

# Amicus Curiarum

VOLUME 26  
ISSUE 4

APRIL 2009

---

A Publication of the Office of the State Reporter

---

## Table of Contents

### COURT OF APPEALS

#### Constitutional Law

##### First Amendment

Newell v. Runnels . . . . . 2

#### Criminal Law

##### Evidence

King v. State . . . . . 8

##### Statutory Interpretation

State v. Sullivan . . . . . 11

#### Real Property

##### Eminent Domain

Park & Planning Commission v. Washington Grove . . . . . 13

### COURT OF SPECIAL APPEALS

#### Constitutional Law

##### Commerce Clause

Frey v. Comptroller . . . . . 18

#### Criminal Law

##### Fourth Amendment

Sparkman v. State . . . . . 20

#### Estates and Trusts

##### Inter Vivos Trusts

Johnson v. Johnson . . . . . 23

ATTORNEY DISCIPLINE . . . . . 24

JUDICIAL APPOINTMENTS . . . . . 25

# COURT OF APPEALS

*Jonathan G. Newell, et al. v. Susan Runnels, et al.*, No. 48, September Term, 2008, Opinion filed 13 March 2009 by Harrell, J.

<http://mdcourts.gov/opinions/coa/2009/48a08.pdf>

CONSTITUTIONAL LAW - FIRST AMENDMENT - POLITICAL SPEECH - TERMINATION OF STATE EMPLOYMENT - SUMMARY JUDGMENT - DISPUTED ISSUES OF FACT CONCERNING THE JOB DUTIES OF VICTIM WITNESS COORDINATOR AND SENIOR DISTRICT COURT COORDINATOR, EMPLOYED BY THE CAROLINE COUNTY STATE'S ATTORNEY'S OFFICE, PRECLUDED SUMMARY JUDGMENT FOR NEWLY ELECTED CHALLENGER AND THE STATE OF MARYLAND, WHERE THE EMPLOYEES ALLEGED THAT THEY WERE FIRED FOR CAMPAIGNING ON BEHALF OF INCUMBENT STATE'S ATTORNEY IN GENERAL ELECTION.

CONSTITUTIONAL LAW - FIRST AMENDMENT - POLITICAL SPEECH - TERMINATION OF STATE EMPLOYMENT - SUMMARY JUDGMENT - DISPUTED ISSUE OF FACT REGARDING WHETHER THE NEWLY ELECTED STATE'S ATTORNEY ELEVATED POLITICAL SUPPORT TO A JOB REQUIREMENT IN HIS ADMINISTRATION PRECLUDED SUMMARY JUDGMENT FOR THE STATE'S ATTORNEY AND THE STATE OF MARYLAND, WHERE STATE'S ATTORNEY PROFFERED THAT HE WAS ENTITLED TO FIRE THE EMPLOYEES FOR CAMPAIGNING AGAINST HIM IN THE GENERAL ELECTION.

CONSTITUTIONAL LAW - CIVIL RIGHTS - QUALIFIED IMMUNITY - WHETHER NEWLY ELECTED STATE'S ATTORNEY WAS PROTECTED BY QUALIFIED IMMUNITY FROM EMPLOYEES' § 1983 CLAIM ASSERTING A VIOLATION OF THEIR FIRST AMENDMENT RIGHTS DEPENDS ON WHETHER A REASONABLE STATE'S ATTORNEY COULD HAVE BELIEVED THAT POTENTIAL HARM TO THE WORK ENVIRONMENT OF THE STATE'S ATTORNEYS OFFICE JUSTIFIED HIS FIRING EMPLOYEES WHO CAMPAIGNED ON BEHALF OF HIS OPPONENT IN THE GENERAL ELECTION.

MARYLAND TORT CLAIMS ACT - IMMUNITY FOR STATE PERSONNEL - ON A CLAIM ASSERTING A VIOLATION OF THE STATE CONSTITUTION'S COUNTERPART TO THE FIRST AMENDMENT, DISCHARGED EMPLOYEES OF THE STATE'S ATTORNEY'S OFFICE GENERATED A TRIABLE ISSUE OF WHETHER THE NEWLY ELECTED STATE'S ATTORNEY ACTED WITH MALICE OR GROSS NEGLIGENCE WHEN HE FIRED THEM FOR CAMPAIGNING ON BEHALF OF HIS OPPONENT IN THE GENERAL ELECTION, SUCH THAT SUMMARY JUDGMENT WAS NOT APPROPRIATE FOR THE NEWLY ELECTED STATE'S ATTORNEY IN HIS INDIVIDUAL CAPACITY.

EMPLOYMENT - ABUSIVE DISCHARGE - FORMER EMPLOYEES OF CAROLINE COUNTY STATE'S ATTORNEYS OFFICE ASSERTED A VIABLE COMMON LAW

CLAIM OF ABUSIVE DISCHARGE, SEPARATE FROM THEIR CONSTITUTIONAL CLAIMS, AGAINST THE NEWLY ELECTED STATE'S ATTORNEY WHO FIRED THEM FOR CAMPAIGNING ON BEHALF OF HIS OPPONENT IN THE GENERAL ELECTION, AS THE LEGISLATURE HAS ARTICULATED A CLEAR MANDATE OF PUBLIC POLICY PROTECTING THE RIGHT OF GOVERNMENT EMPLOYEES TO ENGAGE IN POLITICAL ACTIVITY.

EMPLOYMENT - FAIR LABOR STANDARDS ACT - MARYLAND WAGE HOUR LAW - SUMMARY JUDGMENT FOR DEFENDANT CAROLINE COUNTY WAS NOT APPROPRIATE ON OVERTIME CLAIMS ASSERTED BY FORMER EMPLOYEES OF STATE'S ATTORNEY'S OFFICE, WHERE EMPLOYEES GENERATED A TRIABLE ISSUE OF WHETHER THE COUNTY WAS THEIR JOINT EMPLOYER FOR PURPOSES OF FEDERAL AND STATE OVERTIME LAWS.

Facts: Jonathan Newell was elected as the Caroline County State's Attorney in November 2002. When he assumed office, he fired two Victim Witness Coordinators ("VWCs"), Susan Runnels and Marjorie Cooper (collectively the "Plaintiffs"). Plaintiffs believed that Newell fired them because they actively supported their boss, Robert Greenleaf (Newell's opponent), in the general election. As reasons for firing Plaintiffs, Newell asserted poor job performance and his belief that he could not trust them in light of their commitment to his general election opponent.

Plaintiffs sued Newell and the State of Maryland (collectively the "State Defendants"), as well as Caroline County (the "County"). They asserted violations of the First Amendment and its State Constitution counterpart and a common law abusive discharge claim, arising out Newell's firing them for, allegedly, political reasons. They also sought back pay for overtime hours that they allegedly worked in violation of the Fair Labor Standards Act (the "FLSA") and the Maryland Wage Hour Law (the "MWHL").

The Circuit Court granted summary judgment for all of the defendants on all counts, and Plaintiffs appealed to the Court of Special Appeals. In a reported opinion, the intermediate appellate court, for the most part, reversed. *Runnels v. Newell*, 179 Md. App. 168, 944 A.2d 1183 (2008). The Court of Special Appeals held: (1) Plaintiffs generated a jury question as to whether Newell violated their rights under the First Amendment and its State Constitution counterpart; (2) Plaintiffs generated a jury question as to whether Newell was protected by qualified immunity from the alleged First Amendment violation under 42 U.S.C.A. § 1983; (3) Plaintiffs generated a jury question as to whether Newell was protected by State personnel immunity under the Maryland Tort Claims Act (the "MTCA"); (4) Plaintiffs' common law abusive discharge claim was duplicative of their

constitutional claims; (5) summary judgment was warranted for the County on all claims stemming from the allegedly unlawful firings; (6) Plaintiffs generated a jury question as to whether the County was their joint employer for purposes of the FLSA and the MWHL; and (7) Plaintiffs generated a jury question as to whether the County "suffered or permitted" them to work overtime hours without proper compensation.

All parties sought certiorari from the Court of Appeals, which granted writs to determine: (1) whether summary judgment was appropriate on the merits of Plaintiffs' Federal and State constitutional claims; (2) whether Newell enjoyed qualified immunity for the First Amendment claim; (3) whether he enjoyed State personnel immunity for the State constitutional claim; (4) whether Plaintiffs' abusive discharge claim was duplicative of their constitutional claims; (5) whether the County was their joint employer for purposes of imposing liability on the County under the FLSA and the MWHL; and (6) and whether the County suffered or permitted their overtime work. *Newell v. Runnels*, 405 Md. 290, 950 A.2d 828 (2008). Plaintiffs did not seek certiorari on the question of whether the County could be held liable for the claims arising out of their allegedly unlawful firings.

Held: Affirmed in part and reversed in part. In part I of its opinion, the Court noted that the First Amendment to the U.S. Constitution generally is "co-extensive" with the State Constitution's counterpart, Article 40 of the Maryland Declaration of Rights. Then, the Court considered the competing tests, which the Supreme Court has articulated to govern employee discharge claims under the First Amendment against government employers. The first test, from *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), governs where an employee was fired for engaging in constitutionally protected speech or conduct. It requires the reviewing court to balance the employee's interest in speaking on a matter of public concern against the government's interest, as an employer, in managing the workplace. The second test, from *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), governs where an employee was fired for political patronage reasons. The *Elrod/Branti* test allows a government employer to fire categorically certain "policymaking" employees based on her or his political party affiliation. The Court of Appeals also considered and reaffirmed its prior precedent from *O'Leary v. Shipley*, 313 Md. 189, 545 A.2d 17 (1988), which held that, when a public employee is fired for political campaign activity, the *Pickering* test governs, unless political patronage was the employer's sole motive for firing the employee.

The Court resolved that for summary judgment to be proper for the State Defendants on Plaintiffs' constitutional claims, the State Defendants needed to show that Plaintiffs were "policymakers" - meaning that they held positions at the State's Attorney's Office (the "SAO") for which affiliation with the same political party as Newell was an appropriate bellwether of effective performance, and the State Defendants needed to show that Newell fired Plaintiffs for political patronage reasons. The Court held that disputed issues of material fact precluded summary judgment. Too many questions remained regarding what exactly VWCs (and Plaintiffs specifically) did at the SAO. Additionally, evidence that Newell retained other employees, who he similarly claimed to not trust, and that he stated on the campaign trail that he did not intend to alter the staffing of the SAO if elected suggested that he did not elevate political support to a job requirement. Plaintiffs also adduced evidence that contradicted Newell's claim that he fired them for poor job performance.

In Part II, the Court determined that summary judgment on Plaintiffs' First Amendment claim was not proper, on the current record, for Newell in his individual capacity. The Court set forth the applicable framework for analyzing assertions of common law qualified immunity by public officials, stating that the plaintiffs, in such cases, must show that the right allegedly violated by the official was "clearly established" when the violation of that right allegedly occurred. Because so many questions remained concerning Newell's motivation for firing Plaintiffs and the job duties of Plaintiffs at the SAO, the Court resolved that the lower court should consider Newell's asserted qualified immunity anew on a more developed record.

In Part III, the Court of Appeals held that Plaintiffs generated a jury question as to Newell's individual liability under the MTCA. The Court iterated that, under the MTCA, State personnel are immune from liability, in their individual capacities, except when they act with malice or gross negligence. The Court noted that the test for determining State personnel immunity is subjective, unlike the objective test for determining common law qualified immunity discussed in Part II of the Court's opinion. Plaintiffs put forth enough evidence that, if believed, would permit the inference that Newell acted with either malice or gross negligence. Newell testified at his deposition that he retained employees who did not have "work ethic issues"; however, he told Plaintiffs when he fired them that he did not fault their work performances. Additionally, others testified that Newell was agitated personally by Plaintiffs' overt support for Greenleaf, and, according to Plaintiffs, Newell sarcastically

told them that their campaign activity was not the reason that he chose to fire them.

In Part IV, the Court held that Plaintiffs' common law claim of abusive discharge was not duplicative of their constitutional claims. The Court analyzed two statutes relied on by Plaintiffs: (1) Maryland Code (2004 Repl. Vol.), State Personnel and Pensions Article, § 2-304 (pertaining to State employees) and (2) Maryland Code (1957, 2005 Repl. Vol.), Article 24, § 13-103 (pertaining to employees of local governments). The Court observed that the statutes allow public employees of the State and local governments to "freely participate in any political activity and express any political opinion," subject only to the restrictions that the speech not occur at the workplace and not advocate the violent or unconstitutional overthrow of the government. The Court resolved that the language of the statutes is broader than the constitutional protections accorded public employees with respect to speech on matters of public concern. Thus, Plaintiffs' abusive discharge claim, which was premised on those statutes, was not duplicative of their constitutional claims; however, the record did not reveal whether Plaintiffs could assert their abusive discharge claim because it was not clearly established below that Plaintiffs had no administrative remedy for allegedly losing their jobs for exercising their statutory right to engage in political activity. Accordingly, the Court instructed that the trial court reconsider the matter on remand.

In Part V, the Court of Appeals held that summary judgment for the County was not proper as to Plaintiffs' claims under the FLSA and the MWHL. The Court observed that the MWHL is the "State parallel" to the FLSA, each requiring that an employer pay an employee 1.5 times the usual hourly wage for hours worked over 40 hours in a given workweek. The Court applied a variation of the "economic reality test" to determine whether Plaintiffs, who were employees of the SAO, were jointly employed by the County, such that the County could be liable to them for their overtime claims. Evidence, if believed, tended to show that the County paid the salaries of SAO staff, budgeted for SAO overtime (allegedly with knowledge that the overtime budget was insufficient), exercised control over the hiring and firing of SAO staff, threatened to fire one of the Plaintiffs after confiscating her computer and rerouting her telephone line without SAO permission, and vetoed the SAO's effort to vary the hours worked by its employees. Accordingly, a trier of fact could conclude reasonably that, as an economic reality, the County was a joint employer of Plaintiffs.

In Part VI, the Court considered the Circuit Court's

alternative basis for granting summary judgment in favor of the County on Plaintiffs' overtime claims - that the County did not "suffer or permit" Plaintiffs to work overtime hours, as required by the FLSA and the MWHL, because it had no knowledge of their overtime work. The Court held, however, that Plaintiffs put forth evidence that, if believed, was sufficient to show that the County had constructive knowledge of a pattern of improperly compensated overtime work at the SAO.

\* \* \*

*Darryl King v. State of Maryland*, No. 43, September Term, 2008.  
Opinion filed 18 March 2008 by Harrell, J.

<http://mdcourts.gov/opinions/coa/2009/43a08.pdf>

CRIMINAL LAW - EVIDENCE - NON-PARTY/NON-VICTIM WITNESS - CREDIBILITY AND IMPEACHMENT - TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING DEFENDANT TO IMPEACH STATE'S NON-PARTY, NON-VICTIM WITNESS WITH HER FELONY DRUG CONVICTION WHERE WITNESS'S TESTIMONY AND CREDIBILITY WERE IMPORTANT IN CORROBORATING VICTIM'S ACCOUNT OF HIS SHOOTING, THE VICTIM WAS THE WITNESS'S FIANCÉ, AND THERE WAS LITTLE LIKELIHOOD THAT THE STATE WOULD HAVE SUFFERED UNFAIR PREJUDICE IF CONVICTION WAS ADMITTED.

**Facts:** Kevin Phillips was shot 12 times during the early morning hours of 29 July 2004. At the time of the shooting, he was in the parking lot of an apartment complex, speaking to his fiancée, Terri Lagarde, on his cellular telephone. Emergency responders arrived at the scene and transported Phillips to the hospital, where he told detectives that "Dubbies" shot him. Phillips offered no other information at the time.

Phillips was released from the hospital seven days later, but relocated with Ms. Lagarde to Washington, D.C. and did not contact the investigating detectives for eight months. In March 2005, he and Ms. Lagarde met with a Prince George's County detective, and, from a photo array, he identified Darryl King as "Dubbies," his assailant. Police arrested King, who was indicted for the attempted murder of Phillips and related charges. King pleaded not guilty to all counts.

At trial, Phillips testified on direct examination that he was shot 12 times by three assailants, one of whom was King, known to Phillips at the time as "Dubbies." He stated that he was on his cell phone with Lagarde when a black sport utility vehicle pulled into the parking lot. King exited the vehicle, announcing, "I come in peace." Phillips said he saw that King carried a handgun, so he tried to run away. King and two others began shooting at him, striking him 12 times. Phillips was impeached by the defense with a prior felony drug conviction.

Lagarde corroborated that she was on the phone with Phillips at the relevant time. She said she heard him say, "what, what," then say something about a black truck. She heard shots, and the phone went dead. After waiting for a few minutes to see if Phillips would call back, Lagarde went looking for him. She arrived at the scene as emergency responders were treating him. According to Lagarde, Phillips said to her, "ma, ma, they done



shot me. For no reason, they just shot me. They just shot me for nothing." King's counsel attempted to impeach Lagarde with evidence that she was convicted of possession with intent to distribute marijuana; however, the trial judge refused, noting that the probative value of the evidence did not outweigh the potential harm to the witness.

King was convicted on all counts and sentenced accordingly. He noted an appeal to the Court of Special Appeals, which affirmed his convictions in an unreported opinion. The Court of Appeals granted King's Petition for a Writ of Certiorari to determine whether the trial judge properly excluded the impeachment evidence of Lagarde's prior conviction. *King v. State*, 405 Md. 290, 950 A.2d 828 (2008).

Held: Reversed and remanded. Initially, the Court of Appeals reviewed the framework for determining whether evidence of a prior conviction is admissible for impeachment purposes under Maryland Rule 5-609. First, the crime must be an "infamous crime" or relevant to the witness's credibility. Second, the conviction must be less than 15 years old and not the subject of a pardon or pending appeal. Third, the probative value of the conviction must outweigh the danger of unfair prejudice to the witness or the objecting party. Only the third consideration was relevant to the Court's analysis of the case at hand.

In balancing the probative value of Lagarde's conviction against the danger of unfair prejudice to Lagarde or the State, the Court rejected the State's contention that Lagarde's testimony was not important to its case because she did not identify Phillips's shooter. The Court reasoned that Lagarde's testimony, which corroborated key aspects of Phillips' testimony, was probative in light of the unusual nature of the case. For example, Phillips testified initially that he was on the parking lot of his apartment complex, but later revealed that it was a friend's apartment. Lagarde was Phillips's fiancée. Both Phillips and Lagarde testified that they knew "Dubbies" from their social circles. Additionally, Phillips waited eight months to meet with the detectives investigating his shooting and indicated, at trial, that Lagarde assisted him in making his statement to police when he finally met with them. Accordingly, the Court concluded that impeachment evidence of a prior conviction of Lagarde was probative under the circumstances.

The Court of Appeals also observed that the potential of unfair prejudice is less in a case such as this one, where the witness to be impeached is not a criminal defendant, reasoning that jurors generally do not have incentive to disregard their

evidentiary instructions in order to see the State's case fail. Thus, the possibility that a jury might treat impeachment evidence as propensity evidence does not exist to the same degree that it does where the witness is a State's witness. Accordingly, the Court held that the trial court abused its discretion in failing to consider these points in its decision to exclude the impeachment evidence of Lagarde's prior conviction.

\*\*\*

*State of Maryland v. Christopher Carl Sullivan*, No. 64, September Term, 2008, filed March 9, 2009, opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2009/64a08.pdf>

CRIMINAL LAW - STATUTORY INTERPRETATION - MD CODE (1977, 2006 Repl. Vol.), SECTION 16-303(d) OF THE TRANSPORTATION ARTICLE

Facts: Christopher Carl Sullivan was driving on a highway in Montgomery County on the evening of August 31, 2006. Along the way, Sullivan was stopped by Montgomery County Police Officer, Darrell Furdock. Officer Furdock approached the vehicle that Sullivan was driving and requested that Sullivan produce his driver's license and registration. Sullivan responded that he had no license or registration and thus, could not produce the items. After a series of impertinent exchanges and events, Officer Furdock issued Sullivan multiple citations and had the car that he was driving towed. One of the citations that Sullivan received was for driving while his license or privilege to drive was revoked in violation of Md. Code (1977, 2006 Repl. Vol.), § 16-303(d) of the Transportation Article.

At trial, Sullivan argued that he could not be convicted under § 16-303(d) because he lacked the privilege to drive. The Circuit Court for Montgomery County disagreed, concluding that the privilege to drive is presumptive and automatic. The Circuit Court sentenced Sullivan to one year in prison with all but 30 days suspended and placed him on two years probation. The Court of Special Appeals reversed the judgment of the Circuit Court and vacated Sullivan's conviction. *Sullivan v. State*, 180 Md. App. 35, 948 A.2d 121 (2008). Noting that "neither the Transportation Article, nor Maryland case law defines 'privilege to drive'" or provides an explanation of how "privilege to drive" differs from a "license," the intermediate appellate court interpreted "privilege to drive" to refer to an exemption from the driver's license requirement as provided in Md. Code (1977, 2006 Repl. Vol.), § 16-102 of the Transportation Article.

Held: Affirmed. One is privileged to drive in Maryland if he or she is authorized to do so by law. Accordingly, it is reasonable and consistent with the statutory scheme of Title 16 of the Transportation Article, to interpret the phrase "privilege to drive" as contained in § 16-303(d), to apply to a person who is authorized to drive in this State pursuant to a valid Maryland driver's license or an exemption from the Maryland driver's license requirement. Accordingly, Sullivan's conviction for driving while his license or privilege to drive was revoked was improper because Sullivan was not privileged to drive in

Maryland.

\* \* \*

*The Maryland National Capital Park and Planning Commission v. Town of Washington Grove, Maryland*, No. 55, September Term, 2008, filed 12 March 2009, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2009/55a08.pdf>

REAL PROPERTY - EMINENT DOMAIN - INTERVENTION AS OF RIGHT - DENIAL - STANDARD OF REVIEW - DE NOVO - HOWEVER, IF DENIAL WAS FOR UNTIMELINESS, THE PROPER STANDARD OF REVIEW IS ABUSE OF DISCRETION

STANDARD OF REVIEW FOR PERMISSIVE INTERVENTION IS ABUSE OF DISCRETION

Facts: On 14 September 2001, Toll MD II, LLC ("Toll") filed an application with the Montgomery County Planning Board ("Planning Board") of the Maryland National Capital Park and Planning Commission ("MNCPPC") seeking approval of a preliminary plan of subdivision for a 66.59 acre tract of residentially-zoned land located in Montgomery County. The application was designated as Preliminary Plan No. 1-02022. On 11 July 2005, the Planning Board approved Preliminary Plan No. 1-02022, with conditions.

During the approximate four years of time between Toll's filing of the application and the Planning Board's conditional approval, negotiations occurred between Toll, the Town of Washington Grove ("Town"), and the MNCPPC, among other parties, regarding the fate of a 12 acre tract of land located within Toll's subdivision plan, referred to as the "Legacy Open Space Parcel" ("LOS Parcel"), which lies immediately adjacent to a municipal border of the Town. The LOS Parcel was valued significantly by the Town in particular because its "preservation . . . would preserve a rural viewscape on the last remaining unprotected side of the Town." To best accommodate the interests of the parties involved, the Planning Board's 11 July 2005 preliminary plan of approval included Condition 15, which required Toll to dedicate the LOS Parcel to the MNCPPC, within the earlier of 24 months or recordation of the initial plat of Phase I of the project.

Believing that only its ownership of the LOS Parcel would protect adequately its interests, on 6 September 2005, the Town adopted municipal Resolution No. 2005-06 authorizing the institution of an eminent domain action by the Town in the Circuit Court for Montgomery County to acquire the LOS Parcel. On 2 December 2005, the Town filed its complaint.

The complaint named Toll as the sole defendant and fee simple owner of the LOS Parcel. On 9 February 2006, Toll responded to the Town's action by filing a third-party complaint naming the MNCPPC as a third-party defendant. On 30 March 2006, the MNCPPC filed its answer to Toll's third-party complaint. Thereafter, the MNCPPC participated broadly and actively in the proceedings in the Circuit Court in answering and opposing the Town's condemnation action as beyond the Town's legal authority and in conflict with the MNCPPC's authority as a park and planning agency of the State, with complaint by the Town.

Meanwhile, while the litigation in the Circuit Court spiraled on, Toll continued to work towards approval of a final plat of subdivision to complete the initial phase of the development. On 19 April 2007, Toll sought to comply effectively with Condition 15 in the preliminary plan approval by "conveying" the LOS Parcel to the MNCPPC in a "Deed of Dedication." The Deed, however, contained an automatic unwind provision, which specified that the dedication would terminate automatically, and ownership of the LOS Parcel would revert back to Toll, if Toll's preliminary plan expired or if Toll was unable to obtain approval of the site plan for Phase I in "substantial accordance" with the preliminary plan of subdivision on or before 30 September 2007.

Prior to Toll's execution and delivery of the Deed, on 29 and 31 January 2007, respectively, the Town and the MNCPPC filed cross-motions for summary judgment in the Circuit Court. On 6 September 2007, the Circuit Court granted partial summary judgment in favor of the Town. The Circuit Court found that Maryland statutes and case law supported the Town's legal ability to condemn property beyond its municipal boundaries, and that the Town's condemnation action did not conflict with the MNCPPC's powers under Md. Code, Art. 28 (1957, 2003 Repl. Vol. & Supp. 2008). Thus, the Circuit Court found that the Town could move forward with a jury trial to determine valuation and complete its eminent domain action.

Although the MNCPPC participated extensively in the proceedings in the Circuit Court, the MNCPPC was never formally recognized as a legal party in the Town's condemnation action. Therefore, on 5 October 2007, the MNCPPC filed a formal motion to intervene and a motion for clarification and reconsideration of the partial summary judgment in favor of the Town. By an Order dated 4 December 2007, and entered 5 December 2007, the Circuit

Court denied the motions, without a hearing or further elaboration of reasons. On 2 January 2008, the MNCPPC filed a notice of appeal to the Court of Special Appeals, seeking review of the denial of its motion to intervene, and a motion to stay the condemnation proceedings in the Circuit Court. The Court of Special Appeals granted a stay. On 3 July 2008, the Town filed a Petition for Writ of Certiorari with this Court seeking review of the Court of Special Appeals's order staying the proceedings in the Circuit Court. The MNCPPC also sought certiorari with this Court seeking review of the denial of its motion to intervene. We granted certiorari upon the parties' petitions, and left in place the stay entered by the Court of Special Appeals pending resolution of the appeal. *Park & Planning v. Wash. Grove*, 405 Md. 348, 952 A.2d 224 (Table) (2008).

Held: Judgment of the Circuit Court denying the MNCPPC's motion to intervene reversed. Maryland Rule 2-214, which governs intervention, contains four requirements a person must satisfy in order to intervene as of right: 1) the application was timely; 2) the person claims an interest relating to the property or transaction that is the subject of the action; 3) the person is so situated that the disposition of the action, as a practical matter, may impair or impede that person's ability to protect that interest; and 4) the person's interest is not adequately represented by existing parties to the suit. Md. Rule 2-214(a); see, e.g., *Chapman v. Kamara*, 356 Md. 426, 443, 739 A.2d 387, 396 (1999).

As for reviewing the Circuit Court's denial of the MNCPPC's motion to intervene as of right, the Court noted that the full range of standards of review for rulings on motions to intervene under Maryland Rule 2-214 had yet to be articulated in Maryland. In *Montgomery County v. Ian Corp.*, 282 Md. 459, 385 A.2d 80 (1978), the Court appeared to announce that it adopted the standard laid down by the Supreme Court in *NAACP v. New York*, 413 U.S. 345 (1973) as the proper standard to be applied. In *NAACP*, however, the Supreme Court acknowledged explicitly that it addressed only the proper standard of review for such rulings based on timeliness—abuse of discretion. See *NAACP v. New York*, 413 U.S. at 369. Thus, the Court of Appeals, noting the preference to interpret Maryland Rule 2-214 in accordance with federal case law under the analogous Federal Rule of Civil Procedure 24, adopted the standard of review found in the majority of federal case law for the remaining factors for motions to intervene as of right—review under a non-deferential standard. The Court found that this standard was mostly in accordance with the prior appellate decisions of Maryland under Maryland Rule 2-214.

Applying these requirements to the present case, the Court found that the MNCPPC is entitled to intervene as a matter of right under Md. Rule 2-214. As for timeliness, the Court found that although the MNCPPC did not file its motion to intervene until after the Circuit Court's summary judgment ruling, the MNCPPC's prior substantial participation in the litigation and the Town's lack of objection to that participation until the formal motion to intervene was filed, combined with the unusual procedural posture of the case, effectively moot any concern of unfair prejudice or delay in the MNCPPC's further participation in the condemnation matter. Thus, the trial court's denial of the MNCPPC's motion, to the extent based on timeliness, amounted to an abuse of discretion.

As for the MNCPPC having a sufficient interest relating to the LOS Parcel in the Town's condemnation action, the Court found that despite the automatic "unwind" provision in the Deed of Dedication, because Condition 15, the condition requiring Toll to dedicate the LOS Parcel to the MNCPPC, was the product of some four years of negotiations over the fate of the LOS Parcel, including participation by the Town, the MNCPPC had, at the least, a reasonable expectation that Toll would comply with the Condition and dedicate the land to the MNCPPC. The Court noted that the "unwind" provision was essentially a protection on Toll's part against Toll dedicating the LOS Parcel to the MNCPPC without subsequently having its development plan approved by the Planning Board, whereby Toll thus would relinquish ownership of the Parcel without the intended benefit of being able to move forward with its development plans. Based on the circumstances and the unique procedural posture of the case, the Court found, under a non-deferential standard of review, that the MNCPPC "claims an interest relating to the property or transaction that is the subject of the action." The Town also advanced the argument that the doctrine of *lis pendens* is applicable to its condemnation action, and that the doctrine bars the MNCPPC's participation in the condemnation action because the action was filed before Toll executed the Deed of Dedication with the MNCPPC. The Court agreed with the Town that the doctrine of *lis pendens* applies, but concluded that the doctrine only creates the opportunity for the Town to have an equity relating back to the filing of its condemnation action.

Further, the Court found that the MNCPPC's inability to participate in the Town's condemnation action, as a practical matter, would impair or impede the MNCPPC's ability to protect the interest it was asserting in the LOS Parcel. The Town's condemnation action, if successful, would divest Toll (or the MNCPPC) outright of any ownership interest in the LOS Parcel.



The Court noted that because the Town participated in the planning negotiations and did not object to the Planning Board's imposition of Condition 15 on Toll, the MNCPPC's participation in the Town's condemnation action is proper because it well could be the only forum through which the MNCPPC could protect its interest in the LOS Parcel. Finally, the Court found that although both Toll and the MNCPPC had reason to oppose the Town's action, Toll's opposition was comparatively limited because the Town's action would only affect Toll by frustrating the developer's ability to follow through with its development plans. As the parties' positions in the Circuit Court indicated, the MNCPPC was the driving force in challenging the Town's legal authority to condemn the property as beyond its municipal powers and/or in conflict with the MNCPPC's authority as a planning agency of the State. Accordingly, the Court reversed the trial court's denial of the MNCPPC's motion to intervene, lifted the stay entered by the Court of Special Appeals, and remanded the case to the trial court for further proceedings.

\*\*\*

# COURT OF SPECIAL APPEALS

*Timothy A. Frey, et al. v. Comptroller of the Treasury*, No. 1360, September Term, 2007, filed February 26, 2009. Opinion by Karwacki, R. (Retired, specially assigned).

<http://mdcourts.gov/opinions/cosa/2009/1360s07.pdf>

CONSTITUTIONAL LAW - COMMERCE CLAUSE - EQUAL PROTECTION CLAUSE - PRIVILEGES AND IMMUNITIES CLAUSE

STATUTORY CONSTRUCTION - TAX COURT - ABATEMENT OF INTEREST

Facts: In 2004, David S. Antzis and Judith W. Antzis, Timothy A. Frey and Mary S. Frey, and Rudolph Garcia and Randi E. Pastor-Garcia, three married couples, collectively appellants, resided in the Commonwealth of Pennsylvania and paid Pennsylvania income taxes and various local taxes to its subdivisions. They did not own property in the State of Maryland, but each couple filed a joint nonresident income tax return in Maryland because the husband was a partner in Saul Ewing, LLP, a multi-state law firm with offices in Maryland, Pennsylvania, Delaware, Washington, D.C., New York, and New Jersey.

Also in 2004, the General Assembly enacted a Special Nonresident Tax ("SNRT"), which applied to all taxable years beginning after December 31, 2003. 2004 Md. Laws 1915, 1928. The SNRT was imposed on an individual subject to Maryland State income tax, but not subject to the county or local income tax. Md. Code (2004), §10-106.1(a) of the Tax General Article ("T.G."). The tax rate of the SNRT "shall be equal to the lowest county income tax rate set by any Maryland county[.]" T.G. § 10-106.1(b).

In July 2005, the Maryland Comptroller of the Treasury, appellee, issued Notices of Income Tax Assessment to each of appellants with respect to their joint Maryland Nonresident Tax Returns for the year ended December 31, 2004 because each had failed to pay the amount required by the SNRT.

Following an informal hearing before a hearing officer, appellants each received a Notice of Final Determination assessing them for failure to calculate the SNRT on their tax returns. Appellants were also assessed penalties and interest. They appealed to the Maryland Tax Court, which concluded that although the SNRT violated the Commerce Clause of the United

States Constitution because it discriminated against nonresidents, it was a valid compensatory tax under *Fulton Corp. v. Faulkner*, 516 U.S. 235 (1996). The Tax Court also found that the SNRT did not violate the Equal Protection Clause of the United States Constitution, the Privileges and Immunities Clause of the United States Constitution, or the Maryland Constitution and the Declaration of Rights. The Tax Court abated the penalties assessed against appellants, but concluded that it did not have the authority to abate interest.

Appellants petitioned for judicial review in the Circuit Court for Anne Arundel County. The circuit court affirmed the assessment of the SNRT against appellants, but remanded the case to the Tax Court for consideration of abatement of interest.

Appellants filed an appeal to the Court of Special Appeals and the Comptroller noted a cross-appeal.

Held: Affirmed, in part, and reversed, in part. Case remanded to the Tax Court for consideration of the Abatement of Interest.

The SNRT does not violate the Commerce Clause of the United State Constitution because it is a valid compensatory tax, that is, it compensates for the county tax, T.G. § 10-103(a), imposed upon Maryland residents. The SNRT does not violate the Privileges and Immunities Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, or the Maryland Constitution and Declaration of Rights because it places nonresidents and residents on equal footing. The SNRT does not require nonresidents to pay more Maryland income tax than nonresidents and does not impose a higher Maryland State income tax rate on nonresidents.

The Tax Court has authority to abate interest because: (1) T.G. § 13-501(a)(1) allows for an appeal to the Tax Court from "a final assessment of tax, interest, or penalty..."; (2) T.G. § 3-103(a)(4) grants the Tax Court jurisdiction to hear appeals concerning "the application for an abatement, reduction, or revision of any assessment or tax..."; and (3) T.G. § 13-528(a) gives the Tax Court power to "reassess or reclassify, abate, modify, change or alter any valuation, assessment, classification, tax or final order appealed to the Tax Court."

\*\*\*

*Ronald Sparkman v. State of Maryland, No. 1196, September Term, 2007.* Opinion filed on March 26, 2009 by Hollander, J.

<http://mdcourts.gov/opinions/cosa/2009/1196s07.pdf>

CRIMINAL LAW - FOURTH AMENDMENT - PRETRIAL DETENTION = PRISON MAIL

Facts: Ronald Sparkman, appellant, was charged with the murder of Ralph "Wes" Pritchett, who was shot to death in Baltimore City on January 14, 2005. Following a trial in May 2007, a jury sitting in the Circuit Court for Baltimore City convicted Sparkman of first-degree murder, as well as use of a handgun in a crime of violence, and wearing or carrying a handgun.

Prior to trial, Sparkman unsuccessfully moved to suppress a letter purportedly written by him while he was in pretrial custody. The letter was sent from jail, but it was seized when it was returned to the institution with a label marked "RETURN TO SENDER," "INSUFFICIENT ADDRESS," and "UNABLE TO FORWARD."

Corporal Monique Mitchell, a correctional officer in the Intelligence Unit of the Division of Pretrial Detention, Maryland Department of Public Safety and Correctional Services, was the sole witness at the suppression hearing. She testified that on June 25, 2006, Mitchell received an envelope from the mailroom at the Baltimore City Detention Center, addressed to Tamira Sparkman. The envelope contained a yellow label, apparently applied by the U.S. Postal Service, stating "RETURN TO SENDER," "INSUFFICIENT ADDRESS," and "UNABLE TO FORWARD." The return address on the letter included appellant's name, his inmate number, and the address of the detention center.

Mitchell opened the envelope. It contained two sheets of lined, letter-sized paper, which were folded repeatedly. It also contained a separate sheet of paper, which was also folded, with a photograph inside of it. The separate sheet appeared to be a copy of an autopsy photograph, which Mitchell found "suspicious" and "not ordinary mail." She then opened the lined sheets and saw a handwritten letter. At the bottom of the second page she saw the following sentence: "1 picture is of my victim & the other 1 is my mother!" The letter also contained the statement: "I went to prison at a young age & back I am." Because Mitchell

thought that the envelope's contents indicated "some kind of criminal activity," she did not return it to appellant (which she normally would have done, having found no contraband). Instead, it went to the detective assigned to this case.

When asked why she opened the mail, Mitchell said: "Because it was return to sender" and "the thickness of the envelope . . . it could be something inside the envelope." Mitchell explained that the institution's policy provided for the opening and perusal of all "suspicious" mail, and the thickness of the envelope prompted her suspicion that it might contain contraband. Mitchell added that she had to unfold the papers because they could have contained drugs. In addition, Mitchell stated that incoming mail is inspected for contraband and, as a matter of policy, "all return to sender mail" is opened, as it is regarded as "incoming mail." According to Mitchell, inmates sometimes attempt to circumvent the policy barring inmate-to-inmate correspondence by sending a letter to a bogus address and writing the other inmate's name as the return addressee.

The circuit court denied the motion. It said, in part:

The Court believes and holds that it was proper for the corporal to inspect the letter. There is no question that the Court of Appeals has held that there is no absolute right of expectation, but rather diminished right of expectation [of privacy] pursuant to Fourth Amendment. And that the rule indicated that the institution has to be reasonable. This was a returned letter, therefore, mak[ing] it incoming mail. The rules in the institution are that any incoming mail that is believed that there is a reasonable suspicion that may involve public safety, there inside the institution or inside or out of the institution, may be inspected. . . . Once she opens the envelope and saw a picture, an autopsy picture, this Court holds that she then had the authority then, based on that suspicion  
. . . .

Held: Affirmed. The Fourth Amendment rights of appellant, a pretrial detainee, were not violated when a correctional officer opened and read a letter purportedly written by him, which had been returned to the institution in an envelope marked "Return to Sender." The conduct of the correctional officer was justified

by legitimate security concerns of the institution and a detainee's diminished right to privacy under the Fourth Amendment.

\* \* \*

*Johnson v. Johnson*, No. 126, September Term, 2008, filed March 10, 2009. Opinion by Matricciani, J.

ESTATES AND TRUSTS - INTER VIVOS TRUSTS - ACCOUNTINGS

Facts: Husband and wife established an inter vivos trust (the Trust) for estate planning purposes. The Trust made the couple the first trustors and co-trustees. Upon the death of husband or wife, the Trust provided that the trust estate be divided in to a revocable Trust A and an irrevocable Trust B. After the death of husband, husband's son, appellant, possessed a future interest in the proceeds of the Trust and twice requested an accounting of the Trust from wife. Wife refused to provide an accounting. Appellant filed a Petition for Court Assumption of Jurisdiction of a Trust and Related Relief in the Circuit Court for Calvert County asking the court to order wife to provide an accounting. The circuit court granted his request and ordered wife to provide an accounting. Wife appealed asserting two arguments that the circuit court erred. First, wife argued that appellant did not have an interest in the Trust and thus, was not entitled to an accounting, and second, that language in the Trust eliminated her duty to provide accountings.

Held: Affirmed. A beneficiary is entitled to an accounting from the trustee, despite having only a future interest in the Trust. A trustor cannot circumscribe trustee's duty to provide an accounting to beneficiaries through limiting language in the Trust. The circuit court, therefore, did not err in ordering trustee to provide an accounting to beneficiary.

\*\*\*

# ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated March 11, 2009, the following attorney has been removed from the list maintained in this Court of non-admitted attorneys who are ineligible to practice in this State:

ROBERT SILVERMAN

\*

By an Order of the Court of Appeals of Maryland dated March 11, 2009, the following attorney has been removed from the list maintained in this Court of non-admitted attorneys who are ineligible to practice in this State:

CRAIG KIMMEL

\*

By an Order of the Court of Appeals of Maryland dated March 17, 2009, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

JOSE EXPEDITO GARCIA

\*

By an Opinion and Order of the Court of Appeals of Maryland dated March 18, 2009, the following attorney has been disbarred from the further practice of law in this State:

CHARLES M. SHRYOCK, III

\*

By an Order of the Court of Appeals of Maryland dated March 23, 2009, the following attorney has been disbarred by consent from the further practice of law in this State:

BRADLEY DAVID SCHWARTZ

\*



# JUDICIAL APPOINTMENTS

On February 5, 2009, the Governor announced the appointment of MASTER GREGORY SAMPSON to the Circuit Court for Baltimore City. Judge Sampson was sworn in on March 4, 2009 and fills the vacancy created by the retirement of the Hon. Charlotte M. Cooksey.

\*

On February 5, 2009, the Governor announced the appointment of LAWRENCE FLETCHER-HILL to the Circuit Court for Baltimore City. Judge Fletcher-Hill was sworn in on March 6, 2009 and fills the vacancy created by the Hon. Carol E. Smith.

\*

On January 7, 2009 the Governor announced the appointment of RICHARD EVAN JORDAN to the Circuit Court for Montgomery County. Judge Jordan was sworn in on March 13, 2009 and fills the vacancy created by the retirement of the Hon. S. Michael Pincus.

\*