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# COURT OF APPEALS

*Attorney Grievance Commission of Maryland v. David Moore Thomas*, Misc. Docket AG No. 6, September Term, 2008, filed 10 June, 2009, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2009/6a08ag.pdf>

ATTORNEY DISCIPLINE - DISBARMENT IS APPROPRIATE SANCTION FOR VIOLATIONS OF MRPC 1.15 (SAFEKEEPING PROPERTY) AND 8.4(b) AND 8.4(c) (MISCONDUCT), BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE §§ 10-304, 10-306, AND 10-307, AND MARYLAND RULES 16-607 AND 16-609, WHERE ATTORNEY COMMINGLED FEES WITH CLIENT TRUST FUNDS IN ATTORNEY TRUST ACCOUNT; WITHDREW FUNDS FROM TRUST ACCOUNT FOR CLIENTS WHO CONTRIBUTED SUBSTANTIALLY LESS, OR NOT AT ALL, TO TRUST ACCOUNT; AND WITHDREW FUNDS REQUIRED TO BE HELD IN TRUST FOR OTHER CLIENT, I.E., CONSTITUTED INTENTIONAL MISAPPROPRIATIONS

Facts: The Attorney Grievance Commission of Maryland ("Petitioner"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against David Moore Thomas ("Respondent" or "Thomas") charging him with numerous violations stemming largely from Respondent's mishandling of his trust account over many years. Petitioner charged Respondent with violation of Maryland Lawyers' Rules of Professional Conduct ("MRPC") 1.15 (Safekeeping Property) and 8.4(a - d) (Misconduct); Md. Code (2004 Repl. Vol. & 2008 Supp.), Business Occupations & Professions Art. §§ 10-304, 10-306, and 10-307; and Maryland Rules 16-604, 16-607, and 16-609.

The hearing judge held an evidentiary hearing and issued written findings of fact and conclusions of law. At the evidentiary hearing, Thomas testified that when he left his former law firm employer to begin his solo law practice, he had learned from the law firm that, in handling funds for an attorney trust account, it was best to "build a cushion" of earned fees in the account in the early years so that he could write settlement checks to clients as soon as possible out of the "cushion," without having to wait for the settlement check for the particular client to clear. Most of the alleged violations with which Thomas was charged stemmed from his handling of client funds under this belief.

The hearing judge found that, although Thomas testified that he allowed earned attorney's fees to remain in the trust account in the "early years" of his practice in order to build the

"cushion," Thomas presented no evidence of: the amount of money he deferred in fees in order to form his "cushion"; the amount of the "cushion" at any point in time; the duration of his practice of deferring the withdrawal of fees in order to form the "cushion"; or how frequently he deferred taking a fee in order to form or maintain the "cushion." Thomas retained the services of an accountant to reconcile his trust account from its creation in 1989 until 1993 or 1994. For reasons not made clear, Thomas terminated the services of the accountant before a reconciliation could be achieved. In 2003, Thomas retained the services of a second accountant to reconcile the account. The second accountant was unable to tell Thomas which funds, if any, contained in the account at that time belonged to Thomas. Thomas terminated the services of the second accountant in 2003 and took no further action to reconcile the account. The hearing judge found that Thomas' failure to maintain proper records for his trust account contributed directly to his inability to reconcile his account.

The hearing judge also found that, on two separate occasions in January 2007, Thomas engaged in transactions resulting in negative balances in his attorney trust account. Thomas attempted to withdraw funds on both occasions in excess of the funds available in the account.

In addition, the hearing judge found that, on at least ten occasions, Thomas withdrew funds from his attorney trust account as fees earned from four clients who contributed either significantly less, or not at all, to Thomas' trust account in the amounts withdrawn. For one specific client, between 13 January 2006 and 30 March 2007, Thomas withdrew \$28,512.37 as fees earned or expenses allegedly incurred for that client, despite the fact that no deposits had been made into his attorney trust account for that client during the same time period. One of the withdrawals Thomas made for that client during this period, a \$9,000 check, resulted in Thomas' trust account balance becoming \$1,148.23, whereas, at the time of the withdrawal, he was supposed to be holding \$2,657.02 in his trust account for the benefit of another client.

On no less than nine separate occasions, Thomas disbursed funds to himself from his attorney trust account, ostensibly as fees earned from clients, before the settlement funds for those clients' claims were received and deposited into the trust account.

The hearing judge found that, for two other clients, Thomas disbursed more funds to himself from his attorney trust account

than were deposited in the account on behalf of those clients.

For one client from whom Thomas received a retainer, Thomas placed the entire retainer into his general operating account, instead of his trust account, despite the fact that Thomas had not earned yet the entire retainer fee.

Based on the findings of fact, the hearing judge concluded that: Thomas violated MRPC 1.15(a) and Maryland Rule 16-607 by failing to withdraw earned fees from his attorney trust account when they became earned, thereby commingling client funds with his own, and by failing to maintain adequate records for his trust account; by engaging in transactions resulting in a negative balance in his trust account, he violated Maryland Rule 16-609; by withdrawing funds from his trust account as fees earned for clients who contributed significantly less, or not at all, to the trust account, Thomas violated MRPC 1.15(c), 8.4 (b) and 8.4(c), Maryland Rule 16-609, and Business Occupations and Professions Article § 10-306 and 10-307; by withdrawing funds from his trust account before they became earned for those clients, and by withdrawing funds as fees earned for clients in excess of the funds deposited in the trust account by those clients, respectively, Thomas violated MRPC 1.15(a) and Business Occupations and Professions Article § 10-306; and, finally, by depositing the entire retainer into his general operating account, before the entire retainer was earned, Thomas violated MRPC 1.15(a), and Business Occupations and Professions Article §§ 10-304 and 10-306.

Thomas offered to the hearing judge three grounds of mitigation for his misconduct. First, he alleged that he lacked an understanding of the regulatory requirements regarding attorney trust accounts as imposed by the pertinent rules and statutes. The hearing judge rejected this allegation, finding that Thomas' availing of the accountants on two occasions showed an understanding on his part that his trust account needed to be reconciled, and that Thomas' dismissal of the accountants, after being advised that his account was not able to be reconciled, combined with Thomas' lack of action thereafter until Bar Counsel became involved, undermined Thomas' allegation of a lack of understanding. Second, Thomas alleged that, at the times relevant to his misconduct, he was suffering from mental health problems. The hearing judge rejected this allegation, finding that, at all relevant times, Thomas had proven himself to be more than capable of managing his personal and professional affairs, which included his attendance at all court appearances, paying mortgages on two properties and taxes on four properties, the lack of any competency complaints against him, and his

involvement in numerous social and fraternal clubs. Third, Thomas pointed to the retirement of his long-time administrative assistant and difficulty in securing a replacement. The hearing judge rejected this as mitigation, finding that the assistant was not responsible for Thomas' handling of his trust account.

Thomas took exceptions to the hearing judge's findings of fact and conclusions of law. Thomas excepted to the finding that his practice of commingling funds in order to "build a cushion" was limited to the "early days" of his sole practice. Thomas also excepted to the legal conclusions that he violated MRPC 8.4(b) and (c) and Business Occupations and Professions Art. §§ 10-306 and 10-307 on the grounds that any violations of those sections or rules were not willful. Thomas took the position that, with the one exception when he withdrew amounts in excess of those required to be in his attorney trust account, he "never invaded client[] funds" and made withdrawals always under the belief that the funds being withdrawn were previously earned fees that he left in the account.

Held: Exceptions overruled. Disbarment is the proper sanction. The Court overruled Thomas exceptions' with regards to all of the hearing judge's conclusions of law, with the exception of the conclusion that Thomas violated Business Occupations and Professions Article § 10-306 for certain conduct.

The Court concluded that, in failing to remove his earned fees promptly from his attorney trust account, Thomas fostered the situation and violated both MRPC 1.15(a), requiring a client's property to be kept separate from the lawyer's property, and Maryland Rule 16-607(b)(2), requiring an attorney to withdraw promptly earned fees from her or his attorney trust account.

The Court concluded that Thomas engaged in conduct in violation of Maryland Rule 16-609 by withdrawing funds from his attorney trust account for an unauthorized purpose.

The Court overruled Thomas' flagship exception that Thomas subjectively believed he was entitled to the funds he withdrew from his attorney trust account because the funds he withdrew previously were earned fees he had left in the account to "build a cushion." The Court found that his attribution of the withdrawn funds to later clients who deposited significantly less than the amounts withdrawn pushed Thomas' conduct across the willfulness threshold for purposes of Business Occupations and Professions Art. § 10-307. Therefore, based on this conduct, the Court concluded that Thomas' conduct violated §§ 10-306 and 10-307. Further, the Court found that this conduct also violated

MRPC 8.4(b) and 8.4(c). For MRPC 8.4(b), which provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," the Court noted that Business Occupations and Professions Article § 10-606(b) provides a criminal penalty for willful violations of the pertinent sections of the Business Occupations and Professions Article. Under the authority of *Attorney Grievance Commission v. Nussbaum*, 401 Md. 612, 934 A.2d 1 (2007), Thomas' willful violation of § 10-306 supported a finding of a violation of MRPC 8.4(b). The Court found that Thomas' intentional misrepresentations that he had earned the funds withdrawn for clients who did not contribute those funds also violated MRPC 8.4(c)'s prohibition against attorneys "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."

The Court agreed with the hearing judge's conclusions of law, with the exception that the Court concluded that the alleged conduct was insufficient to sustain a violation of Business Occupations and Professions Article § 10-306. The Court also agreed with the hearing judge's rejection of Thomas' alleged grounds for mitigation, concluding that Thomas failed to prove any mitigation by a preponderance of the evidence.

The proper sanction was disbarment. Citing *Attorney Grievance Commission v. Zdravkovich*, 381 Md. 680, 852 A.2d 82 (2004), the Court noted that, although the hearing judge in the present case found that no client suffered a loss, the Court articulated that intentional misappropriation of client funds will warrant the most severe of penalties. Two notable considerations compelled the Court to conclude that Thomas' misconduct amounted to serious violations. The first was Thomas' repetition in attributing the funds he withdrew from his trust account as earned fees to clients who did not contribute those funds, which on at least one occasion resulted in Thomas invading trust funds required to be held for another client. The second was Thomas' failure to take remedial action and the continuation of his deceitful practices (until Bar Counsel became involved), even after being advised by the second accountant he employed that his trust account was beyond reconciliation.

*State Security Check Cashing, Inc. v. American General Financial Services (DE) a/k/a American General Financial Services, Inc., No. 105, September Term, 2008, filed 9 June 2009, Opinion by Harrell, J.*

<http://mdcourts.gov/opinions/coa/2009/105a08.pdf>

COMMERCIAL LAW - HOLDER IN DUE COURSE - CHECK CASHING BUSINESS IS HOLDER IN DUE COURSE OF CHECK CASHED UNDER MD. CODE, COMMERCIAL LAW ART. § 3-302 BECAUSE THE INSTRUMENT, WHEN NEGOTIATED, DID NOT BEAR APPARENT EVIDENCE OF FORGERY OR ALTERATION AND BECAUSE THE BUSINESS TOOK THE INSTRUMENT: 1) FOR VALUE; 2) IN GOOD FAITH; 3) WITHOUT NOTICE THAT INSTRUMENT WAS OVERDUE OR HAD BEEN DISHONORED; 4) WITHOUT NOTICE THAT THE INSTRUMENT CONTAINED AN UNAUTHORIZED SIGNATURE OR WAS ALTERED; 5) WITHOUT NOTICE OF ANY CLAIM TO THE INSTRUMENT DESCRIBED IN § 3-306; AND 6) WITHOUT NOTICE THAT ANY PARTY HAD A DEFENSE OR CLAIM IN RECOUPMENT AS DESCRIBED IN § 3-305(a).

COMMERCIAL LAW - IMPOSTER RULE OF COMMERCIAL LAW ART. § 3-404 - ORDINARY CARE IN PAYING OR TAKING AN INSTRUMENT - CHECK CASHING BUSINESS DID NOT FAIL TO EXERCISE ORDINARY CARE IN CASHING CHECK ISSUED BY FINANCIAL COMPANY (ISSUER) AS PROCEEDS OF A VALID LOAN BECAUSE CHECK CASHING BUSINESS EXAMINED THE SAME DRIVER'S LICENSE IDENTIFICATION THAT ISSUER RELIED ON, AND EXAMINED LOAN DOCUMENTS ISSUED BY FINANCIAL COMPANY TO IMPOSTER VERIFYING THE PERSONAL INFORMATION IMPOSTER SUBMITTED PREVIOUSLY TO THE ISSUER

Facts: On 20 June 2007, American General Financial Services, Inc., ("American General") was contacted by telephone by a man, later revealed to be an imposter posing as Ronald E. Wilder. The imposter sought a \$20,000.00 loan. Based on the information supplied by him over the telephone, American General ran a credit check on Ronald E. Wilder, finding his credit to be excellent. American General informed the imposter that it would need Wilder's personal tax returns for the prior two years, and asked him what he intended to do with the proceeds of the desired loan. The imposter sent by electronic facsimile to American General the requested tax returns of Mr. Wilder and explained that he wanted the loan to renovate a property he owned. On Friday, 22 June 2007, American General's District Manager received the completed loan application and tax returns, performed a cash flow analysis, and obtained approval from senior management for an \$18,000.00 loan.

On that same morning, American General informed the imposter that the loan was approved. The imposter appeared at noon at American General's Security Boulevard office in Baltimore County.



He proffered an apparent Maryland driver's license bearing Mr. Wilder's personal information and the imposter's photograph. He remained in the loan office for approximately thirty minutes, meeting with the branch manager and a customer account specialist during the loan closing. After all the loan documents were signed, American General issued to the imposter a loan check for \$18,000.00, drawn on Wachovia Bank, N.A., and payable to Ronald E. Wilder.

Later that afternoon, the imposter presented the check to State Security Check Cashing, Inc. ("State Security"), a check cashing business. At the time the imposter appeared in State Security's office, also on Security Boulevard in Baltimore County, only one employee was on duty, Wanda Decker. Decker considered the same driver's license that the imposter presented to American General, and reviewed the American General loan documents leading to issuance of the check. She also compared the check to other Wachovia checks issued by American General which had been cashed previously by State Security. Deeming the amount of the check relatively "large," Decker called Joel Deutsch, State Security's compliance officer, to confirm that she had taken the proper steps in verifying the check. Deutsch directed Decker to verify the date of the check, the name of the payee on the check, the address of the licensee, the supporting loan paperwork, and whether the check matched other checks in State Security's system from the issuer. Decker confirmed the results of all of these steps, and, upon Deutsch's approval, cashed the check, on behalf of State Security, for the imposter for a fee of 3-5% of the face value of the check.

On Monday, 25 June, the next business day after the imposter negotiated the check at State Security, the real Ronald E. Wilder appeared at the offices of American General indicating that he had been notified by the U.S. Secret Service that a person applied for a loan in his name. At that time, the true Ronald E. Wilder completed an Affidavit of Forgery. As a result of the Affidavit, Thurman Toland, the Branch Manager of American General's Security Boulevard branch, called Wachovia Bank to determine whether the \$18,000.00 check had been presented for payment. Learning that the check had not been presented yet, Toland placed a "stop payment" on the check.

State Security filed a civil claim in the District Court of Maryland, sitting in Baltimore County, against American General for the face value of the check, plus interest, asserting that it was a holder in due course of American General's check, that it received the check in good faith, without knowledge of fraud, and that it gave value for the check. On 3 December 2007, the

District Court conducted a bench trial. The District Court concluded that, under Md. Code, Commercial Law Art. § 3-404(d), State Security had not exercised ordinary care in paying the imposter's check, and that its failure to exercise ordinary care contributed substantially to the loss. State Security appealed to the Circuit Court for Baltimore County. A hearing was held on 24 July 2008, based on the record made in the District Court. On 8 August 2008, the Circuit Court issued its Memorandum Opinion and Order affirming the judgment of the District Court.

State Security pressed on. It filed a writ of certiorari with the Court of Appeals, pursuant to Md. Code, Courts and Judicial Proceedings Art. §§ 12-305 and 12-307 (2006 Repl. Vol. & Supp. 2008), seeking review of the Circuit Court's judgment. The Court granted a writ of certiorari. *State Sec. v. Am. Gen.*, 406 Md. 443, 959 A.2d 793 (2008).

Held: Judgment reversed. In the District Court and the Circuit Court, State Security argued that, under Md. Code, Commercial Law Art. § 3-302, it was a holder in due course of the check issued by American General. Neither the District Court nor the Circuit Court, however, resolved that claim in reaching their respective judgments. In order to resolve the rights of the parties, the Court found it necessary to address State Security's § 3-302 claim.

The Court concluded that, under § 3-302, State Security was a holder in due course of the check. State Security alleged that all of the § 3-302 requirements were satisfied for it to be considered a holder in due course, and American General disputed State Security's allegations as to only one of the prerequisites—the good faith requirement. Thus, the Court focused on the good faith requirement of Title 3 of the Commercial Law Article.

The definition of "good faith," for the purposes of Title 3 of the Commercial Law Article, is found in Commercial Law Article § 3-103(a)(4): "'Good faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing." Md. Code, Com. Law Art. § 3-103. The Court concluded that, under the circumstances of this case, State Security's conduct satisfied the statutory "good faith" requirement. The Court based this conclusion on the fact that State Security took the check, which was issued by American General to the imposter in person, and relied on much of the same documentation and/or identification that American General had relied on in giving the imposter the loan proceeds check in the first place. The Court

found significant that the check presented in this case was a legitimate check drawn by American General, a financial institution, for two reasons: the check itself was more likely to be valid, including the drawer's signature, as confirmed by State Security's comparing it to prior American General checks it had cashed; and the payee of the check was more likely to have been subjected to an examination of her or his personal identification, credit-worthiness, and purpose for taking out the loan, as confirmed by State Security's review of the driver's license presented and the loan documents before cashing the check. The Court concluded that American General's allegation, that State Security did not take the check in good faith, seemed anomalous when State Security relied on the same document for personal identification, as well as the loan documents that American General generated in issuing the check to the imposter, when cashing the check.

The Court then examined the lower courts' reasoning that State Security's cashing the check constituted a failure to exercise ordinary care. Section 3-404(d) provides:

(d) With respect to an instrument to which subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

The Court concluded that the lower courts erred in finding that State Security's actions lacked ordinary care. The definition of "ordinary care" for the purposes of § 3-404(d) is found in § 3-103(a)(7): "observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." The Court noted that American General failed to present sufficient evidence reflecting upon State Security's conduct on the day in question and, more generally, upon State Security's general business procedures in the check cashing business. More significantly, the Court found that the trial court's ruling in favor of American General is contrary to the position emphasized in Official Comment 3 of § 3-404, which provides that "[i]f a check payable to an impostor . . . is paid, the effect of

subsections (a) and (b) is to place the loss on the drawer of the check rather than on the drawee or the Depository Bank that took the check for collection."

*Board of Education of Baltimore County v. Mireille Zimmer-Rubert*, No. 69, September Term 2008, filed June 11, 2009, opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2009/69a08.pdf>

CONSTITUTIONAL LAW – SOVEREIGN IMMUNITY – ELEVENTH AMENDMENT – MD CODE (1974, 2006 REPL. VOL.), §5-518(c) OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE WAIVES THE GOVERNMENTAL IMMUNITY OF A COUNTY BOARD OF EDUCATION, INCLUDING THE IMMUNITY GUARANTEED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS TO ALL CLAIMS IN THE AMOUNT OF \$100,000 OR LESS.

Facts: Mireille Zimmer-Rubert applied for a teaching position in the Baltimore County public schools. Upon learning that the Board of Education of Baltimore County ("the Board") had hired younger teachers to fill its vacancies, Zimmer-Rubert filed a Charge of Discrimination with the Equal Employment Opportunity Commission. The EEOC granted Zimmer-Rubert a Right to Sue letter. Thereafter, in the Circuit Court for Baltimore County, Zimmer-Rubert brought a claim pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., for the amount of \$100,000.

In the Circuit Court, the Board contended that it was immune from suit under the Eleventh Amendment to the United States Constitution. The court agreed with the Board and dismissed the case. The Court of Special Appeals reversed the decision below, holding that Md. Code (1974, 2006 Repl. Vol.), § 5-518(c) of the Courts and Judicial Proceedings Article effects a waiver of the Board's governmental immunity, including its Eleventh Amendment immunity, as to all claims in the amount of \$100,000 or less. We granted the Board's petition for writ of certiorari to consider the extent to which § 5-518(c) waives the Board's immunity from suit.

Held: Judgment of the Court of Special Appeals affirmed. Section 5-518(c) of the Courts and Judicial Proceedings Article waives the governmental immunity of a county board of education, including the immunity guaranteed by the Eleventh Amendment, as to all claims in the amount of \$100,000 or less.

A state agency retains governmental immunity in the forms of sovereign immunity and the immunity guaranteed by the Eleventh Amendment. The doctrine of sovereign immunity is more general, derived from the structure of the Constitution itself; the specific grant of immunity in the Eleventh Amendment is an example of a state's broader sovereign immunity. See *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). The Eleventh

Amendment thus reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Section 5-518(c) of the Courts and Judicial Proceedings Article provides that "[a] county board of education may not raise the defense of sovereign immunity to any claim of \$100,000 or less." As the statute's plain language, as well as the accompanying legislative history make clear, § 5-518(c) unambiguously waives the Board's sovereign immunity as to all claims in the amount of \$100,000 or less, including claims brought pursuant to the ADEA.

In addition, § 5-518(c) effects a waiver of the Board's Eleventh Amendment immunity. A state waives Eleventh Amendment immunity by "specify[ing its] intention to subject itself to suit in federal court." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, 3146-47, 87 L. Ed. 2d 171, 179 (1985). Here, the State specified its intention to subject the Board to suit in federal court, as the words "any claim" in § 5-518(c) encompass a claim brought in either state or federal court. In contrast to the statute at issue in *State v. Sharafeldin*, 382 Md. 129, 854 A.2d 1208 (2004) (noting that § 12-201 of the State Government Article, which waived the defense of sovereign immunity in contract actions brought "in a court of the State," did not waive Eleventh Amendment immunity), the General Assembly has not exhibited its intent to preserve the defense of Eleventh Amendment immunity in § 5-518(c).

*Kramer v. Liberty Property Trust f/k/a Republic Property Trust*, No. 23, September Term, 2008, filed March 23, 2009. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2009/23a08.pdf>

CORPORATIONS LAW – INDEMNIFICATION AND ADVANCEMENT OF EXPENSES – STATUTORY INTERPRETATION – A “PROCEEDING” WITHIN THE MEANING OF MD. CODE (1975, 2007 REPL. VOL.) § 2-418 OF THE CORPORATIONS AND ASSOCIATIONS ARTICLE IS AN ACTUAL OR THREATENED ADJUDICATIVE OR ADMINISTRATIVE PROCESS, OR ANY STAGE OF EITHER PROCESS, INCLUDING AN INVESTIGATION. THE TERM “PROCEEDING” DOES NOT, HOWEVER, COMPRISE A CORPORATION’S INTERNAL GOVERNANCE FUNCTIONS, SUCH AS THE REMOVAL OF A DIRECTOR OR OFFICER FOR CAUSE.

CORPORATIONS LAW – INDEMNIFICATION AND ADVANCEMENT OF EXPENSES – UNDER GOVERNING DOCUMENTS PROVIDING ADVANCEMENT RIGHTS TO A TRUSTEE “MADE A PARTY [TO A PROCEEDING] BY REASON OF SERVICE IN SUCH CAPACITY,” THERE MUST EXIST A NEXUS BETWEEN THE “PROCEEDING” AND THE TRUSTEE’S OFFICIAL STATUS AS A PREREQUISITE TO AN ADVANCEMENT.

Facts: Richard L. Kramer was the Chairman of the Board of Trustees and a trustee of Republic Property Trust (Republic). In addition, he was a co-owner of Republic Properties Corporation (RPC), an affiliate of Republic engaged in real estate development in the City of West Palm Beach, Florida. In response to a federal investigation into RPC’s involvement in alleged corruption in West Palm Beach, Florida, Republic’s Audit Committee launched an internal investigation into possible wrongdoing by Republic or its employees. Audit Committee Counsel found that Kramer’s dealings in West Palm Beach could possibly serve as the basis for a criminal obstruction of justice charge and that Kramer’s conduct during the investigation did not reflect an appropriate “tone at the top.” As such, Audit Committee Counsel recommended that Republic seek the voluntary resignation of Kramer as Chairman of the Board of Trustees.

In response to Audit Committee Counsel’s recommendation, Kramer retained private counsel to defend him. In so doing, Kramer requested that Republic advance to him the legal expenses he incurred in connection with the “proceeding” Republic had begun against him. Kramer requested an advancement pursuant to Md. Code (1975, 2007 Repl. Vol.), § 2-418 of the Corporations and Associations Article and Republic’s Bylaws. The relevant portion of Republic’s Bylaws provided: “The Trust shall pay or reimburse, as incurred, in advance of [the] final disposition of a proceeding, reasonable expenses incurred by a Trustee or officer or former

Trustee or officer made a party to a proceeding by reason of [service in such capacity]."

Republic denied Kramer's request for an advancement. Kramer then filed a complaint against Republic in the Circuit Court for Baltimore City to collect his expenses. On cross-motions for summary judgment, the Circuit Court held that there was no "proceeding" that triggered Kramer's right to an advancement. The Court of Appeals issued a writ of certiorari to determine whether the trial court erred in concluding that an action to remove a trustee from the board for an alleged breach of fiduciary duty was not a "proceeding."

Held: Affirmed. Md. Code (1975, 2007 Repl. Vol.), § 2-418 of the Corporations and Associations Article authorizes a corporation to indemnify or advance expenses to a director who is a "party" to a "proceeding." Under the statute, a "[p]roceeding" means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative." *Id.* § 2-418(a)(7). By examining the Maryland legislative history, the Model Business Corporations Act, and the Delaware courts' construction of what constitutes an "action, suit or proceeding" subject to advancement or indemnification, the Court of Appeals concluded that a "proceeding" within the meaning of § 2-418 involves an actual or threatened adjudicative or administrative process, or any stage of either process, including an investigation. The Court ruled that the term "proceeding" does not, however, comprise a corporation's internal governance functions, such as the threatened or actual removal of an officer or director for cause. In the instant case, the only "proceeding" that occurred was an internal investigation.

Although the internal investigation by Audit Committee Counsel constituted a "proceeding," Republic's Bylaws set forth an additional condition for a trustee or officer's entitlement to an advancement. That is, the trustee or officer must have been "made a party to [the] proceeding by reason of [service in such capacity]." For a "proceeding" to be by reason of one's official status, there must exist a nexus or causal connection between the underlying proceeding and one's official status. *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005). Here, however, there was no nexus between the internal investigation and Kramer's status as a trustee of Republic. The investigation concerned Kramer because of his ownership interest in RPC, not because of his position as a trustee of Republic. Thus, although the investigation was a "proceeding," it was not a "proceeding" in which Kramer was entitled to an advancement under Republic's Bylaws.



*Kelvin Parker a/k/a Calvin Parker v. State of Maryland* - No. 89, Sept. Term 2008. Opinion filed on May 4, 2009 by Adkins, J.

<http://mdcourts.gov/opinions/coa/2009/89a08.pdf>

CRIMINAL LAW - EVIDENCE - HEARSAY - RULED COMPONENTS - RELEVANCE - CONFUSION, MISUSE AND PREJUDICE - INFORMANT INFORMATION.

CRIMINAL LAW & PROCEDURE - APPEALS - STANDARDS OF REVIEW - HARMLESS ERROR.

Facts: Appellant Kelvin Parker was convicted by a jury of possession of heroin after the jury twice reported itself to be deadlocked. Detective McGowan of the Baltimore City Police Department testified that he arrived in an area which he described as "open air drug market" and a "heroin shop" after receiving a telephone call from one of his registered confidential informants. McGowan testified over Parker's objection that the informant told him that a black male wearing a blue baseball cap and a black hooded sweatshirt was selling heroin at a particular intersection.

McGowan related that once he arrived at the area he observed a black male wearing a blue baseball cap and a black hooded sweatshirt - later identified as Parker - walking around at the intersection. He then observed Parker enter a liquor store and within a couple of seconds two unknown males followed him into the liquor store. After "maybe five to ten seconds" the two men left the liquor store empty-handed. McGowan expressed his expert opinion that Parker "was engaged in illegal narcotic activity".

According to McGowan, Parker walked out of the store and down the street, and McGowan lost sight of Parker for a brief period. When McGowan spotted him again, he and two other detectives pulled up next to Parker in their vehicle, got out, and approached him. Parker did not run when approached, but according to McGowan, said "Oh shit". McGowan recovered three gel caps of heroin out of Parker's right rear pants pocket and an additional thirteen gel caps of heroin in an incision in the seam of his waistband. He also found \$82.00 on him, which McGowan believed were the proceeds of Parker's heroin sale. McGowan indicated that the drugs were never fingerprinted.

On cross-examination, McGowan said that Parker went into the store for "several brief seconds[,] " but acknowledged that he initially wrote in the statement of probable cause that Parker went into the store for "several minutes". He also admitted that: during his investigation, he never entered the liquor store, he could not recall how many other people were present on the street;

the two unknown men were not stopped; and the pants with the incision were not recovered. Neither of the detectives who were with McGowan was called to testify.

Parker testified that he was in front of the Capital Cake Company talking to a girl who worked there when his friend Warren passed by and spoke to Parker. He then walked to the corner liquor store. As Parker got to the liquor store, Warren and a friend were coming out of the store, so Parker "stepped in and stepped right back out." Warren and his friend, got into Warren's truck, and drove away. Parker testified that about five minutes later, three officers back up around the corner. According to Parker, McGowan got out, approached him, and "dropped [Parker's] pants to the ground and did not find anything." Another officer went across the street to search the grass, returned and said "it's not over there, I don't see it." The officer went over to the grass again, returned, and said something to McGowan, after which Parker was handcuffed. Parker denied that McGowan found any heroin vials on him and denied that he said "Oh shit" to McGowan.

Held: Reversed and remanded for a new trial. The Circuit Court erred in allowing McGowan's testimony that the informant told him that a black male wearing a blue baseball cap and a black hooded sweatshirt was selling heroin at a particular intersection. Applying *Graves v. State*, 334 Md. 30, 637 A.2d 1197 (1994), the informant's extrajudicial statement was inadmissible hearsay because it contained too much specific information about Parker and his alleged criminal activity to be justified by the proffered non-hearsay purpose of establishing why McGowan was at the intersection. The timing and particularity of the description, without evidence that there were other individuals wearing this type of clothing, created a danger that the jury would misuse the information as substantive evidence of Parker's guilt. The State proved this point by referencing the informant's tip for the truth of matter asserted in its closing argument.

The admission of the informant's extrajudicial statement was not harmless error. The jury only heard testimony from McGowan, who relayed the informant's information, and Parker. The State introduced into evidence sixteen vials of heroin McGowan said he found on the defendant, but the vials were never fingerprinted. In this close case for the jury, that turned on whether the jury credited McGowan's testimony over Parker's, the informant's statement - that an individual fitting Parker's description was "selling heroin from his person" at a particular intersection - provided potentially scale-tipping corroboration for McGowan's testimony that he (1) observed Parker engage in what he believed to

be "illegal narcotic activity" and then (2) recovered from Parker sixteen gel caps of heroin.

*State of Maryland v. Paul Benjamin Blackwell*, No. 45, September Term, 2008. Opinion filed May 14, 2009 by Greene, J.

<http://mdcourts.gov/opinions/coa/2009/45a08.pdf>

CRIMINAL LAW – EXPERT TESTIMONY – THE HORIZONTAL GAZE NYSTAGMUS TEST IS A SCIENTIFIC TEST, AND TESTIMONY RECOUNTING A DEFENDANT’S PERFORMANCE ON THE TEST IS ADMISSIBLE IN EVIDENCE PURSUANT TO MD. RULE 5-702.

Facts: Paul Benjamin Blackwell was charged with multiple offenses surrounding his driving of a vehicle on the morning of August 17, 2005. The charges included driving a vehicle while under the influence of alcohol and driving a vehicle while impaired by alcohol. At Blackwell’s trial, the State’s sole witness was Maryland State Trooper Jeffrey Linger, who stopped the vehicle Blackwell was operating.

Trooper Linger testified that he detected an odor of alcohol on Blackwell’s breath and that “[Blackwell’s] eyes were glassy, speech was slurred.” In addition, Trooper Linger stated that he administered multiple field tests to Blackwell, including the horizontal gaze nystagmus (HGN) test. With respect to the HGN test, Trooper Linger testified that he observed “lack of smooth pursuit” and “distinct nystagmus at maximum deviation” in each of Blackwell’s eyes. Defense counsel objected to this testimony on the basis that the officer was not properly qualified to give the HGN test. The trial judge overruled defense counsel’s objections, and Blackwell was subsequently convicted of the alcohol-related offenses.

Blackwell noted an appeal to the Court of Special Appeals, which reversed Blackwell’s alcohol-related convictions. The Court of Appeals granted the State’s Petition for a Writ of Certiorari to determine whether the admission of Trooper Linger’s HGN testimony was erroneous and unduly prejudicial to Blackwell. See *State v. Blackwell*, 405 Md. 290, 950 A.2d 828 (2008).

Held: Affirmed. In *Ragland v. State*, 385 Md. 706, 726, 870 A.2d 609, 620-21 (2005), the Court of Appeals held that testimony based upon specialized knowledge, skill, experience, training or education is expert testimony under Md. Rule 5-702, rather than lay opinion testimony under Rule 5-701. In light of *Ragland*, Trooper Linger’s testimony recounting his administration of the HGN test was expert testimony. Indeed, this testimony was not based upon Trooper Linger’s general knowledge as a layperson but upon his specialized knowledge and training. Moreover, in contrast to other field

sobriety tests, the HGN test is a scientific test, and a layperson would not necessarily know that nystagmus is an indicator of alcohol consumption; nor could a layperson measure the onset of nystagmus with any accuracy or reliability. Thus, the trial judge erred, as a matter of law, in admitting the HGN testimony into evidence without first making a preliminary legal determination, pursuant to Rule 5-702, that Trooper Linger was qualified to testify as an expert witness. On the facts of the case, taking into account the heightened credibility jurors tend to give scientific evidence, such error constituted an undue prejudice to Blackwell, the defendant.

*Juan Rivera v. State of Maryland*, No. 80, September Term 2008, filed June 10, 2009, opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2009/80a08.pdf>

CRIMINAL LAW - PETITION FOR CORAM NOBIS RELIEF - MARYLAND RULE 4-242(c) -

Facts: On October 8, 2003, Juan Rivera, a Peruvian national, was charged with child abuse, second degree sexual offense, and third degree sexual offense. Mr. Rivera agreed to plead guilty to contributing acts, omissions, or conditions rendering a child in need of assistance in violation of Md. Code (1973, 2002 Repl. Vol.) § 3-828 of the Courts and Judicial Proceedings Article. The trial court determined Mr. Rivera's plea was entered voluntarily and that Mr. Rivera understood the charges against him. Thereafter, Mr. Rivera filed a motion to reconsider his sentence and on January 16, 2007, the trial court struck the conviction, entered a probation before judgment, and placed Mr. Rivera on supervised probation. In March of 2007, Immigration and Customs Enforcement ("ICE") initiated deportation proceedings against Mr. Rivera.

Mr. Rivera subsequently filed a petition for coram nobis relief. The coram nobis court denied the petition, determining that Mr. Rivera's plea was entered voluntarily and in compliance with Maryland law. Alternatively, the coram nobis court held that it did not have jurisdiction to hear Mr. Rivera's petition, reasoning that a probation before judgment is not a criminal conviction and a criminal conviction is required in order for a petitioner to have standing to seek coram nobis relief. The Court of Special Appeals affirmed the judgment of the coram nobis court in part, but disagreed with that court's determination that it did not have jurisdiction to consider Mr. Rivera's coram nobis petition.

Held: Judgment of the Court of Special Appeals affirmed. Whether a probation before judgment qualifies as a conviction, in the context of the court entertaining a coram nobis petition, depends on the circumstances presented in the case. Because the deportation proceedings instituted against Mr. Rivera were a significant collateral consequence of his sentence of probation before judgment, the entry of a probation before judgment in Mr. Rivera's case did not deny him standing to seek coram nobis relief. Mr. Rivera, however, is not entitled to coram nobis relief under the circumstances of this case because the record reveals that his guilty plea was entered voluntarily and in compliance with Maryland Rule 4-242(c).

Steven Diggs v. State of Maryland, No. 110, September Term 2008 and Damon Lamar Ramsey v. State of Maryland, No. 147, September Term 2008. Opinion filed June 12, 2009 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2009/110a08.pdf>

CRIMINAL LAW - PLAIN ERROR - DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL

Facts: Steven Diggs and Damon Lamar Ramsey faced separate trials before the same judge in the Circuit Court of Baltimore City. In the *Diggs* trial, the judge asked questions to lay the foundation for the drug distribution charge during questioning of the lead detective, rehabilitated a State witness after he appeared confused, commented to a defense witness "You have a very good memory on everything else," and questioned her whether she was comfortable with her testimony, while implying a disbelief in the defense and creating the aura of partiality in front of the jury. Similarly, in the *Ramsey* trial, the judge elicited key elements of the State's case from a police officer, including the timing and in-court identification of the defendant, established key aspects of the officer's testimony regarding the drugs, elicited testimony regarding the elements of intent to distribute after the prosecutor finished questioning the witness, made comments to the jurors to bolster the integrity of the prosecutor that "most lawyers, good lawyers, talk to their witnesses," and established the chain of custody of the drugs, after the prosecutor failed to do so. Diggs and Ramsey appealed their convictions to the Court of Special Appeals. Before any proceedings in the intermediate appellate court, the Court of Appeals granted certiorari on its own initiative.

On appeal, both Diggs and Ramsey claimed the judge's behavior created an atmosphere of judicial bias in front of the jury, thereby preventing the defendants from obtaining fair and impartial trials. Diggs argued the trial court's lack of impartiality, continuous questioning of witnesses beyond the acceptable "clarification" questions, and implications to the jury that the witnesses were lying, resulted in fundamental errors, which deprived him of his right to a fair trial. Similarly, Ramsey argued that the trial judge's pervasive questioning of witnesses reflected bias, and that the judge acted as a "second prosecutor" by, among other things, eliciting favorable testimony for the prosecution and establishing the elements of the crime. The State argued, in each case, that defense counsel did not object to most of the judge's questioning of witnesses and, therefore, failed to preserve various issues for review pursuant to Rule 8-131(a), which provides that the Court will

ordinarily not address an issue unless "it plainly appears by the record to have been raised in or decided by the trial court."

Held: The Court of Appeals utilized a plain error analysis and held that the Court needed to intervene because the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded a fair and impartial trial. In the cases *sub judice*, the trial judge acted as a co-prosecutor whose repeated and egregious behavior exceeded "mere impatience" and created an atmosphere so fundamentally flawed as to prevent Diggs and Ramsey from obtaining fair and impartial trials. The Court also concluded that the failure to object may be countenanced only in those instances in which the judge exhibits repeated and egregious behavior of partiality, reflective of bias. The Court noted that failure to object in less pervasive situations may not have the same result, nor would the Court necessarily intervene.



*Miguel Gonzales v. State of Maryland*, No. 102, September Term 2008. Opinion filed May 7, 2009, by Greene, J.

<http://mdcourts.gov/opinions/coa/2009/102a08.pdf>

CRIMINAL LAW - WAIVER OF COUNSEL = MARYLAND RULE 4-215(e)

Facts: Miguel Gonzales was charged in the Circuit Court for Baltimore County with first-degree burglary. Gonzales consequently hired a private attorney, Spencer Gordon, to represent him in his criminal case. Mr. Gordon, then, entered his appearance as Gonzales's attorney via a letter to the Circuit Court. Specifically, the letter requested that the court "enter the appearance of Spencer Gordon and Henslee & Gordon, L.L.C., Attorneys at Law... on behalf of Defendant, Miguel Gonzales."

On January 16, 2007, the case went to trial. Mr. Gordon, however, did not show up to represent Gonzales. Instead, Mr. Gordon's law partner, Marshall Henslee, appeared on Gonzales's behalf. Shortly thereafter, Mr. Henslee and the prosecutor informed the court that there was some confusion as to whether Mr. Gonzales wished to proceed with Henslee as counsel or simply represent himself. The court asked Mr. Gonzales to clarify his position. In response, Mr. Gonzales clearly stated that although Mr. Henslee worked at the same law firm as Mr. Gordon, Mr. Henslee was not his lawyer. Mr. Gonzales also said that Mr. Gordon was the only one at the firm with whom he spoke about the case. Despite his efforts, Mr. Gonzales was unable to convince the Circuit Court as to his position. At no time, did Mr. Gonzales request permission to discharge his attorney of choice, Mr. Gordon. The Circuit Court concluded that Henslee was Gonzales's attorney and required Gonzales to select between proceeding with Henslee as his representative or representing himself. Gonzales elected to represent himself.

Subsequently, Mr. Gonzales was convicted of first-degree burglary. He later wrote a letter to the Circuit Court explaining the circumstances which led to his decision to represent himself. In response, the Circuit Court treated Gonzales's letter as a motion for a new trial and denied the motion. Mr. Gonzales filed an appeal. In affirming the lower court's decision, the Court of Special Appeals concluded: (1) that the defendant was not denied his counsel of choice, (2) that the defendant knowingly and intelligently waived his right to counsel, and (3) that the Circuit Court administered all of the steps mandated by Maryland Rule 4-215(e). In response, Mr. Gonzales petitioned to this Court for certiorari. We granted the petition.

Held: Judgment of the Court of Special Appeals reversed. Under the facts of this case, Gonzales and the trial court never engaged in a discussion whereby Gonzales requested to discharge his attorney, Gordon. The trial court would not permit such discussion because it insisted that Henslee was Gonzales's lawyer. Under such circumstances, we hold that the trial court erroneously found that Gonzales knowingly and voluntarily chose to discharge his attorney and waive his right to counsel as permitted by Rule 4-215(e). Henslee was not Gonzales's chosen lawyer and his appearance had not been entered on behalf of Gonzales.

We do not hold that substitution of counsel is always improper. Where a lawyer other than counsel of record appears for trial, and the client does not consent to the substitution of counsel, the trial judge should inquire into the reasons why counsel of record is absent from the proceedings in order to gain more information about the status of the relationship between the counsel of record and the defendant. In the present case, the record does not reveal whether Gonzales entered into an agreement with Gordon or with the firm of Gordon & Henslee, with regard to the substitution of counsel. In addition, there is no evidence that the trial court inquired into whether such an agreement existed. Under these circumstances, the trial judge did not have sufficient information to conclude that (1) Henslee was Gonzales's attorney or (2) by not accepting Henslee's representation, Gonzales in effect, rejected Gordon's representation.

*Board of Education of Worcester County v. Horace Mann Insurance Company*, No. 90, September Term, 2008. Opinion filed April 10, 2009, by Greene, J.

<http://mdcourts.gov/opinions/coa/2009/90a08.pdf>

EMPLOYMENT - EDUCATION ARTICLE - TORTS

Facts: In August of 2005, Pocomoke High School student Bradley Souders ("Souders") brought a civil action in the Circuit Court for Worcester County, alleging that Vice Principal, James L. Covington ("Mr. Covington"), had assaulted him. Souders was called to Mr. Covington's office for allegedly harassing another student. Souders purported that while he was in Mr. Covington's office, Mr. Covington "brandished" a knife in front of him, placing him in fear of imminent harm. Mr. Covington insisted that he had confiscated the knife from a former student who was small and often teased by others. He explained that he displayed the knife to Souders in order to teach Souders "where harassment could lead."

Mr. Covington asked the Board of Education of Worcester County ("the Board") to provide him with a defense to the assault action pursuant to Md. Code § 4-104(d) of the Education Article. The Board refused to defend Mr. Covington and contended that assault is an intentional tort that can never be without malice, and thus, that does not fall within the purview of § 4-104(d) of the Education Article. Ultimately, Horace Mann Insurance Company ("Horace Mann") provided Mr. Covington with a defense pursuant to an Educators Employment Liability Policy that it had issued to the Maryland State Teachers Association. The case was tried before a jury and the jury found Mr. Covington did not assault Souders.

Horace Mann then filed an action for declaratory judgment in the Circuit Court for Worcester County, seeking a declaration that: 1) the Board had a duty to defend Covington against the allegations in the underlying action, (2) the Board breached its duty by refusing to provide Covington with such defense, and (3) the Board was obligated to reimburse Horace Mann for the expense of defending Covington in the underlying action and for the expense of bringing the declaratory judgment action. The court held the Board was required to provide Covington with a defense pursuant to § 4-104(d) of the Education Article. The Board filed a timely appeal to the Court of Special Appeals, but before the intermediate appellate court could consider the case, this Court issued a writ of certiorari on its own initiative.

Held: A board of education's duty to provide an educator with a defense under § 4-104 of the Education Article is independent of its duty to procure insurance to protect itself, its agents, and its employees pursuant to § 4-105 of the Education Article. A school board has a duty to defend an educator under § 4-104 of the Education Article if the evidence presented establishes the potentiality that the educator's conduct was (1) undertaken in the performance of his or her duties, (2) within the scope of his or her employment and (3) without malice. To determine if there is a potentiality that the educator's alleged conduct meets the requirements of the above test, courts must look to the allegations of the complaint and to any extrinsic evidence provided by the insured. In this case, Covington presented sufficient evidence to establish the potentiality that he was acting pursuant to his duties as vice principal, within the scope of his employment, and without malice at the time the alleged assault occurred. Accordingly, the Board was required to provide Covington with a defense.

# COURT OF SPECIAL APPEALS

*Abdel Khader Diallo v. State of Maryland*, No. 71, September Term, 2008, decided on June 4, 2009. Opinion by Davis, J.

<http://mdcourts.gov/opinions/cosa/2009/71s08.pdf>

CRIMINAL LAW - CONVENTION ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS - ART. IV, SECTION 11(providing that "Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations" shall enjoy certain privileges and immunities while "exercising their functions and during their journey to and from the place of meeting[,] " including providing that such persons possess, under subsection (a), "*immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind*").

ART. V. SECTION 19 OF THE CONVENTION ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS (providing that, in addition to the immunities and privileges specified in Section 18, the "Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, *their spouses and minor children*, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law").

Facts: Appellant was tried upon a "not guilty" agreed statement of facts and convicted of first-degree assault and use of a handgun in the commission of a crime of violence. Appellant, whose father was a former Executive Secretary of the Permanent Secretariat of the United Nations Convention to Combat Decertification (UNCCD), appealed the denial of his motion to dismiss his indictment and the denial of his motion to suppress his subsequent confession based on his contentions (1) that he enjoyed diplomatic immunity, as a result of his father's position with the United Nations and (2) that the failure of the United States Department of State to disclose what appellant argued was an error as to his father's diplomatic status, in a State Department certification submitted by the State to the court, should be imputed the

State of Maryland under *Brady v. Maryland*, 373 U.S. 83 (1963). Appellant also argued that his statement to police subsequent to his arrest was involuntary and should be suppressed.

Held: Appellant's challenge to the denial of his motion to dismiss was waived, because his appellate brief contained no substantial argument in support of that challenge and did not include a clear and concise statement of the facts relative to the trial court's ruling on the motion.

The circuit court did not err in concluding that the evidence failed to establish that appellant enjoyed diplomatic immunity; although, in all proceedings before the trial court, appellant relied on art. IV, section 11 of the United Nations Convention on Privileges and Immunities, Feb. 13, 1946, 21 U.S.T. 1418, to establish the basis of his father's diplomatic status and represented that this immunity was triggered by his father's official travel to the United States, appellant did not succeed in proving that his father was in the United States, *in his official capacity*, at the time of appellant's arrest.

The circuit court did not err in concluding that appellant, at the time of his arrest, never claimed diplomatic immunity; the circuit court's assessment of the credibility of the police officer's testimony indicating that appellant never asserted such immunity was entitled to deference.

There was no *Brady* suppression when the information at trial and on appeal, upon which appellant attacked the credibility of the State Department's certification regarding his diplomatic status, was information known to appellant and/or used by appellant in support of his various pretrial motions.

Because the State Department was not an investigative or prosecutorial agency invested with an interest in the prosecution of appellant, the accuracy, *vel non*, of the State Department's certification as to appellant's diplomatic immunity could not be imputed to the State of Maryland and, thus, *Brady* was inapplicable.

Even though appellant testified that he was on medication when he confessed to the crime, the circuit court did not err

in determining that appellant's confessions were voluntary under a totality of the circumstances, based on its assessment of the credibility of the interrogating detective's testimony establishing that appellant was coherent and responsive to questions posed by the detective.

*Henry v. State*, No. 946, September Term, 2007, filed February 4, 2009. Opinion by Wright, J.

<http://mdcourts.gov/opinions/cosa/2009/946s07.pdf>

CRIMINAL LAW - HOMICIDE - MURDER - TRANSFERRED INTENT

HOMICIDE - ASSAULT WITH INTENT TO KILL - INTENT OR MENS REA

Facts: In 1997, fifteen-year-old appellant was sitting with his friends on the front steps of an apartment building when a fight broke out between his friends and three older men. Appellant left the scene, returned with a sawed-off rifle, and began shooting at one of the older men. Appellant struck the man seven times, killing him. In addition, two bullets struck and killed a bystander, who was located approximately 30 feet from appellant's intended target.

Appellant was charged, in the Circuit Court for Prince George's County, with two counts of first degree murder and two counts of use of a handgun in a crime of violence. He filed a motion to transfer the case to juvenile court, as well as a motion to suppress a statement he made to police, but both motions were denied. Following a jury trial in 1998, appellant was convicted of all four counts and the court imposed an aggregate sentence of 80 years. Appellant filed an appeal to the Court of Special Appeals but, because it was filed late, the appeal was dismissed in 1999.

A post-conviction hearing was held eight years later, in 2007. By order of the Circuit Court for Prince George's County, appellant was granted a belated appeal.

Held: Affirmed. The doctrine of transferred intent applies to the death of the unintended victim notwithstanding that fact that the shooter actually hit the intended victim. Because transferred intent applies where both the intended and unintended victims were killed, the circuit court did not err in instructing the jury on the doctrine of transferred intent.



*Barrett v. Ayres*, No. 1222, September Term, 2008. Opinion filed on June 3, 2008 by Kenney, J. (retired, specially assigned).

<http://mdcourts.gov/opinions/cosa/2009/1222s08.pdf>

FAMILY LAW - MODIFICATION OF GRANDPARENT VISITATION ORDER - § 9-102

Facts: Appellant, mother, agreed to court-ordered grandparent visitation by appellees, her child's paternal grandparents. A year later, she sought to terminate visitation. After a hearing, a Master recommended termination of visitation because appellees failed to establish that appellant was unfit or that exceptional circumstances existed such that lack of grandparent visitation would have a deleterious effect upon the child. Appellees took exception to the Master's report. The circuit court held a hearing and denied the motion, determining that appellant failed to show a change in circumstances required to modify the visitation order.

Held: Ordinarily, a parent's decision to modify a grandparent visitation order, because it is presumed to be in the best interest of the child, is, in effect, a material change in circumstances requiring modification of a visitation order. The burden shifts to the third party to establish that the parent is unfit or that exceptional circumstances exist indicating that the lack of grandparent visitation would have a deleterious effect upon the child. Only then can a court grant grandparent visitation against the parent's wishes. Judgment vacated and remanded for further proceedings in accordance with the opinion.

*Allen v. Dackman*, No. 2356, September Term, 2007, filed January 6, 2009. Opinion by Wright, J.

<http://mdcourts.gov/opinions/cosa/2009/2356s07.pdf>

REAL PROPERTY - STATUTES - CONSTRUCTION AND OPERATION

LIMITED LIABILITY COMPANIES - RIGHTS AND LIABILITIES OF MEMBERS OR STOCKHOLDERS

CIVIL LIABILITIES

Facts: Two minor girls suffered elevated blood-lead levels while residing at a Baltimore City property, for which their grandmother was the lessee of record. After the owner and alleged lessor failed to pay taxes on the property, a limited liability company ("LLC") purchased the tax lien and assumed ownership. Upon assuming ownership, the LLC did not intend to lease the property, nor were its members aware that people were residing in the property. Mother, on behalf of her minor daughters and individually, brought action against one of two members of the LLC, alleging negligence and seeking damages under the Consumer Protection Act ("CPA"). The defendant filed a motion for summary judgment, which the Circuit Court for Baltimore City subsequently granted. Mother appealed.

Held: Affirmed. Where an LLC is the owner of record for a piece of property that is not being let or offered for occupancy, its individual members cannot be held liable as "owners" or "operators" of the property, pursuant to the Baltimore City Housing Code. Under the provisions of Maryland's Limited Liability Company Act, an individual member of a LLC cannot be held liable for any negligent acts of the LLC. Further, the CPA bars claims brought by parties who never entered into a lease and, therefore, are not "consumers," as defined by the CPA. As such, the trial court did not err in granting the motion for summary judgment.

*Comptroller of the Treasury v. Johns Hopkins University*, No. 532, Sept. Term 2008, filed June 9, 2009. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2009/532s08.pdf>

TAXATION - MARYLAND ADMISSIONS AND AMUSEMENT TAX - MARYLAND TAX COURT - ADMINISTRATIVE LAW - DEFERENCE TO ADMINISTRATIVE AGENCY'S FINDING ON A MIXED QUESTION OF LAW AND FACT.

Facts: The Maryland Tax Court ruled that The Johns Hopkins University was entitled to a refund of State admissions and amusement taxes paid on gross receipts from ticket sales to NCAA Division I mens' intercollegiate lacrosse games at Homewood Field. Hopkins had paid the tax for many years, but an internal audit led its financial officer to apply for a refund on the ground that the proceeds from lacrosse game ticket sales were used exclusively for educational purposes and therefore were not subject to Maryland admissions and amusement tax, under Md. Code, section 4-103(b)(4)(i) of the Tax-General Article.

The Comptroller of the Treasury, which had collected the tax, opposed the refund request, despite the recommendations of the field auditors assigned to the case, who had recommended granting it. According to the Comptroller, the ticket sales proceeds were not used *exclusively* for educational purposes and thus Hopkins was ineligible for a tax refund. The Tax Court found, however, that the gross receipts were used exclusively for educational purposes, which were construed to include, in addition to security, public address announcers, cleanup costs, and other direct game-related expenses, such items as facility maintenance costs, because the facility is used by the general University population for purposes distinct from the games themselves. Consequently, the Tax Court granted Hopkins a tax refund for the three most recent fiscal years (statute of limitations barred Hopkins from obtaining a refund of older tax payments). The Tax Court issued a written order explaining that "the gross receipts in question, which were used in part for intercollegiate athletics at the school, were used exclusively in furtherance of the education of the students."

The Comptroller filed an action for judicial review in the Circuit Court for Baltimore City, which affirmed the Tax Court's decision. The Comptroller then appealed to the Court

of Special Appeals, arguing that the Tax Court had applied an incorrect standard of review by failing to give deference to the Comptroller's interpretation of the applicable statute, as required by section 10-222 of the State Government Article.

Held: The appellate court affirmed the ruling of the Tax Court. Because the issue before the Tax Court was a mixed question of law and fact, under controlling precedent, the applicable standard of review was substantial evidence. Furthermore, the Tax Court, not the Comptroller, was the administrative agency charged with interpreting the relevant statute, and thus deference was owed to the Tax Court's interpretation, not to the Comptroller's. There was substantial evidence before the Tax Court from which reasoning minds could find that the gross receipts from ticket sales were used exclusively for educational purposes.

*Richardson v. Nwadiuko*, No. 2816, September Term, 2007, filed March 6, 2009. Opinion by Wright, J.

<http://mdcourts.gov/opinions/cosa/2009/2816s07.pdf>

TORTS - NEGLIGENCE - PREMISES LIABILITY

STANDARD OF CARE - STATUS OF ENTRANT - INVITEES: IMPLIED INVITATION - LICENSEES - CARE REQUIRED OF BUSINESS AND STORE PROPRIETORS

BREACH OF DUTY - KNOWLEDGE OR NOTICE IN GENERAL - CONSTRUCTIVE NOTICE

Facts: A woman, who was accompanying her husband to his doctor's appointment, alleged that she slipped and fell on wet floor at the doctor's office. At the time of the incident, it was raining heavily and had been raining steadily since the night before. After the woman entered the office, she claims that her left foot slid out from under her and she fell to the floor, sustaining severe and permanent injuries to her right knee, lower back, and tailbone area.

The woman stated that she had no personal knowledge that anyone ever tripped and fell, or slipped and fell at the property, and no personal knowledge as to how long that area had been wet. In addition, she stated that she saw nothing to indicate that there was a dangerous situation or defective condition at the property. According to the doctor, he had no personal knowledge of anyone else slipping and falling at the property from the time he acquired it, fifteen years prior. The doctor stated that neither he nor his employees would allow a dangerous condition to exist if they had notice or knowledge of it, but maintained that neither he nor his employees "had any notice or knowledge that there was any potential hazard since no one had ever slipped and fallen at the medical office before the alleged incident."

The woman and her husband brought a negligence action against the doctor-landowner in the Circuit Court for Prince George's County. The court entered summary judgment in favor of the doctor, finding that the woman was a bare licensee and not an invitee at the time of the incident, and that the plaintiffs failed to make a prima facie showing of negligence. Plaintiffs appealed.

Held: Affirmed. Woman, who was accompanying her husband to his doctor's appointment is considered an "invitee" under the implied invitation theory, and not a "bare licensee," even though she did not have an appointment herself. Nonetheless, summary judgment was appropriate because plaintiffs failed to prove that a dangerous condition existed, that defendant knew of the dangerous condition, or that the condition existed long enough for defendant to have had constructive notice.

# ATTORNEY DISCIPLINE

By an Opinion and an Order of the Court of Appeals dated June 8, 2009, the following attorney has been indefinitely suspended from the further practice of law in this State:

PAUL STEPHEN BEATTY

\*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective June 9, 2009:

MICHAEL VINCENT KUHN

\*

By an Order of the Court of Appeals of Maryland dated June 9, 2009, the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

LAWRENCE TONY ROBINSON

\*

By and Opinion and Order of the Court of Appeals of Maryland dated June 10, 2009, the following attorney has been disbarred from the further practice of law in this State:

DAVID MOORE THOMAS

\*

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

DONALD PAUL McLAUGHLIN

\*

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

MICHAEL U. GISRIEL

\*



## JUDICIAL APPOINTMENTS

On April 9, 2009, the Governor announced the appointment of SHERRIE ROBINSON BAILEY to the Circuit Court of Baltimore County. Judge Bailey was sworn in on May 26, 2009 and fills the vacancy created by the retirement of the Hon. Dana M. Levitz.

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On April 30, 2009, the Governor announced the appointment of KENNETH AUGHTRY TALLEY to the District Court for Charles County. Judge Talley was sworn in on May 29, 2009 and fills the vacancy created by the retirement of the Hpn. Richard A. Cooper.

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On April 30, 2009, the Governor announced the appointment of Master HELEN INA HARRINGTON to the Circuit Court for Charles County. Judge Harrington was sworn in on June 5, 2009 and fills the vacancy created by the retirement of the Hon. Christopher C. Henderson.

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On April 30, 2009, the Governor announced the appointment of CYNTHIA CALLAHAN to the Circuit Court of Montgomery County. Judge Callahan was sworn in on June 29, 2009 and fills the vacancy created by the retirement of the Hon. William J. Rowan, III.

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# RULES REPORT

The **161<sup>st</sup> Rules Report** was filed on June 16, 2009:

<http://www.mdcourts.gov/rules/reports/161streport.pdf>