENTIFICATION" THAN THE CONCEPT OF "IDENTIFICATION" IN THE CONTEXT OF CHALLENGE ON THE BASIS OF ASSERTED MISIDENTIFICATION OF A WITNESS.

Facts: Richard Wayne Simons, appellant, was found guilty of first degree burglary, two counts of felony theft, malicious destruction of property valued at $500 or more, and unlawful taking of a motor vehicle. During trial, appellant argued a motion *in limine* to disallow a witness's testimony regarding her pre-trial identification of appellant and subsequent identification of appellant at trial because the State violated Maryland Rule 4-263(a)(2)(C). The witness had seen appellant and an accomplice pacing in front of the victim's apartment on the night in question around the time the crime occurred, and subsequently told the police about her observation. Appellant argued that the State did not disclose this pretrial identification to him. The State asserted that the identification was not a pre-trial identification that required disclosure under the discovery rule. The trial judge denied appellant's motion *in limine* and the witness subsequently identified appellant at trial as the man she saw on the night in question.

Held: The trial judge erred by failing to grant appellant's motion *in limine* because the State violated Maryland Rule 4-263(a)(2)(C) when it did not disclose the pretrial identification of a witness. Rule 4-263 provides that the State shall provide the defendant with "pretrial identification of the defendant by a witness for the State." The Court of Appeals in *Williams v. State*, 364 Md. 160 (2004), held that the observation of the defendant at an apartment on the night of a drug raid was a pretrial identification within Rule 4-263(a)(2)(C). Besides an accomplice, he was the only person to observe the defendant on the night in question. It concluded that the discovery rule expands beyond the traditional show-up or lineup, as the purpose of the rule is to provide the parties with adequate information to make informed pleas, ensure thorough and effective cross-examination, and to protect a defendant from unfair surprises so that he or she may effectively prepare his or her defense.

The policy considerations contemplated by the Court of Appeals are applicable to appellant. The witness's in-court identification was prejudicial to appellant, because, had he known of her pretrial identification prior to trial, he may have accepted a plea bargain, investigated her identification, and, therefore, had ample opportunity to prepare his defense and refute her testimony on cross-examination. Although appellant knew the witness would testify at trial, when appellant and his investigator spoke with the witness prior to trial, she, in fact, told the investigator that she did not see appellant on the night

in question. The State's failure to divulge the pretrial identification before trial violated the rule.

The trial court's error was not harmless. The witness's identification, like *Williams*, constituted the only identification of appellant at the scene of the crime around its commission. This identification was crucial to the case and its admission, therefore, was not harmless.

Richard Wayne Simons v. State of Maryland, No. 853, September Term, 2003, decided October 29, 2004. Opinion by Davis, J.

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CRIMINAL LAW - SEARCH AND SEIZURE - VEHICLE SEARCH - PROBABLE CAUSE - CANINE ALERT - RESIDUAL ODORS - BEST EVIDENCE RULE.

Facts: The State brought an expedited appeal, pursuant to Maryland Code (1974, 2002 Repl. Vol., 2003 Supp.), §12-302(c)(3)(i) of the Courts & Judicial Proceedings Article ("C.J."), challenging the suppression of contraband and over $175,000 recovered during a warrantless search of a vehicle driven by Yerson Rafael Cabral, appellee.

On August 28, 2003, Maryland State Police effected a traffic stop of the vehicle, driven by appellee, for following another vehicle too closely; appellee was accompanied by one passenger. Upon request, Cabral produced his driver's license and vehicle registration, which revealed that "the vehicle was registered to a third party." As Cabral gave the officer his driver's license and registration, the officer noticed that appellee appeared to be nervous and that "there was a single key in the ignition, no other keys on the key ring, and there were some pump air fresheners throughout the vehicle as well as a strong odor of air freshener coming from the vehicle."

The officer called for assistance while he checked the license and registration. Shortly thereafter, a K-9 unit arrived on the scene and a K-9 scan of the vehicle was conducted. It

result[ed] in a positive K-9 alert." The officer who initially stopped the vehicle "was still working on the warning" and had not yet finished the "license and registration check" when the dog alerted. Based on the alert, the officers searched the vehicle and detected "a hidden compartment in the driver's side panel of the vehicle," from which they recovered $178,840 in United States currency and "three compressed pellets" of heroin.

During the stop, a DVD camera in the officer's patrol car was activated. However, at the subsequent suppression hearing, the State was unable to play the digital recording of the traffic stop. At the suppression hearing, the officer who handled the dog testified that he and the dog were certified in 2002 and that the dog was recertified in November 2003. Furthermore, the officer stated that the dog had never had a false alert. But, the officer acknowledged that the dog had alerted on a vehicle "where there hadn't been drugs in the car," but drugs had been in the vehicle up to 72 hours prior to the scan.

Cabral's lawyer moved to strike the testimony of the State's witnesses on the ground that the recording was the best evidence of the stop. The State explained that it could not get the recording to play. The suppression court ruled that the alert by a trained and certified drug dog did not provide probable cause to search the vehicle and that the best evidence would be the recording. Therefore, the court granted Cabral's motion to suppress.

Held: Reversed. On appeal, the primary question posed by the State was whether "the possibility that a drug dog could alert on residual odor" undermined probable cause to search a vehicle. The Court held:

> The possibility that the contraband may no longer be present in the vehicle does not compel the finding that there is no probable cause; for purposes of the probable cause analysis, we are concerned with probability, not certainty. The issue of a possible alert to a residual odor is a factor to be considered by the trial court, but it is not dispositive.

Furthermore, the Court remarked that a trained drug dog's ability to detect the presence of drugs that were not physically present in the vehicle or container at the time of the alert, but were present as long as 72 hours prior to the alert, "serves to strengthen the argument that the dog has a superior sense of smell on which to rely to support a finding of probable cause."

The Court also rejected the trial court's ruling as to the

best evidence doctrine. It noted that the State made a diligent effort to play the recording, but was unable to overcome diagnosed technological problems. Moreover, there was no suggestion "of any intentional misconduct or bad faith on the part of the State." Specifically, this Court concluded that, "if the testimony as to the stop would have been sufficient to demonstrate probable cause, it is no less so merely because the recording did not function as intended."

State of Maryland v. Yerson Rafael Cabral, No. 261, September Term, 2004, filed October 6, 2004. Opinion by Hollander, J.

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CRIMINAL LAW - SEARCH & SEIZURE - WARRANTLESS SEARCHES - SEARCH INCIDENT TO LAWFUL ARREST

CRIMINAL LAW - INTERROGATION - MIRANDA RIGHTS - CUSTODIAL INTERROGATION

Facts: While under the influence of alcohol, appellant, David Conboy, crashed a Ford van, littered with alcoholic beverages, into a ditch. Appellant fled the scene of the accident only to return later, in a taxicab, to retrieve his belongings. At that time, a state trooper investigating the accident stopped the cab, obtained appellant's identity, and, after observing a rifle in the backseat of the cab asked appellant, inebriated and reeking of alcohol, to step out of the taxi. When he did, the trooper patted him down for weapons and, upon feeling a key in appellant's pocket, retrieved what would ultimately prove to be the key to the van. That, in turn, led appellant to volunteer that he was drunk and had in fact been the driver of the van.

Appellant was subsequently charged with driving while under the influence ("DUI") and, seeking to exclude the key and his statement, he filed a motion to suppress in the Circuit Court for Worcester County. That motion was denied and appellant was tried and convicted. He then appealed the denial of his motion to suppress.

Held: Judgment affirmed. Once lawfully arrested, police may search the person of the arrestee to remove any weapons or evidence that could be concealed or destroyed. Moreover, as long as police have probable cause to arrest before they search the arrestee, it is not particularly important that the search precede the arrest. In this case, the trooper had probable cause to arrest appellant for DUI prior to asking him to step out of the taxi. The trooper then searched appellant, finding a key, discovered the key fit the ignition of the wrecked van, and arrested appellant within a short period of time. The search of appellant's pocket was therefore incident to his subsequent arrest and was lawful.

Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Here, appellant was not subject to "custodial interrogation" because he was not in custody at the time he admitted to being drunk. The trooper initiated a lawful *Terry* stop to investigate appellant's presence. Appellant was then detained on a busy public street during daylight hours, his detention lasted for a short period of time, there was only one trooper at the scene, and he was not placed in handcuffs or otherwise physically restrained. Therefore, that investigatory stop did not evolve into a formal arrest or significant restraint on his freedom.

Moreover, appellant's statement was not the product of interrogation, either express questioning or its functional equivalent. After trying the key in the van's ignition, the trooper remarked, "it's funny, the key fits." That statement was merely an observation made without inviting a response. Appellant nonetheless responded, stating that "he fled the scene because he was drunk." Accordingly, the statement was admissible.

Conboy v. State of Maryland, No. 2298, September Term, 2002, filed March 2, 2004, opinion by Krauser, J.

FAMILY LAW - DIVORCE - ALIMONY - NECESSITY OF MAKING A FINDING AS TO THE PARTIES' INCOMES

FAMILY LAW - DIVORCE - ALIMONY - IMPUTATION OF INCOME TO SPOUSE BASED ON INVESTMENT STRATEGY

FAMILY LAW - MARRIAGE - PRESUMPTION OF JOINT OWNERSHIP OF HOUSEHOLD GOODS AND FURNISHINGS

Facts: After almost thirty-five years of marriage, the circuit court granted appellee, Gretchen K. Brewer, a judgment of absolute divorce from appellant, Lawrence J. Brewer. In doing so,

the circuit court awarded Mrs. Brewer $2,000 a month in indefinite alimony, but upon consideration of a motion to reconsider that was filed by Mr. Brewer, the court reduced that amount to $1,500. In addition, the court awarded Mrs. Brewer a monetary award in the amount of $250,000, but upon consideration of Mr. Brewer's motion for reconsideration, the court reduced that amount to $175,000. Both parties noted appeals from that order.

In determining Mr. Brewer's income for purposes of alimony, Mrs. Brewer argued that the circuit court should impute income to Mr. Brewer based on what she argued was an underutilization of his investments. Mr. Brewer testified that he had always invested in growth-oriented stocks. Mrs. Brewer argued that if Mr. Brewer were to instead invest in income producing securities, his income would be substantially higher. The circuit court declined to impute income to Mr. Brewer based on his investment strategy.

Also at issue was furniture that Mr. Brewer had inherited from his mother. Mr. Brewer maintained that the inherited furniture belonged solely to him. Mrs. Brewer, on the other hand, argued that the furniture was jointly-owned, pointing out that there is a presumption that household goods and furnishings used for the family are jointly-owned. The circuit court found no evidence that Mr. Brewer intended the furniture to be a gift to Mrs. Brewer and ordered that the furniture belonged solely to Mr. Brewer.

Held: Vacated. The circuit court erred in failing to make a finding as to Mrs. Brewer's income. Moreover, after considering Mrs. Brewer's income from her job, her eligibility for social security benefits, and her portion of Mr. Brewer's pension, which was to be awarded by a QDRO, Mrs. Brewer's monthly income would equal almost 80% of Mr. Brewer's. No reported Maryland appellate decision has upheld an award of indefinite alimony where there is such a small disparity in the parties' incomes. Indeed, after including her alimony payment, her income would far exceed Mr. Brewer's.

As for the imputation of income, Maryland law does not require the court to impute a higher rate of return to spouses from there investment assets. This is especially true in cases such as this where the spouse has always elected to invest in growth stocks and there is no evidence that he chose that strategy simply to lessen his alimony payments. Thus, under the circumstances, the trial court neither erred nor abused its discretion by not imputing a higher rate of return to Mr. Brewer from his investment assets.

As for the furniture, Mrs. Brewer is correct that in Maryland that furniture used for marital purposes is presumed to be jointly-owned, regardless of whether one spouses uses separate funds to purchase that furniture. That presumption does not, however, extend to cases where the spouse passively inherits furniture, even if used for marital purposes. Simply using inherited household goods as they are intended to be used is not enough to create a presumption that the spouse intended to make a gift of the property to the marital unit. A distinction can legitimately be drawn between a spouse purchasing household goods or furnishings for family use and inheriting those same goods. Unlike purchased goods, inherited items frequently have a sentimental value that exceeds market worth, but only to the recipient.

Lawrence J. Brewer, Jr. v. Gretchen K. Brewer, No. 2704, September Term, 2002, filed March 31, 2004. Opinion by Krauser, J.

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INSURANCE - SCOPE OF PERMISSIVE USE OF AUTOMOBILE

Facts: Dennis Ray Drewery, Sr., the insured, granted his son permission to drive his mother to work. Drewery instructed his son that he was to use the car to take his mother to work and then to bring the car back. After leaving his father's house, the son picked up a friend. The son and his friend then picked up the mother and dropped her off at work. After leaving his mother's place of employment, the pair decided to visit the friend's cousin. At that time, the son allowed the friend to drive the car. While driving, the friend struck a parked truck, which in turn injured Donald Leroy Andrew, an employee of the Flippo Construction Company.

After the accident, Liberty Mutual, the worker's compensation insurance carrier for Flippo, paid Andrew worker's compensation

benefits. Liberty Mutual subsequently filed a complaint for declaratory relief in the Circuit Court for Prince George's County, requesting a declaration that the son's friend was covered under Drewery's automobile insurance policy with MAIF and that MAIF was therefore required to indemnify Liberty Mutual for compensation payments made to Andrew. At the conclusion of that proceeding, the circuit court declared that the friend was not covered by Drewery's automobile insurance policy, because he "did not have the express permission of the insured, Dennis Ray Drewery, Sr." to drive his car and because "both father and son . . . had a mutual understanding that the driving would be restricted to the son when the car was lent to him."

Held: Judgment Affirmed. The operation of Drewery's car was not "for a purpose germane to the permission granted." The son was given permission to use the car only for the purpose of taking his mother to work. After completing that task, the son and his friend, without consulting Drewery, continued and visited the friend's cousin. Since the son was not granted permission to use the car for any other purpose than to take his mother to work, the use of the car at the time of the accident was outside of the scope of the permission granted. Therefore, the circuit court did not err in finding that the friend was not covered under the MAIF policy.

Liberty Mutual Insurance Company v. Maryland Automobile Insurance Fund, et al., No. 774, September Term, 2002, filed January 29, 2004. Opinion by Krauser, J.

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INSURANCE - UNINSURED MOTORIST COVERAGE - MD. CODE (2002 REPL. VOL.) INSURANCE ARTICLE, § 19-509 (c) (1) AND (2); *FORBES V. HARLEYSVILLE MUTUAL*, 322 MD. 689 (1991); *GLOBE V. AMERICAN CASUALTY CO. V. CHUNG*, 76 MD. APP. 524 (1988), VAC. BY *GLOBE AMERICAN CASUALTY CO. V. CHUNG*, 322 MD. 713 (1991); TRIAL COURT ERRED WHEN, IN RELIANCE ON *FORBES*, IT GRANTED SUMMARY JUDGMENT IN FAVOR OF APPELLEE, CONCLUDING THAT INSURANCE ARTICLE, § 19-509 REQUIRED INSURER TO PROVIDE UNINSURED MOTORIST COVERAGE FOR WRONGFUL DEATH OF A PERSON WHO WAS NOT AN INSURED UNDER THE POLICY.

Facts: A passenger in an uninsured vehicle was killed in an accident resulting from the driver's negligence. The deceased passenger's son filed an uninsured motorist claim with the insurer

under which the son was covered, seeking compensation for the wrongful death of his father, who was not insured under the policy which covered the son. When the insurer rejected the son's claim (because the father was not insured under that policy), the son filed a breach of contract action in the Circuit Court for Baltimore City, and after the court granted summary judgment for son, the insurer appealed.

Held: Reversed. Section 19-509(c)(1) of the Insurance Article does not require uninsured motorist coverage for wrongful death claims when the decedent is not the insured. Although the Court of Appeals held, in *Forbes v. Harleysville Mutual*, 322 Md. 689 (1991), that uninsured motorist coverage extended to wrongful death actions when the decedent was not the insured, the General Assembly subsequently amended the statute. The revised statute includes § 19-501(c)(2), which specifically governs wrongful death coverage, and that section limits wrongful death coverage to cases where the decedent was the insured. The revision superseded *Forbes*.

Nationwide Mutual Insurance v. Jaedon Johnson, No. 1825, September Term, 2003, decided October 6, 2004. Opinion by Davis, J.

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PRISONERS - FOURTEENTH AMENDMENT DUE PROCESS CLAUSE - INMATES/PROTECTED LIBERTY INTERESTS

DEPARTMENT OF PUBLIC SAFETY AND CORRECTION - DIVISION OF CORRECTION

Facts: Appellant, Joseph Patrick, was charged with attempted escape and transferred from the Maryland House of Correction Annex ("MHC-X"), a maximum security prison, to the Maryland House of Correction Annex ("MCAC"), a supermaximum security prison. At a subsequent disciplinary hearing, appellant was adjudicated not guilty of attempted escape. When appellant was not transferred back to MHC-X after this adjudication, he initiated grievance

procedures, arguing that he was entitled to a transfer back to MHC-X.

Appellant represented himself at the grievance hearing, arguing that he was being wrongly detained at MCAC because a disciplinary hearing officer had determined that appellant was not guilty of escape or attempted escape. Appellant specified that he was being punished for an act he had not committed and that he was now forced to remain at MCAC for at least two to three years as the result of the Assistant Commissioner's placing him in Transfer Category Three. The administrative law judge ("ALJ") denied and dismissed appellant's grievance with respect to his request for a transfer to MHC-X. But, because the disciplinary hearing officer had found appellant not guilty of attempted escape, the judge recommended that the Division of Correction place appellant in Transfer Category Ten or Eleven, neither of which requires a minimum period of retention at MCAC before transfer. The Secretary of the Department of Public Safety and Correctional Services ordered, without comment, that the ALJ's proposed order be affirmed.

Appellant, represented by counsel, sought judicial review in the Circuit Court for Baltimore City. The court affirmed the Secretary's order. Appellant filed an application for leave to appeal to this Court, which was granted.

Held: Affirmed. An inmate has no protected liberty interest in avoiding continued incarceration at a supermaximum facility, in the absence of a showing that the State has "impose[d] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

Transfer from one institution to another does not implicate a protected liberty interest. An inmate who had been transferred from a maximum to a supermaximum security institution, after being charged with attempted escape, has no protected liberty interest implicated merely by the refusal of the Division of Correction to return him to a maximum security institution after being adjudicated not guilty of the charged rule infraction by a disciplinary hearing officer.

A disciplinary hearing officer's ruling bears on the inmate's adjustments, pursuant to Division of Correction Directives ("DCD") 100-105. Consequently, the Assistant Commissioner, who is accorded complete discretion in making institutional transfers pursuant to DCD 100-161, was not bound by the disciplinary hearing officer's fact findings or decision in making his own decision

whether to transfer the inmate.

Joseph Patrick v. Secretary, Department of Public Safety and Corr. Servs., No. 2423, September Term, 2001, filed April 2, 2004. Opinion by Barbera, J.

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REAL PROPERTY - FORECLOSURE SALE - EXCEPTIONS TO RATIFICATION OF SALE – CHALLENGE TO AWARD OF WRIT OF POSSESSION – WHERE MORTGAGOR'S HOME WAS SOLD AT FORECLOSURE SALE, MORTGAGOR DID NOT FILE EXCEPTIONS, AND SALE WAS RATIFIED, MORTGAGOR COULD NOT CHALLENGE PROPRIETY OF SALE IN EFFORT TO BLOCK ISSUANCE OF WRIT OF POSSESSION TO BUYER AT FORECLOSURE SALE.

Facts: The appellee, Bank of America ("the Bank") held a mortgage on the home of the appellant, Tong-ya G. Manigan. A dispute arose as to whether Manigan's mortgage payments were current, and the Bank eventually instituted foreclosure proceedings.

A foreclosure sale was held, and the home was sold to B.A. Mortgage, L.L.C. ("the purchaser"), a wholly owned subsidiary of the Bank. Manigan filed no exceptions to the sale and the sale was ratified by the Circuit Court for Prince George's County. The court referred the matter to an auditor, and an auditor's report was later filed.

The purchaser moved for writ of possession and a hearing was held. Manigan attempted to argue at the hearing that the foreclosure sale had been improperly conducted, in that the bank had wrongfully accused her of being delinquent on her mortgage payments and had hindered her attempts to resolve the matter. The trial court explained that the time for challenging the foreclosure sale had passed. It granted the writ of possession.

On appeal to the Court of Special Appeals, Manigan argued

that the trial court erred in issuing the writ of possession without first conducting a full evidentiary hearing into the propriety of the foreclosure.

Held: Judgment affirmed. The Court of Special Appeals explained that the time to challenge a foreclosure sale is before it takes place, by moving to enjoin it, or immediately afterward, prior to ratification. The sale cannot be challenged in proceedings regarding the issuance of a writ of possession to the buyer at foreclosure.

The Court added that the ratification of the sale of property at foreclosure is *res judicata* as to the validity of the sale. The sale cannot be collaterally attacked except in the case of extrinsic fraud, mistake, or irregularity. Nothing in the record suggested that such fraud, mistake, or irregularity had occurred.

Tong-ya G. Manigan v. John S. Burson, Trustee, No. 1540, September Term, 2003, filed September 14, 2004. Opinion by Smith, J. (retired, specially assigned).

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TORTS – NUISANCE.

Facts: William Echard ("Echard") and his mother, Mary Echard, lived next to Richard and Karen Kraft. The neighbors coexisted peacefully until the Krafts decided to build a fence along their common property line in March 2001.

The proposed fence angered Echard and his mother because both believed that the fence would interfere with Mrs. Echard's ability to use her driveway. The fence issue led Echard to engage in six rude acts, *viz*: (1) he asked Mr. Kraft, "What kind of asshole would do this?"; (2) while Echard and Mr. Kraft were walking outside of their houses at the same time, Echard gave Mr. Kraft what the latter described as a "very emphatic finger"; (3) Echard,

on one occasion, stood outside the Krafts' house late at night and shouted at Mr. Kraft, "Come down here. Come down here"; (4) on another occasion, Echard yelled at Mr. Kraft, "What the hell are you looking at"; (5) Echard hollered at the Krafts maid, as she was banging a dust bag on the railing of the Krafts' porch, that she "shouldn't be putting garbage and dust on his property"; and (6) while the fence was being erected, Echard went onto the Krafts' property, was asked to leave by Mrs. Kraft, but refused to immediately obey Mrs. Kraft's request that he leave.

Echard sued the Krafts in the Circuit Court for Anne Arundel County, claiming that they had defamed him when they made statements to the Annapolis police concerning his words and actions. The Krafts filed a counterclaim sounding in nuisance against Echard, in which they alleged, *inter alia*, that Echard had interfered with their peaceful possession of their property.

The matter was tried before a jury. At the conclusion of the entire case, Echard, *pro se*, made a motion for judgment in his favor on the nuisance count. He maintained that the Krafts had failed to prove that he had created a nuisance. The trial judge denied Echard's motion. The jury returned a verdict against Echard on his defamation claim and found in favor of the Krafts on their nuisance claim. The jury award the Krafts $25,000 in damages. Echard filed an unsuccessful motion for new trial and then a timely appeal to the Court of Special Appeals.

Held: Reversed. To prove a nuisance, the plaintiffs must show that the defendant's actions caused injury of such a character as to diminish materially the value of the plaintiffs' property as a dwelling and to have substantially interfered with the ordinary comfort and enjoyment of the plaintiffs' land. The six rude actions about which the Krafts complained, when viewed either individually or collectively, did not produce such damage. Annoying though Echard's words and actions may have been, his actions produced far less interference than the type of constant harassing activity that is actionable, e.g., tanks leaking hazardous waste, constant blaring of music, barking dogs, loud trains, and smelly farmyards.

William Bruce Echard v. Richard Kraft, et al., No. 490, September Term, 2003, filed on October 1, 2004. Opinion by Salmon, J.

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TORTS - PRODUCT LIABILITY - FAILURE TO HEED TO MANUFACTURER'S WARNING DID NOT BAR RECOVERY AS A MATTER OF LAW.

Facts: Appellants, David and Texie Hoon, brought suit against Lightolier, a Genlyte Thomas Company, LLC. Lighotlier manufactured light fixtures, which were installed in the Hoons' residence by Gede Installation, LLC. The fixtures contained an express warning of the risk of fire if the fixtures were installed within three inches of the insulation. The fixtures were also equipped with self-heating thermal protectors (SHTPs). The SHTPs were designed to cause the fixtures to blink on and off if the bordering area overheated. The purpose of the "blinking" function was to warn users of the insulation problem and to cool down the bulb. Despite the warning, Gede installed fixtures in the Hoons' residence within three inches of the insulation. After they were installed, two of the fixtures began to blink, which caused the Hoons to check those fixtures and remove the adjacent insulation. The Hoons did not check any other fixtures.

On November 2, 1998, the ceiling above a third fixture caught fire. One of the causes of the fire was that the insulation was installed too close to the fixture. In addition, there was evidence that the SHTPs in the fixture malfunctioned because the heat sensor in the fixture was too far from the bulb, which prevented the fixture from blinking and the bulb from cooling down.

The Circuit Court for Kent County granted Lightolier's motion for summary judgment as to the Hoons' claims of strict liability, negligence and breach of warranty, on the ground that Gede's failure to heed Lightolier's express warning was the sole proximate cause of the fire. An additional ground was that the Hoons were guilty of contributory negligence and/or assumption of a known risk.

Held: Reversed. The Court held that a triable issue of fact existed as to whether the Hoons' were contributorily negligent and/or assumed the risk when they did not check to see if the third fixture was installed too close to the insulation. The Court held that a jury could reasonably find that the Hoons reasonably believed other fixtures were not too close to insulation because those lights never blinked.

The Court also held that a jury could find that Gede's negligence was not the sole proximate cause of the accident, because there was evidence from which the jury could find that the SHTPs were defectively designed or negligently manufactured because the SHTPs did not fulfill their function.

The fact that Lightolier included the SHTPs in the fixture for the purpose of warning users of the risk of fire in case the fixtures were too close to the insulation negated the argument that Lighotlier assumed its warning would be heeded and could not foresee an installer's disregard of the warning. The Court held that a legally adequate warning to the installer does not bar recovery, as a matter of law, to third-party users, such as the Hoons, when the manufacturer foresaw that an installer might disregard the warning; further, an adequate warning label does not necessarily preclude liability when a safety device malfunctions and the manufacturer has led its customer to believe that they would be warned by blinking lights of such a malfunction.

Hoon, et al. v. Lightolier, A Division of Genlyte Thomas Group, LLC, No. 2596, September Term, 2002, filed September 15, 2004. Opinion by Salmon, J.

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WORKERS' COMPENSATION — COST OF LIVING ADJUSTMENT

Facts: Appellee, Marion Hensley injured his back while swinging a sledge hammer at work. Hensley filed a workers' compensation claim against appellants, Clarence W. Gosnell, Inc. and its insurer, City Insurance Company. The Workers' Compensation Commission ("Commission") found Claimant's injury to be compensable under the Maryland Workers' Compensation Act ("Act"), Md. Code (1991, 1999 Repl. Vol.), § 9-101 *et seq*. of the Labor and Employment Article ("LE"), and issued an automatic award. Because Claimant was found to be permanently and totally disabled, his weekly checks were subject to yearly cost of living adjustment ("COLA") increases pursuant to LE § 9-638. Employer made no COLA payments to Claimant from 1997 to 2001.

In 2001, Claimant demanded the necessary adjustments, and Employer complied by paying Claimant $5,714.38 in COLA payments retroactive to January 1, 1997. Employer, however, refused to round to the next higher dollar any past and future COLA payments due Claimant. Believing that annual COLAs are subject to rounding to the next higher dollar, Claimant filed issues of underpayment of COLA benefits with the Commission. Following a hearing, the

Commission denied Hensley's issues. Hensley sought review in the Circuit Court for Montgomery County, and the parties filed cross motions for summary judgment. After a hearing, the court granted summary judgment in favor of Claimant.

Held: Reversed. There is no express language in either the "rounding up" provision, LE § 9-604, or the COLA provision, LE § 9-638, that requires COLAs to be rounded to the next higher dollar. Nor does either section of the Act explicitly or implicitly refer to the other. By application of the rules of construction that no language may be added or deleted to ascertain the statute's meaning, and that a court may not surmise a legislative intent contrary to the plain language of a statute, COLAs, which are applied to compensation for a permanent and total disability, are not subject to rounding up to the next higher dollar.

Clarence W. Gosnell, Inc., et al. v. Marion Hensley, No. 982, September Term, 2002, filed April 8, 2004. Opinion by Barbera, J.

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ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective October 27, 2004:

DIANE LEIGH DAVISON
*

By an Order of the Court of Appeals of Maryland dated November 5, 2004, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State:

MICHAEL JUDE GRAHAM
*

By an Order of the Court of Appeals of Maryland dated November 5, 2004, the following attorney has been immediately suspended from the further practice of law in this State:

NATHAN MURRAY GUNDY, III
*

By an Order of the Court of Appeals of Maryland dated November 5, 2004, the following attorney has been suspended for sixty (60) days by consent, effective December 1, 2004, from the further practice of law in this State:

ORVILLE ANTHONY WRIGHT
*

By an Order of the Court of Appeals of Maryland dated November 9, 2004, the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

HARRISON B. WILSON, III
*

By an Opinion and Order of the Court of Appeals of Maryland dated November 16, 2004, the following attorney has been indefinitely suspended from the further practice of law in this

State:

NATHAN H. CHRISTOPHER, JR.
*