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ATTORNEYS - MISCONDUCT – FAILURE TO COMPLY WITH TAX OBLIGATIONS – FAILURE TO PROMPTLY DELIVER CLIENT FUNDS – FAILURE TO COMPLY WITH COURT ORDERS – FAILURE TO APPEAR

Facts: The disciplinary action against Gary Mininsohn arose out of four separate complaints. As to the first complaint, an expert hired by Mininsohn filed suit against him in District Court seeking to be paid for his services. Mininsohn, however, failed to defend or otherwise respond to the complaint against him and failed to appear. He then failed to appear with records in response to a Show Cause Order for Contempt and, when that matter was continued, failed to appear again. When Mininsohn finally appeared, he once again did not bring the requested records.

As to the second complaint, Mininsohn failed to prepare a draft order in a family law matter after being requested by the court to do so. As to the third complaint, Mininsohn failed to submit to his client a written fee statement upon conclusion of a contingent fee matter, failed to keep records of his client's trust fund, retained client funds in his account for more than a year, failed to render a full accounting to his client, and wrote two checks from the client's trust fund account for Mininsohn's own benefit. As to the fourth and final complaint, Mininsohn failed to withhold State income tax from the wages of his employees in 1995, 1996, and 1999-2003. He also failed to hold such funds in trust for the State.

Mininsohn had been reprimanded on a prior occasion where he failed to deposit an advance retainer in his trust account, failed to render a full accounting to the client, and failed to respond to lawful demands by Bar Counsel for information concerning the client's complaint.

Held: Disbarred. As to the first complaint, Mininsohn violated MRPC Rule 3.4(c) for failure to appear in court on two occasions and for failure to produce documents as directed by court order and Rules 8.4(a) and (d) for engaging in conduct prejudicial to the administration of justice.

As to the second complaint, Mininsohn violated MRPC Rule 1.3 by not acting with reasonable diligence and promptness in representing a client. Because of his lack of diligence and failure to fulfill the directive of the court, Mininsohn also violated Rule 8.4(d) for engaging in conduct prejudicial to the administration of justice.

As to the third complaint, Mininsohn violated MRPC Rule 1.15(a) for failing to keep complete records of his client's

trust fund, and Rule 1.15(b) for failing to notify the client of receipt of funds and promptly deliver those funds held on a client's behalf. Mininsohn also violated Maryland Rule 16-109 and Maryland Code, Section 10-306 of the Business Occupations and Professions Article (1989, 2000 Repl. Vol.) when he wrote two checks for his own benefit that were drawn from a client's trust fund account.

As to the fourth complaint, Mininsohn violated MRPC 1.15(b), Maryland Code (1988, 1997 Repl Vol., 2003 Cum. Supp.), Sections 10-906 and 13-1007 of the Tax-General Article by failing to withhold, report, and remit to the Comptroller employee income taxes. By willfully and regularly failing to comply with his obligation as an employer, by failing to withhold State income tax from the wages of his employees, and by failing to hold such funds in trust for the State, his failures are also conduct prejudicial to the administration of justice in violation of MRPC Rules 8.4(a)(b)(c) and (d).

As the Court explained, disbarment ordinarily follows any unmitigated misappropriation of funds. The Court also emphasized that, when an attorney neglects statutory tax obligations, it reflects adversely on his honesty or fitness to practice law. The Court then went on to conclude that a myriad of aggravating factors were present in this case: Mininsohn had a prior disciplinary offense; he had refused to acknowledge the wrongful nature of his conduct; and, finally, he had substantial experience in the practice of law and could not point to inexperience to mitigate the seriousness of his conduct. Because no compelling extenuating circumstances existed for an exception to be made in his case, the Court imposed the sanction of disbarment upon Mininsohn.

Attorney Grievance Commission of Maryland v. Gary S. Mininsohn. AG No. 70, September Term, 2002, filed March 17, 2004, opinion by Battaglia.

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CORPORATIONS - FORFEIT CHARTER - POWER TO SUE - STATUTE OF LIMITATIONS - ANY CLAIM BARRED BY THE STATUTE OF LIMITATIONS WHILE THE CORPORATE CHARTER IS FORFEIT MAY NOT BE RESURRECTED BY REVIVAL OF CORPORATE CHARTER

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Facts: J. Frederick Dual, Jr. (Dual), in his capacity as president and sole shareholder of Dual, Inc., brought a civil action on behalf of Dual, Inc. in the Circuit Court for Baltimore City against Lockheed Martin Corporation and two of its subsidiaries (collectively "Lockheed") for claims arising out of the termination of two contracts. Dual/Dual, Inc. claimed that Lockheed wrongfully terminated a subcontract agreement between the parties in May of 1999. They also claimed that Lockheed tortiously interfered with a contract between Dual, Inc. and the United States Air Force by inducing the Air Force to terminate the contract in June of 1999 so that Lockheed could assume the balance and benefits of the contract. Dual/Dual, Inc. stated that they only became aware of Lockheed's activities surrounding the termination of the Air Force contract in early or mid-2000 when they acquired a Department of Defense report detailing Lockheed's performance of the balance of the contract.

Dual/Dual, Inc. brought suit against Lockheed in October of 2001. Dual, Inc.'s corporate charter, however, had become forfeit in Maryland two years earlier. After causing the corporate charter to be revived, Dual/Dual, Inc. filed an amended complaint in October of 2002. The trial court, in dismissing the suit, held that the initial complaint was invalid and that the amended complaint was therefore time-barred by the three year statute of limitations. The trial court held that although director-trustees may bring suit on behalf of a defunct corporation to wind up the corporation's affairs under § 3-515 of the Corporations § Associations Article of the Maryland Code, the litigation in question did not bear a rational relationship to any legitimate winding up activity. The trial court also held that the initial complaint was improper because Dual, as a non-lawyer, signed the complaint on behalf of the corporation. Dual and Dual, Inc. appealed to the Court of Special Appeals. On its initiative, the Court of Appeals issued a writ of certiorari before the intermediate appellate court could consider the appeal.

Held: Affirmed. Treating the trial court's action as the grant of summary judgment, the Court of Appeals held that Dual's initial complaint, filed on behalf of a defunct corporation, was a nullity, and any amended complaint filed after revival of the

charter could not relate back to the original complaint for statute of limitations purposes. If the statute of limitations for a claim expires while a corporation's charter is forfeit, revival of the charter does not resurrect any claims that became time-barred during the forfeiture period.

The Court held that if a corporate director-trustee brings suit under § 3-515 of the Corporations & Associations Article of the Maryland Code, the suit must have a rational relationship to a legitimate winding up activity. In this case, after the charter became forfeit, the record reflected that Dual continued to transact regular corporate business on behalf of Dual, Inc., and made no efforts to engage in legitimate winding up activities. The subject of the current suit was not related to the winding up of the corporation. The Court did not reach the trial court's alternative grounds for dismissal, namely whether the October 2001 complaint was a nullity because Dual, as a non-lawyer, could not file suit on behalf of Dual, Inc.

The Court held that, absent affirmative fraud or concealment on the part of the putative tortfeasor, the statute of limitations for a claim for tortious interference with contractual relations, based on the termination of a contract, begins to run when the party is aware that the contract in question has been terminated. The aggrieved party is put on notice when the contract is terminated to investigate the circumstances surrounding that termination. The harmed party is then charged with any knowledge that could be obtained as the result of a reasonably diligent investigation within the statutory three year period. Dual, Inc.'s October 2002 complaint was filed more than three years after the termination of both contracts, and the claims contained there were time-barred. The Court also held that other claims whose harm is derived from the alleged tortious interference with contractual relations claim will begin, for statute of limitations purposes, to run when the party is either actually aware of the tortious conduct or when the party is aware that the contract in question has been terminated.

Dual, Inc. v. Lockheed Martin Corporation, No. 115, September Term, 2003, filed 13 September 2004. Opinion by Harrell, J.

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CRIMINAL LAW - AGREEMENT BETWEEN THE STATE AND DEFENDANT

DUE PROCESS — INCONSISTENT THEORIES OF PROSECUTION

CONSTITUTIONAL LAW — FOURTH AMENDMENT — SEARCH AND SEIZURE — CONSENT EXCEPTION TO WARRANT REQUIREMENT

Facts: Erika Sifrit was convicted of first degree murder,

second degree murder, and various theft charges arising out of events that occurred over the Memorial Day weekend 2002 in Ocean City, Maryland, resulting principally in the death of two people, Martha Crutchley and Joshua Ford.

On May 31, 2002, the Ocean City Police Department responded to an alarm call from the closed-for-the-night Hooters Restaurant and Bar merchandise store on 122nd Street in Ocean City. There they found Erika and Benjamin Sifrit loading Hooters merchandise into their Jeep Cherokee. Upon searching the couple and their vehicle, the police found two guns and three knives. The two were arrested and charged with burglary. At the scene, Erika told the officers that she had anxiety problems and that she needed Xanax and Paxil from a brown leather pouch in her purse located in the front of the Jeep. While looking for her medication, a sergeant discovered four spent .357 magnum shell casings, one live round, and the identification cards of Mr. Ford and Ms. Crutchley in the purse. The police ordered an immediate search of the Sifrits' condominium.

Upon entering the Sifrits' condominium, the police observed photographs of the Sifrits, Ms. Crutchley, and Mr. Ford, taken before the murders, along with two bullets on a glass table. Both of the bullets on the table had been fired from the .357 magnum recovered from Erika at Hooters, and one of the bullets had Mr. Ford's blood and tissue on it. Crime scene technicians found bloodstains in over a dozen locations in the Sifrits' master bathroom, all of which were later identified as matching the DNA of either Ms. Crutchley or Mr. Ford.

On June 2, 2002, Erika entered into a Memorandum of Understanding (MOU) with the State. The MOU stated that Erika agreed to "cooperate with the State in the prosecution of Benjamin, her husband, and further agrees to testify truthfully on behalf of the State at his trial." The MOU provided that the State would not seek a sentence of death or life without parole against Erika as long as she provided reliable information to the State ". . . detailing the way and manner in which the bodies of Martha Margene Crutchley and Joshua Ford were packaged prior to disposal, as well as information on the location where the bodies were disposed of." The MOU also provided that if Erika took a polygraph examination and if she tested ". . . 'not deceptive' on all material questions related to the homicides of the victims . . ." then the State would not prosecute her for the homicide charges.

After the MOU was executed, Erika told a detective that she had helped Benjamin throw bags containing the body parts into a dumpster. After searching the landfill where the contents of the dumpster had been emptied, police recovered the torso and both arms of Mr. Ford and the left leg of Ms. Crutchley. Two bullets fired from the .357 magnum recovered from Erika at Hooters on the night of May 31 were found in Mr. Ford's torso. In an interview with the same detective, Erika admitted to being present in the

condominium that she shared with Benjamin when three of the shots were fired.

The State's theory in both cases was that the two couples met on a bus in Ocean City that was headed to a local night spot. The couples spent the evening together at the night club and then returned to the Sifrits' condominium. Once in the condominium the Sifrits engaged in a "missing purse game" in which they claimed Erika's purse was missing. They demanded the other couple find the purse and when it couldn't be found, somehow got Crutchley and Ford into the upstairs bathroom where both Sifrits shot Mr. Ford and in some other manner killed Ms. Crutchley.

Held: Affirmed. The first of three issues that Erika raised on appeal was whether the State failed to comply with the express terms of the MOU where the State agreed not to prosecute Erika for murder if certain conditions were met. In a pre-polygraph interview, Erica made reliable inculpatory statements that indicated her involvement in the murders was greater than her previous representations. The statements constituted a breach of the agreement and relieved the State of its obligations pursuant to the MOU.

The second issue that Erika raised on appeal was whether the State violated fundamental principles of fairness and due process by presenting conflicting theories in separate trials of Erika and her husband, Benjamin, both of whom were charged with committing the same crimes. A due process violation does not exist in a situation involving multiple trials based upon a single criminal transaction, unless the prosecution presents inconsistent theories and the inconsistency exists at the core, rather than the margins, of the State's case. It is not enough to find a due process violation that there are discrepancies because of rational inferences drawn from ambiguous evidence, provided the multiple theories are supported by consistent underlying facts. In the present case, the State's theory that Benjamin and Erika committed the criminal offenses together as a team remained consistent throughout both trials. Based on our review of the record, we find no inconsistency in the State's position in the two cases. Any inconsistency in inferences or emphasis placed on particular facts by the State was consistent with the State's underlying theory of the case and did not violate Erika's right to due process.

The third and final issue presented by Erika on appeal was whether the police conducted an unlawful search of her purse. The proper scope of Erika's consent encompassed all areas in her purse where the requested medication could have been contained. The search of her purse was lawful.

Erika Sifrit v. State of Maryland, No. 139, September Term, 2003, filed August 27, 2004. Opinion by Greene, J.

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CRIMINAL LAW - DUE PROCESS — INCONSISTENT THEORIES OF PROSECUTION

EVIDENCE — CHARACTER EVIDENCE — OTHER CRIMES, WRONGS, OR ACTS

SENTENCING — MERGER — REQUIRED EVIDENCE TEST

SENTENCING — MERGER — RULE OF LENITY

Facts: Benjamin Sifrit was convicted of murder in the second degree, assault in the first degree, and accessory after the fact in connection with the death of Martha Crutchley. Benjamin's convictions and this appeal arise out of events that occurred over the Memorial Day weekend 2002 in Ocean City, Maryland, resulting in the death of two people, Martha Crutchley and Joshua Ford.

On May 31, 2002, the Ocean City Police Department responded to an alarm call from the closed-for-the-night Hooters Restaurant and Bar merchandise store on 122nd Street in Ocean City. There they found Erika and Benjamin loading Hooters merchandise into their Jeep Cherokee. Upon searching the couple and their vehicle, the police found two guns and three knives. The two were arrested and charged with burglary. At the scene, Erika told the officers that she had anxiety problems and that she needed her medication located in her purse in the front of the Jeep. While looking for her medication, a sergeant discovered four spent .357 magnum shell casings, one live round, and the identification cards of Mr. Ford and Ms. Crutchley in the purse. The police ordered an immediate search of the Sifrits' condominium.

Upon entering the Sifrits' condominium, the police observed photographs of the Sifrits, Ms. Crutchley, and Mr. Ford, taken before the murders, along with two bullets on a glass table. Both of the bullets had been fired from the .357 magnum recovered from Erika at Hooters, and one of the bullets had Mr. Ford's blood and tissue on it. Crime scene technicians found bloodstains in over a dozen locations in the Sifrits' master bathroom, all of which were later identified as matching the DNA of either Ms. Crutchley or Mr. Ford.

The police ultimately found the dismembered bodies of Martha Crutchley and Joshua Ford in a Delaware landfill. Two bullets fired from the .357 magnum recovered from Erika at Hooters were

found in Mr. Ford's torso. The State's theory in both cases was that the two couples met on a bus in Ocean City. The couples spent the evening together at Seacrets and then returned to the Sifrits' condominium. Once in the condominium the Sifrits engaged in a "missing purse game" in which they claimed Erika's purse was missing. They demanded the other couple find the purse and when it couldn't be found, somehow got Cructhley and Ford into the upstairs bathroom where both Sifrits shot Mr. Ford and in some other manner killed Ms. Crutchley.

At his trial, Benjamin denied any involvement in the actual killing of the two victims. He testified that he "passed out" in the couple's jeep that night and some time later found Joshua Ford and Martha Crutchley dead on the bathroom floor. Benjamin admitted that it was his idea to dismember the bodies. He gave a detailed account of how he dismembered and disposed of the bodies, and he testified that Erika helped him.

Held: Affirmed. The first issue is whether the State violated Benjamin's fundamental right to due process by presenting factually inconsistent theories at his trial and that of his wife, Erika, both of whom were charged with committing the same crimes. A due process violation does not exist in a situation involving multiple trials based upon a single criminal transaction, unless the prosecution presents inconsistent theories and the inconsistency exists at the core, rather than the margins, of the State's case. It is not enough for us to find a due process violation that there are discrepancies because of rational inferences drawn from ambiguous evidence, provided the multiple theories are supported by consistent underlying facts. In the present case, the State's theory that Benjamin and Erika committed the criminal offenses together as a team remained consistent throughout both trials. A review of the record reflects no inconsistency in the State's position in the two cases. Any inconsistency in inferences or emphasis placed on particular facts by the State was consistent with the State's underlying theory of the case and did not violate Benjamin's right to due process.

The second and third issues raised on appeal are whether the trial court erred in admitting the testimony of Michael McInnis regarding a conversation that Benjamin had with McInnis three years before the murders as prior bad acts evidence and whether the trial court erred in refusing to allow the defense to present evidence regarding Erika's ability to commit the crimes alone.

McInnis, a former Navy SEAL and friend of Benjamin, testified that in 1999 the two men were having drinks when the discussion turned to how Benjamin would dispose of a body if he ever killed someone. Benjamin contends that the trial court erred in admitting the testimony because it was not relevant evidence and it did not fall within any of the stated exceptions embodied in Rule 5-404(b) relied upon by the trial court in admitting the testimony. Evidence of the conversation between

McInnis and Benjamin did not constitute "other crimes" or "prior bad acts evidence" because the testimony did not satisfy the *Klauenberg* definition. *Klauenberg v. State,* 355 Md. 528 (1999). However, the testimony was both relevant and admissible.

Benjamin also challenges the trial court's decision to prevent Elizabeth Sifrit, Benjamin's mother, from testifying regarding an incident that allegedly occurred with Erika in North Carolina. At trial, the defense proffered that Elizabeth would testify that Erika "pulled a gun" on Elizabeth. Based on the argument presented during trial to support the admission of Elizabeth Sifrit's testimony, the trial court did not err in excluding the testimony. Whether Erika once pulled a gun on someone does not have a tendency to show that she was the sole perpetrator of these heinous crimes.

The final issue raised on appeal is whether the trial court erred in imposing separate sentences for second degree murder and first degree assault of the same person in the same criminal transaction. Applying the required evidence test to the crime of assault in the first degree, the Court concluded that for sentencing purposes assault in the first degree merges with the crime of second degree murder. In addition, under the rule of lenity the conviction for first degree assault would merge with second degree murder.

Benjamin Sifrit v. State of Maryland, No. 142, September Term, 2003, filed August 27, 2004. Opinion by Greene, J.

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CRIMINAL LAW - PRIVILEGE AGAINST SELF-INCRIMINATION - FIFTH AMENDMENT - REFUSAL BY PARENT TO TESTIFY CONCERNING WHEREABOUTS OF CHILD IN CINA CASE

Facts: A few months after being adjudicated a Child in Need of Assistance (CINA) by the Circuit Court for Baltimore City, sitting as a juvenile court, the then ten year old Ariel G. disappeared from his Carroll County foster home in the early morning hours of 9 January 2001. His mother, Teresa B., could not be located, and evidence soon came to light that indicated she may have been involved in Ariel's disappearance. Teresa was charged in Carroll County with kidnapping. When Teresa was arrested later that year and held on unrelated contempt charges, the juvenile court ordered her and her attorney to appear at a CINA proceeding and answer questions concerning Ariel's whereabouts. Teresa refused to answer, instead invoking her right against self-incrimination under the Fifth Amendment. The court found her in contempt, and ordered her jailed until she

purged herself of the contempt by answering questions related to Ariel's whereabouts. Over the course of ten months of incarceration, Teresa was brought back before the court and asked the same or similar questions. Her refusal persisted.

Teresa appealed to the Court of Special Appeals from the juvenile court's latest order finding her in contempt for her refusal to answer questions concerning the last known whereabouts of Ariel. The Court of Special Appeals reversed the judgment of the juvenile court, concluding that Teresa had a Fifth Amendment right to refuse to answer questions in light of the pending kidnapping charge. *In re Ariel G.*, 153 Md. App. 698, 712-13, 837 A.2d 1044, 1052 (2003). The Baltimore City Department of Social Services (BCDSS) sought review in the Court of Appeals, and its petition for writ of certiorari was granted. *In re Ariel G.*, 380 Md. 617, 846 A.2d 401 (2004).

Held: Affirmed. Although a court may compel the production of evidence, it may not compel a person to testify about the whereabouts of such evidence if the testimony would be incriminating. In this case, Teresa was not held in contempt for failing to produce her child, but rather for refusing to testify about her knowledge of his whereabouts, in the face of the pending kidnapping charge. BCDSS claimed that Teresa could be compelled to testify because her refusal interfered with the operation of a noncriminal regulatory regime, citing *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549, 110 S. Ct. 900, 107 L. Ed. 2d 992 (1990). The Court of Appeals, however, held that *Bouknight* was inapplicable to the present case. When the compelled statements fall within the central scope of the Fifth Amendment, namely that they are testimonial and potentially incriminating, the operation of a civil regulatory regime can not trump the assertion of the Fifth Amendment right. The Court held that BCDSS's reliance on the best interests of the child could not override Teresa's ability to refuse to answer questions on the basis of the Fifth Amendment. The Court stated that if the State wishes to compel an individual to testify without infringing on that individual's Fifth Amendment rights, it should seek a grant of use immunity.

In re Ariel G., No. 9, September Term, 2004, filed 5 October 2004. Opinion by Harrell, J.

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CRIMINAL LAW - RIGHT TO COUNSEL - MD RULE §4-215 - WAIVER OF COUNSEL - RIGHT TO COUNSEL.

Facts: The petitioner, Kurt H. Richardson, was arrested and charged with felony and misdemeanor drug offenses and resisting arrest. When he appeared for his bail hearing, rather than being taken directly before the court, he, along with a group of defendants, was shown a videotape, which purportedly gave the advice that Maryland Rule 4-215 (a) requires.

After viewing the video, the petitioner and the other members of the group were taken into the courtroom, before the bail review judge. Having inquired, whether "[t]his group has seen the video and been advised of their rights, is that correct[]" and received the response, "Yes, sir, they have," the judge proceeded to review each defendant's case individually. The record thus reflects that the bail review judge never inquired of the petitioner personally whether he was present when the video was shown, whether he understood its contents, or whether he had any questions regarding the video. Nevertheless, "The Bail Review Docket" recorded that the District Court Judge did make "certain the defendant received a copy of the charging document; informed the defendant of right to, and importance of, counsel; complied w/rule 4-215; referred defendant to public defender; advised felony defendant of right to preliminary hearing; advised defendant of right to jury trial; ordered bail to remain the same."

Following a jury trial, the petitioner was found guilty of possession of heroin. He was sentenced the same day to three years incarceration. The petitioner timely noted an appeal to the Court of Special Appeals. Initially, that court, in an unreported opinion, dismissed the petitioner's appeal for "failure to provide a complete transcript of the proceedings in [C]ircuit [C]ourt as required by Maryland Rule 8-411." Subsequently, after receiving affidavits the petitioner submitted with respect to the efforts his counsel had made to complete the record, without granting or denying the petitioner's motion for reconsideration of that decision, but recognizing that justice would thereby be served , the intermediate appellate court issued an order remanding the case to the Circuit Court for an evidentiary hearing to determine whether the petitioner is entitled to a new trial because of noncompliance with Rule 4-215. Thereafter, the petitioner filed with the Court of Appeals a petition for writ of certiorari, which we granted. Richardson v. State, 376 Md. 139, 829 A.2d 530 (2003).

Held: Reversed. A defendant, who is shown, either singly or as a member of a group of defendants, a videotape of a judge giving the advice that Maryland Rule 4-215 (a) requires and subsequently taken before a judge for bail review, without a meaningful colloquy with the judge, cannot be said to have waived his or her right to counsel under Rule 415 (c), because that procedure does not comply with Rule 4-215.

Kurt Richardson v. State of Maryland No. 41, September Term, 2003, filed May 14, 2004. Opinion by Bell, C. J.

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COUNTIES - COUNTY CHARTER ON USE OF PART-TIME EMPLOYEES - INTERPRETATION OF LOCAL ORDINANCES AND CHARTERS GENERALLY

INTERPRETATION OF LOCAL ORDINANCES AND CHARTERS BY AGENCY

BALTIMORE COUNTY EMPLOYMENT LAW

Facts: Appellants, Julianne O'Connor, Julianne Uehlinger, Janice Zimmerman, and Gail Jett, ("the Employees"), seek review of an Order of the Circuit Court for Baltimore County, dated July 25, 2003, granting a declaratory judgment and summary judgment pursuant to a motion filed by Baltimore County ("the County"). They are four current or past part-time workers in the County's Department of Social Services. Their positions are classified by the County as exempt or non-merit positions. On November 1, 2002, the Employees filed a complaint in the Circuit Court for Baltimore County seeking declaratory and injunctive relief, alleging that their employment violates the Baltimore County Charter ("Charter") and the Baltimore County Code ("County Code"). Specifically, the Employees sought: (1) a declaratory judgment that designating permanent employees as "part-time" based on a 34 hour or 39 hour work week violates the Charter, and (2) an order from the court directing the County to classify plaintiffs' positions as non-exempt merit positions.

The Employees' complaint includes allegations that they have been doing the same work for virtually the same number of hours per week as merit system employees, but that they are denied merit status because they are classified by the County as part-time or hourly workers. The Employees argue that the Charter did not intend to create a class of permanent part-time workers who are exempt from the merit system. Rather, they argue, the Charter intended to exempt only employees who work occasionally or temporarily, which is only 15% of their workforce. The County did not answer the complaint but instead filed a motion for summary judgment. The County argued that in order to obtain injunctive relief against a municipality, the Employees must show "grave and irreparable injury." The County asserted that the Employees had not met that burden. The County also contended, among other

things, that the classification of the Employees as non-merit did not violate the Charter.

In addition, the County listed a series of material facts that are not in genuine dispute. Those facts include, among other things, that: (1) the Employees are employed by the County; (2) all four of the positions are funded exclusively by the State or federal government; (3) the four positions are not merit positions; (4) all four positions are part-time; and (5) each employee signed a statement upon accepting his or her positions with the County, that stated "I fully understand that the position I am accepting with Baltimore County is of a part-time nature and does not entitle me to benefits received by full-time employees of the Merit System . . . ." These facts are supported by the affidavit and attachments also filed by the County.

The parties appeared before the Circuit Court for a hearing on the motion for summary judgment on July 11, 2003. The Circuit Court granted the County's motion, deciding that there was no factual dispute and that, as a matter of law, the Charter did not prohibit the County from classifying the workers as non-merit exempt employees.

Held: Affirmed. The Circuit Court properly determined that no material dispute of fact exists. The Employees and the County agree about the manner in which personnel were hired, the number of hours worked, and the duties and responsibilities of the positions.

The Employees in the case at bar assert that their employment violates the Charter because they do the same work as merit employees, yet they are classified differently. As evidence of the County's bad faith, the Employees allege that the County was oblivious to Charter employee classifications until the lawsuit was filed, because only then were the supervisor plaintiffs informed that they were "consultants." The Employees' arguments are unpersuasive. There is nothing in the relevant portions of the Charter to suggest that in order to classify someone as a non-merit employee, their job function must be different from the job function of those classified as merit employees. Rather, the Charter permits the County to make the different classification based on the hours worked. In addition, there is nothing in the relevant portions of the Charter to suggest that in order for an employee's non-merit classification to be legitimate, the County must inform the employee that a part-time supervisory employee is considered to be a "professional consultant." Furthermore, there is nothing in the Charter to suggest that the County is limited in the amount of employees it may classify as non-merit employees. The commonly understood meaning of the word indicates that anyone working under 40 hours per week could fairly be classified as part-time. None of the workers in this case were scheduled to work over 34 hours per week.

All of the personnel in this case were hired to perform part-time duties and there is no allegation in the complaint that any of

them worked more than part-time hours. Consequently, their classification as non-merit employees is permissible under the relevant local laws. The Circuit Court for Baltimore County did not err by granting summary judgment to the County on that basis.

O'Connor, et al. v. Baltimore County, Maryland, No. 124, September Term, 2003, filed July 26, 2004, Opinion by Greene, J.

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FAMILY LAW - DIVORCE - INDEFINITE ALIMONY - ADEQUACY OF AWARD - MARITAL PROPERTY - TAX CONSEQUENCES - INTANGIBLE ASSETS - NON-EQUITY COUNTRY CLUB MEMBERSHIP

Facts: The issues in this case concern marital property and indefinite alimony awards. Michael Solomon challenged the equitable distribution of marital property because the trial court failed to account for, as an "other factor" pursuant to Family Law Article, § 8-205(b)(11), the asserted tax consequences of liquidating prematurely and necessarily his retirement assets in order to satisfy the marital property award. He also questioned the Court of Special Appeals's remand to the trial court to recalculate the amount of the monthly indefinite alimony award based on the appellate court's conclusion that the award failed to alleviate the unconscionable disparity found to exist between the parties even after Nancy Solomon was awarded $5,000 in monthly indefinite alimony.

Nancy Solomon, in her cross-petition for writ of certiorari, queried whether a non-transferrable, non-redeemable, and non-exchangeable country club membership is "property" within the meaning of § 8-201(e)(1) of the Family Law Article. Mrs. Solomon asserted that the Court of Special Appeals erred in concluding that Mr. Solomon's country club membership was not marital property for purposes of determining the marital property award. Mrs. Solomon also challenged the trial court's conclusion, affirmed by the Court of Special Appeals, that it was not persuaded that the disposal of Mr. Solomon's stock in Orthopedic Systems International, Inc. (OSI) constituted intentional dissipation of a marital asset.

At the time of divorce, Mr. Solomon held $959,217.55 of the marital property in his name, with $445,731 of it in retirement accounts. Mrs. Solomon held approximately $10,000 in marital

property in her name. The Solomons jointly held approximately $350,000 in marital assets.

During the marriage, Mrs. Solomon had no income because she stayed at home to raise the parties' three children. Based on expert vocational testimony, the trial court imputed approximately $25,000 to Mrs. Solomon as annual earned income. Mr. Solomon's annual income as a tax attorney ranged from approximately $500,000 just prior to the parties' 1986 wedding to $1,050,000 at the time of the divorce. Mr. Solomon also relied extensively on loans and lines of credit from friends, business acquaintances, and lending institutions throughout the marriage. The Solomons incurred over two million dollars in mortgage, other secured, and unsecured debt between them.

A marital asset held in Mr. Solomon's name at the inception of the divorce litigation in the Circuit Court for Montgomery County was shares of OSI, a corporation that manufactured hospital equipment. Prior to trial, Mr. Solomon pledged his shares of OSI to secure a $200,000 loan to him from a trust managed by a close business acquaintance and fellow OSI minority shareholder. After failing to make the first two quarterly interest payments on the note in June and September 2000, Mr. Solomon, in December 2000 (while the litigation was pending), transferred both the shares and his rights to any proceeds from the sale of the shares, to the trust to satisfy the loan indebtedness.

Evidence adduced during the Circuit Court trial indicated that OSI's value was $83,000,000. Two experts, relying on this valuation, testified that Mr. Solomon's shares may have been worth approximately $1,083,000; other valuations ranged from $600,000 to $1,300,000. Although the experts commented that the conveyance of Mr. Solomon's shares appeared to be somewhat suspect, neither expert could state that the transaction satisfying the note indebtedness was fraudulent.

Mr. Solomon also held a membership in the Congressional Country Club (the Club). He had been admitted to the club as a "summer" member in 1980, before the parties marriage, and received full membership in 1987 after paying a $25,000 initiation fee. The Solomon family used the Club's facilities frequently. Club membership is non-transferrable, non-redeemable, and non-exchangeable. At the time of trial, a new member to the Club would pay an $80,000 initiation fee to join.

Following a bench trial in May and June of 2002, the Circuit Court issued its Amended Opinion and Order on 20 August 2002. The trial court concluded that Mr. Solomon did not dissipate intentionally his interest in OSI and, thus, did not impute the value of the OSI shares into the marital estate. The court also held that the Club membership was marital property with a value of $80,000. The trial court ordered Mr. Solomon to pay a $550,000 marital property award to Mrs. Solomon. In addition, he was ordered to pay $6,000 in monthly rehabilitative alimony for three

years and $5,000 in monthly indefinite alimony thereafter. Both parties appealed.

In a lengthy unreported opinion, a sometimes shifting majority of the Court of Special Appeals's panel affirmed the judgment of the Circuit Court in part, and reversed in part. The panel unanimously held that the Circuit Court acted within its discretion in not considering as an "other factor" under Family Law §8-205(b)(11) Mr. Solomon's asserted tax liabilities associated with a premature liquidation of his retirement accounts in order to pay the marital award. Absent a court order compelling liquidation of the retirement accounts, Mr. Solomon had other methods of paying the marital award and, therefore, it was not required that he liquidate his retirement accounts. As a result, the Court of Special Appeals held that Mr. Solomon's tax liabilities of an unnecessary liquidation of the accounts were not "immediate and specific," but rather "speculative." The intermediate appellate court panel agreed unanimously that the Circuit Court did not commit clear error in determining that there was insufficient evidence that Mr. Solomon dissipated intentionally his interest in OSI.

Two members of the panel formed a majority to reverse the Circuit Court's ruling that the country club membership was marital property and directed that its $80,000 valuation be subtracted from the marital property valuation. A different majority concluded that the Circuit Court abused its discretion in setting the indefinite alimony amount. That majority found that, even with Mrs. Solomon's imputed annual income of $25,000 and $5,000 in monthly indefinite alimony, the unconscionable disparity in living standards between the Solomons was not relieved. The Court of Special Appeals remanded the issue to the Circuit Court for reevaluation in accordance with its opinion.

The Court of Appeals granted Mr. Solomon's petition for writ of certiorari and granted Mrs. Solomon's cross-petition for writ of certiorari.

Held: Court of Special Appeals's judgment affirmed. The Court of Appeals first held that tax liabilities may be considered as an "other factor" under § 8-205(b)(11) only when they are "immediate and specific or not speculative." Because Mr. Solomon was not ordered to pay the marital property award from his retirement assets and had other funding sources, the Circuit Court did not commit clear error or abuse its discretion in not considering the asserted potential tax liabilities under §8-205(b)(11) because they were not "immediate and specific" and "speculative."

When indefinite alimony is appropriate to relieve unconscionable disparity in post-divorce income, the alimony amount must be sufficient to relieve the unconscionably disparate situation. While there can be no "bright-line" standard to determine when the amount of an indefinite alimony award sufficiently relieves an unconscionable disparity in lifestyles,

relative comparison of post-divorce incomes between the two parties (an analytical paradigm used often by the Court of Special Appeals in indefinite alimony cases) is a useful guide in determining whether the unconscionable disparate condition is relieved. Here, the trial court abused its discretion by awarding Mrs. Solomon only $5,000 in monthly indefinite alimony and did not alleviate the unconscionable disparity between the parties.

The Court also held that the trial court did not commit clear error or abuse its discretion in determining that Mr. Solomon did not dissipate intentionally his shares of OSI from the marital property. A trial court's judgment on dissipation will not be disturbed if the judgment is reasonable and supported by competent evidence under the clearly erroneous standard. Here, there was competent evidence demonstrating a wide range of value of the shares and ongoing litigation regarding the value, balanced against the certitude of eliminating a known substantial indebtedness as a result of the transfer of the stock.

Lastly, the Court held that the non-transferrable, non-equity country club membership was not property under the Marital Property Act because it could not be converted into a monetary amount for equitable distribution. Mr. Solomon's Congressional Country Club membership cannot be sold, transferred, exchanged, redeemed, inherited, or liquidated in any way to satisfy a marital property award.

Solomon v. Solomon, No. 116, September Term, 2003, filed September 13, 2004. Opinion by Harrell, J.

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INSURANCE - LEGAL MALPRACTICE INSURANCE CONTRACTS - ATTORNEY REPRESENTATION -WHERE AN ATTORNEY REPRESENTS MULTIPLE CLIENTS IN A TORT ACTION, A MALPRACTICE INSURANCE PROVISION WHICH DEFINES "THE PER CLAIM LIMIT OF LIABILITY" AS "ALL DAMAGES ARISING OUT OF THE SAME, RELATED OR CONTINUING PROFESSIONAL SERVICES WITHOUT REGARD TO THE NUMBER OF CLAIMS MADE, DEMANDS, SUITS PROCEEDINGS, CLAIMANTS, OR PERSONS INSURED INVOLVED," THE COURT WILL LOOK AT THE INDIVIDUAL DIFFERENCES IN THE CLIENTS AND THE DISTINCT AND SEPARATE DUTY THAT THE ATTORNEY OWES TO EACH.

Facts: Between 1988 and 1990, Eric, Michael, Antoine, Dustin

and Cynthia Beale (the Beale Children), the appellants, resided at premises, 1705 Holbrook Street in Baltimore City, in which, it was alleged, there was loose and flaking paint and which was cited for lead paint violations. During that time, and as a result of the alleged negligence of the landlord, each child was exposed to, and ingested, lead paint, sustaining an elevated blood lead level, as a result. The Beale Children's grandmother retained Mark E. Herman, Esq. and the firm with which he was associated, William G. Kolodner, P.A. to represent them in their attempt to recover for their injuries.

Kolodner, P.A. filed suit against Northern Brokerage Co. and Brokerage I., Inc., the owners and operators of 1705 Holbrook, the landlords, on behalf of the Beale children and their parents. In the complaint, there were six counts relating to the Beale children, the claim of each Beale child being consolidated with the claims of all of the other Beale children. The claims of each individual child, as alleged was identical to the claims of all of the other children. Subsequently, noting the lack of any evidence as to the landlord's notice of the lead paint condition in the leased premises and on the issue of the causal connection between the alleged presence of lead-based paint in the dwelling and the alleged injury to the children, the trial court granted the landlords' motion for summary judgment and entered judgment in their favor. That judgment was affirmed by the Court of Special Appeals in an unreported opinion.

Subsequently, now represented by new counsel, the Beale children, by their grandmother and next friend, brought a malpractice action against Kolodner P.A. Although consolidated in one complaint, having a total of ten (10) counts, the claim of each of the children against the law firm and Herman was set forth in separate counts. In each count, the subject child alleged that, as a result of the total neglect of his or her attorney, as appropriate, Kolodner, P.A. and Herman, he or she was injured.

Kolodner P.A. was insured, under a lawyers professional liability policy, by American National Lawyers Insurance Reciprocal (Risk Retention Group) (ANLIR), the appellee. That policy provided coverage of $ 1,000,000 per claim and $ 2,000,000 aggregate per policy period and that ANLIR would pay on behalf of its insured "all sums [the insured] shall become legally obligated to pay as Damages because of any [timely made] Claim to which this policy applies."
A "claim," the policy states, is "a demand received by the insured for money, other than fines, penal sums or any other amount or item not otherwise included within the definition of Damage in this policy, including the service of suit or the institution of other proceedings against the insured."

Maintaining that, under its policy, the five Beale claims constituted but "one claim," ANLIR offered the appellants its per claim limit of $ 1,000,000.00. When the appellants rejected the offer, it filed this declaratory judgment action to resolve which

limit of liability applied, the per claim or the aggregate. The legal malpractice action was stayed pending the result of the declaratory judgment action.

The Circuit Court entered summary judgment in favor of ANLIR, agreeing that the claims of each one of the Beale Children and, therefore, the damages each claimed due to their attorneys' alleged malpractice, "arose out of the 'same, related or continuing Professional Services, without regard to the number of Claims made, demands, suits, proceedings, claimants or Persons Insured involved,"'it declared, "[b]ased upon the undisputed material facts, and in accordance with caselaw cited by the parties, the Per Claim Limit of Liability of the Policy applies to all damages claimed by the Beales' claims against the Attorneys."

The Petitioner timely noted an appeal to the Court of Special Appeals. We granted certiorari, on the Court's own motion, before any proceedings in the intermediate appellate court. Beale, et al. v. Am. Nat'l. Law. Ins. Reciprocal, 371 Md. 613, 810 A.2d 961 (2002).

Held: Reversed. Where an attorney represents multiple clients in a tort action, a malpractice insurance provision which defines "the Per claim Limit of Liability" as "all Damages arising out of the same, related or continuing Professional Services without regard to the number of claims made, demands, suits proceedings, claimants, or Persons Insured involved," does not preclude a finding that an aggregate limit of liability is appropriate against that attorney, even where the same skill set and process may have been applicable to the handling of all of the cases. Rather, the court will look at the individual differences in the clients and the distinct and separate duty that the attorney owes to each.

Eric Beale, a minor, etc., et al v. American National Lawyers Insurance Reciprocal (Risk Retention Group), No. 87, September Term, 2002, filed February 19, 2004. Opinion by Bell, C.J.

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MARYLAND PUBLIC INFORMATION ACT - CONTRACTS - THIRD PARTY CONTRACTS - PUBLIC DOCUMENTS.

Facts: This case had its genesis when the appellees made a written Maryland Public Information Act (MPIA) request to the Athletic Department of the University of Maryland at College Park (UMCP) seeking "copies of the original and revised employment contracts for head football coach Ralph Friedgen. ... [and] any separate letters of understanding, side letters or similar documents specifying incentives, bonuses, broadcast agreements, athletic footwear contracts, and other matters concerning the terms and conditions of [Coach Friedgen's] employment and compensation." In response, University Counsel disclosed that Coach Friedgen's annual salary was $183,920, and denied the remainder of the request, citing § 10-616(i) and § 10-617(f), which prohibit the disclosure of personnel and certain financial information.

Dissatisfied with the UMCP's response, the appellees retained counsel, who sought reconsideration of UMCP's decision to disclose only those documents related to Coach Friedgen's salary and to refuse disclosure of documents "describing other employment related compensation due" him. They argued that UMCP's reliance on §10-616(i) and §10-617(f) was flawed because UMCP improperly and narrowly interpreted the term, "salary," and, at the same time, improperly construed the term, "personnel," broadly, both inconsistently with the "bias in favor of disclosure recognized by the courts."

The UMCP was not persuaded and maintained its position. Nonetheless, perhaps in an attempt to avoid the threatened lawsuit, Coach Friedgen voluntarily agreed to provide additional information about his compensation. Accordingly, the UMCP disclosed the sought after information.

Prior to receipt of the additional information voluntarily disclosed by Coach Friedgen, the appellees made another MPIA request of the UMCP Athletic Department, seeking information with respect to the compensation and income of UMCP's head basketball coach, Gary Williams. The University reaffirmed its previously communicated interpretation of the MPIA and, accordingly, refused to disclose any information relating to Coach Williams' non-University related income. Nor did it disclose a copy of Coach William's University contract.

The appellees filed suit in the Circuit Court for Prince George's County. The parties filed cross-motions for summary judgment, at the center of which was the question whether the University was required to disclose, not only each coach's total salary from the University, but, the underlying contracts and agreements relating to each coach's income. The appellants argued that the plain language of the applicable sections of the MPIA statute requires state agencies to deny disclosure of a state employee's personnel and financial records, with a narrow exception for salary derived from State funds. The appellees, on the other

hand, maintained that the records sought were subject to the mandatory disclosure requirements of the MPIA and that the appellant's interpretation "accords broad secrecy to the terms of a state employee's compensation contrary to the MPIA's mandate that the salary of public employees should be a matter of public record."

The trial court found in favor of the appellees. It reasoned: the legislature has directed that the MPIA "shall be construed in favor of permitting inspection" of public records; the term "salary" unambiguously is included in the definition of "public record" in § 10-611(g)(2); the financial records exclusion contained in § 10-617(f) does not apply to the salary of a public employee; and, salary related documents are not personnel records within the meaning of the statute. Consequently, the trial court granted the appellees' motion for summary judgment and denied the appellants' cross-motion. Accordingly, the court ordered that the records requested by the appellees be produced. The court instructed that, to the extent that salary information and personnel records coexist in the same document, the personnel information should be redacted before the records are delivered to the appellees. The appellants moved to alter or amend the judgment, in an attempt to have any references to payments to the coaches from third parties deleted from the court's order. They argued, in that regard, that such payments did not constitute "salary" of a public employee and pointed out that the appellees requested information only about payments to the coaches "by the State University from public funds" and indicated that the records it sought did "not reveal anything about the coaches' personal finances other than how much taxpayer money they are paid from their public employment." The trial court denied that motion, whereupon the appellants timely noted an appeal to the Court of Special Appeals. Prior to any proceedings on the merits in the intermediate appellate court, this Court, on its own initiative, issued a writ of certiorari. University System of Maryland v. The Baltimore Sun Co., 374 Md. 81, 821 A.2d 369, (2003).

Held: Affirmed in part and reversed in part. Records evidencing a contract or agreement between a State employee and a third party, which provides income to that employee and to which the State entity employing that employee is not a party, when the subject of a Maryland Public Information Act (MPIA) request, are subject to in camera review to determine whether they are financial information within the contemplation of § 10-617 (f) and, thus, not required to be disclosed. Remanded.

University System of Maryland, et al.v. The Baltimore Sun Company, et al. No. 138, September Term, 2002, filed April 15, 2004. Opinion by Bell, C.J.

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TORTS - BATTERY - NEGLIGENCE - JURY INSTRUCTIONS - TORT - LACK OF INFORMED CONSENT - MEDICAL MALPRACTICE.

Facts: Tasha Molé, the appellant, consulted a doctor, after experiencing pain in her left breast, in which she also discovered a lump. She was referred for a sonogram of her breast, the results of which revealed that the appellant had two tender masses in her left breast, one of which was determined to be a "simple cyst," i.e. a fluid filled sac, and the other a "complex cyst containing a mural nodule." As to the latter, a biopsy was "suggested," due to the possibility of malignity.

On her doctor's advice, the appellant consulted a surgeon, the appellee, Dr. Jutton, who was employed by Linhardt Surgical Associates, P.A., with respect to how best to proceed with regard to the cysts. Having initially attempted to aspirate the cysts to determine if they were cancerous, but finding that "she was too tender for me to aspirate,"with a needle, Dr. Jutton determined that "the best way to proceed would be a surgical procedure to remove the solid nodule."

In preparation for the surgery, Dr. Jutton informed the appellant of the risks involved, including post-operative infection. The appellant consented to the expected procedure, "excision breast mass left."Thus, the appellant consented to any necessary extension of the surgery or to any different procedure that Dr. Jutton, in the "exercise of professional judgment," deemed "necessary or advisable."

During the surgical procedure, tissue surrounding the two cysts was removed and some of the appellant's milk ducts were cut, according to Dr. Jutton, "in the process of removing the mass." Dr. Jutton also subsequently testified, "[t]he breast is composed of milk ducts, milk ducts get cut when you do incision."

The appellant filed an action against the appellees in the Circuit Court for Anne Arundel County. The complaint contained two (2) counts, one for medical negligence and the other for battery. The battery count was premised on Dr. Jutton having cut the milk ducts leading to her left nipple during the surgery to

remove the two (2) cysts, without the appellant's authorization, that Dr. Jutton exceeded the scope of the consent she was given. As to that count, at the conclusion of the trial, the appellant requested that the jury be given an instruction on battery. The trial court denied the appellant's request.

The jury returned a verdict in favor of the appellant, awarding her $22,500.00 in damages. Judgment was entered on the verdict against the appellees. Despite the appellant's success in the negligence count, she noted an appeal, in which she challenged the trial court's refusal to instruct the jury on battery. Prior to any proceedings on the merits in the intermediate appellate court, this Court, on its own initiative, issued the writ of certiorari to address the important question that this case presents. Molé v. Jutton, 373 Md. 406, 818 A.2d 1105 (2003).

Held: Affirmed. In the case where a surgeon has exceeded the consent he or she was given, it is proper for court to deny a party's request for a jury instruction on battery, when, as read as a whole, the court's instructions to the jury clearly set forth the applicable law that the cause of action for lack of informed consent is one in tort for negligence, as opposed to battery or assault.

Tasha Molé v. Jerrylin Jutton, M.D., et. al., No. 126, September Term, 2002, filed April 13, 2004. Opinion by Bell, C.J.

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WORKERS' COMPENSATION ACT - STATUTORY EMPLOYER IMMUNITY FROM NEGLIGENCE SUIT

Facts: In 1966, the District of Columbia, the State of Maryland, and the Commonwealth of Virginia entered into an interstate compact called the Washington Metropolitan Area Transit Authority Compact ("Compact"), for the purpose of creating the Washington Metropolitan Transportation Authority ("WMATA") "to plan, develop, finance and cause to be operated improved transit facilities." In 1992, WMATA entered into the Fifth Interim Capital Contributions Agreement ("ICCA 5"), under which WMATA "will proceed with all practical dispatch to accomplish the construction" of four new line segments, one of which is "Branch Avenue."

On July 15, 1999, Rodrigues-Novo was working on the construction project at the Branch Avenue Metro Station in Prince George's County, Maryland. While using a Toyota SDK-8 Loader to break up a driveway that had been built incorrectly, Rodrigues-Novo sustained a serious injury leading to the loss of his lower right leg. At the time of the accident, WMATA had a contract relationship with Recchi, in which Recchi had agreed to construct an extension of WMATA's subterranean "Green Line," including the Branch Avenue Station. To complete the work, Recchi had entered into a subcontract with Pessoa, which promised to complete certain road construction and other concrete work at the Station. Rodrigues-Novo worked for Pessoa.

Shortly after his injury, Rodrigues-Novo applied for workers' compensation benefits under the Maryland Workers' Compensation Act. When WMATA's workers' compensation insurer, Lumberman's Mutual Casualty Co., learned of Rodrigues-Novo's application, it notified the Maryland Workers' Compensation Commission that WMATA's "wrap-up" workers' compensation insurance policy covered the claim. Rodrigues-Novo has received some benefits from WMATA's wrap-up insurance coverage.

Appellant Rodrigues-Novo and his wife filed suit in the District of Columbia Superior Court against Recchi and WMATA, alleging negligence in the supervision, maintenance, and inspection of the loader and construction site. The trial court granted summary judgment to both defendants, on the ground that under the Maryland law of workers' compensation they were "statutory employers" and hence immune from suit. Rodrigues-Novo appealed to the District of Columbia Court of Appeals challenging that conclusion.

Considering that WMATA's status as a statutory employer would be determinative of the appeal, that no controlling legal authority exists, and that the issue is one of general importance, the District of Columbia Court of Appeals certified the following question to this Court: "Whether, in the circumstances of this case, WMATA was a 'statutory employer' under the Maryland Workers' Compensation Act and hence immune from suit alleging negligence."

Held: Under the Maryland Workers' Compensation Act, WMATA qualifies as a statutory employer of Rodrigues-Novo. WMATA had entered into a principal contract, the ICCA 5, to perform work or services needed for the construction of the Metrorail extension, the project on which Rodrigues-Novo was working at the time of his injury. As evidenced by the WMATA Compact, construction of Metrorail facilities is part of WMATA's trade, business, or occupation. Furthermore, the WMATA contract with Recchi

constitutes a subcontract for the whole or part of the work or services required under the ICCA 5. Because WMATA is a "statutory employer," it is, therefore, immune from Rodriguez-Novo's claim of negligence.

Joao Rodrigues-Novo, et al. v. Recchi America, Inc., et al., Misc No. 11 September Term, 2003, filed April 14, 2004. Opinion by Battaglia, J.

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COURT OF SPECIAL APPEALS

ATTORNEYS - ATTORNEY'S FEES — LODESTAR ANALYSIS

Facts: On December 23, 1993, appellant filed a marital status discrimination claim with the Montgomery County Office of Human Rights ("MCOHR"). She averred that appellee's policies, which restricted access to and use of appellee's golf course, were discriminatory on the basis of marital status and resulted in disparate treatment of her because of her sex. Appellant later amended her claim to add a sex discrimination claim, asserting theories of disparate impact in the membership structure and hostile environment.

Following an investigation, MCOHR found reasonable grounds to believe that appellee was a place of public accommodation and had violated Chapter 27, Article I, Section 27-8 of the Montgomery County Code (1987), by engaging in unlawful discriminatory practices on the basis of marital status and gender. MCOHR referred the matter to the Office of Zoning and Administrative Hearings for a public hearing.

Following a ten-day public hearing, the hearing examiner issued a Report and Recommendation to the Public Accommodation Panel of the MCOHR. The report set forth the hearing examiner's findings that appellee was a place of public accommodation; appellee had engaged in sex discrimination (disparate treatment) against appellant during the golf course incident; and appellee had engaged in gender-based discriminatory practices, which created a hostile environment. The hearing examiner did not find that appellee's practices had resulted in a disparate impact on women. The hearing examiner recommended that appellant be awarded $1,000.00 in damages (the statutory limit), $120,481.00 in attorney's fees, and $4,282.31 in expenses. Both parties filed briefs seeking modification by the Public Accommodation Panel ("Panel") of the hearing examiner's recommendation.

On March 1, 2000, the Panel held a public hearing on the matter and allowed the parties to make oral arguments. Two months later, the Panel issued a Memorandum Opinion and Order adopting the hearing examiner's finding that appellee was a place of public accommodation. The Panel also adopted the hearing examiner's finding that there had been a single act of sex discrimination against appellant. The Panel, however, rejected the hearing

examiner's finding that appellee had engaged in sex discrimination by creating a hostile environment, concluding that such theories are reserved for employment cases. In its order, the Panel granted appellant equitable relief and awarded her $750.00 in damages and $3,000.00 in attorney's fees, which was a significant reduction of the hearing examiner's recommended attorney's fee award of $120,481.00.

Both parties filed petitions for judicial review in circuit court. Following oral argument, the court affirmed the Panel's decision on all points except its award of attorney's fees. The court reversed the Panel's decision and remanded the case with instructions for the Panel to consider the factors listed in § 27-7(k)(1) of the Montgomery County Code, as well as the degree of success in appellant's pursuit of her claims in calculating attorney's fees.

Pursuant to the court's order, the Panel issued an order directing appellant to submit to the Panel an application for award of attorney's fees. Appellant duly filed an application for attorney's fees. Appellee filed an opposition, arguing, *inter alia*, that appellant's application was deficient because the time entries lacked specificity and bundled more than one activity per entry.

The Panel thereafter issued an undated memorandum order, listing its preliminary findings with respect to the factors in § 27-7(k)(1) of the Montgomery County Code, and stating that appellant was entitled to reasonable attorney's fees for time spent litigating the jurisdictional question of whether appellee was a place of public accommodation. The Panel instructed appellant to submit "a revised billing report indicating the estimated time spent only on the issue of determining [appellee] to be a place of public accommodation." Appellant subsequently filed a revised billing report, which included time entries for 757.17 hours of work spent litigating the public accommodations issue, amounting to $131,476.10. In the same petition, appellant identified an additional 436.17 hours ($71,044.04) in fees accrued while litigating the attorney's fee award.

Appellee filed an opposition, arguing that $131,476.10 was not a reasonable fee for litigating the jurisdictional issue, because that figure amounted to 70 % of the total time counsel spent litigating the entire case. Appellee further argued that appellant's time entries were still unbundled and unduly vague.

The Panel thereafter issued an Order and Opinion Awarding Attorney's Fees, in which the Panel stated that appellant's request lacked specificity and bundled time entries. The Panel stated:

> [I]t is not our responsibility to make subjective estimates as to how such entries should be allocated. Moreover, the Panel is comprised of volunteers and does not have access to staff who could spend large amounts of time to attempt to make such estimates, even if the Panel thought it wise to attempt to do so, which it does not. For those reasons, we will make the rate percentage cuts in the final award.

The Panel then addressed each of the factors in § 27-7(k)(1) of the Montgomery County Code and the relative success of appellant's case, and declined to make an upward or downward adjustment on any of the factors. The Panel concluded by stating that, based on its consideration of the lodestar factors, appellant was entitled to an award of attorney's fees in the amount of $22,440.00, reflecting 132 hours of work at a rate of $170.00 per hour.

Appellant filed a petition for judicial review and, seven months later, the parties appeared for a hearing on the matter. The court affirmed the Panel's award of attorney's fees. In its order, the court specifically found that the Panel did not abuse its discretion or commit legal error in reaching its decision concerning appellant's award of attorney's fees. The court determined that the Panel properly applied the factors in § 27-7(k)(1) and that there was substantive evidence in the record to support the Panel's decision.

Held: Reversed. The Public Accommodation Panel of the Montgomery County Office of Human Rights did not properly apply the lodestar analysis in calculating an award of attorney's fees to a prevailing plaintiff when the Panel reduced the reported hours by 89 % without explaining its rationale for the reduction.

The Panel's order awarding attorney's fees must articulate the decisions made and supply principled reasons for those decisions in order to allow for meaningful judicial review. Attorney's fees may not be reduced by a particular percentage or amount in an arbitrary or indiscriminate fashion.

Betty Flaa v. Manor Country Club, No. 1102, Sept. Term, 2003, filed September 8, 2004. Opinion by Barbera, J.

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CIVIL PROCEDURE - HEALTH CARE MALPRACTICE CLAIMS ACT- EVIDENCE- EXPERT TESTIMONY.

Facts: William Frew and his wife, Debra, allege that Dr. Ralph Salvagno improperly applied a tourniquet while performing surgery on William Frew's right ankle. As a result, there was an injury to his right calf and he lost sensation in the right foot. The Frews filed a two-count statement with the Health Claims Arbitration Office (HCAO) against Salvagno, Michael Fitzgerald and the Altizer-Salvagno Center for Surgery ("Appellants"), alleging negligence and loss of consortium.

Thereafter, the Frews requested and were granted two extensions of time to file a certificate of a qualified expert ("the certificate") by the HCAO Director. The Frews filed an amended statement of claim, adding a count for lack of informed consent. They also requested another extension of time to file the certificate, which was granted. In response, Appellants filed a motion to dismiss count one, which was granted. Appellants, then filed a motion to dismiss counts two and three because the Frews had not yet designated an expert. The chairperson ordered that counts two and three be dismissed without prejudice.

The Frews filed in the Circuit Court for Washington County a petition to nullify the award, which was granted. The court found that, because the sole issue was lack of informed consent, a certificate of a qualified expert was not required under the Health Claims Arbitration Act.

Held: Affirmed. A claimant is entitled to arbitrate a lack of informed consent claim without naming an independent expert witness and may rely on the expert testimony of an adverse party to establish his or her claim. Moreover, dismissal of a claim prior to arbitration does not constitute an "award" under Md. Code (1974, 2002 Repl. Vol.), § 3-2A-05 of the Courts and Judicial Proceedings Article. When a claim has been improperly dismissed prior to arbitration, a remand to the HCAO is appropriate.

Salvagno v. Frew, No. 859, September Term, 2003, filed September 3, 2004. Opinion by Kenney, J.

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CONTRACTS - MARYLAND UNIFORM COMMERCIAL CODE § 2-105 - SALES - GOODS - LIVESTOCK

A contract for the sale of pigs is governed by the UCC because the definition of goods in § 2-105 of the UCC covers young animals and even the unborn young of animals.

CONTRACTS - MARYLAND UNIFORM COMMERCIAL CODE - SALES - MIXED SALES AND SERVICES CONTRACTS

The UCC applies to contracts involving services and the delivery of goods. The court must analyze the predominant thrust of the contract to see if it is primarily a contract for the sale of goods with labor incidentally involved.

CONTRACTS - MARYLAND UNIFORM COMMERCIAL CODE § 2-201 - STATUTE OF FRAUDS - QUANTITY TERM REQUIRED

A written memorandum of a contract for the sale of goods in excess of $500 must contain a quantity term in order for the agreement to be enforceable under the statute of frauds.

Facts: Appellant Charles D. Lohman, trading as Lohman Farms, filed a complaint in the Circuit Court for Washington County against Appellees John C. Wagner and Joyce E. Wagner, trading as Swine Services. The complaint alleged breach of a Weaner Pig Purchase Agreement between the parties, where Lohman agreed to raise and sell weaner pigs to Wagner. Wagner was in the process of putting together a network of pork producers and buyers, and the parties had several conversations concerning Lohman becoming a weaner pig producer for the proposed pork network.

At the time of the conversations, Lohman was operating a farrow to finish pig operation, which he needed to remodel into an acceptable facility for raising weaner pigs. Accordingly, Lohman sought financing from First National Bank of Mercersburg to fund the remodeling of his facility. Prior to a meeting with his banker, Lohman asked Wagner to fax him a copy of the Weaner Pig Purchase Agreement to show his bank. Wagner testified he did not have any sample agreements for the weaner pig operation at that time because the pork network was not ready to enter into contracts. However, he faxed a sample agreement to Lohman to show his banker. The sample agreement contained several blank lines, including the quantity of pigs to be purchased, but it was signed by Wagner as the purchaser. Without any further communication with Wagner, Lohman filled in the blanks, inserting the number "300" as the quantity of weaner pigs to be supplied weekly. Lohman signed the document as producer, and faxed a copy to his bank, but never sent Wagner a copy of the agreement containing his handwritten alterations.

Lohman shipped weaner pigs to Wagner at $28 per head until October 1998 when Wagner told Lohman he needed to reduce the price to $18 per head because of an extreme drop in market prices for pork. Lohman continued selling pigs to Wagner at $18 per head until March 1999, when Lohman wound down his business. During this time, Lohman attempted to find another buyer for his pigs, but was unable to do so. Wagner's pork network never came into being.

Subsequently, Lohman filed a one-count complaint against the Wagners, alleging breach of contract and seeking damages. The trial court entered judgment for the Wagners finding that the alleged contract did not meet the requirements of Maryland Uniform Commercial Code § 2-201 - statute of frauds, because it did not contain a quantity term. Therefore, the court held the agreement was not enforceable.

Held: Affirmed. Lohman argued the Maryland Uniform Commercial Code (UCC) was not applicable to the Weaner Pig Purchase Agreement because it was a contract for the provision of services and not a contract for the sale of goods. The Court of Special Appeals concluded the UCC does apply to the agreement because it involves a transaction in goods. The UCC defines goods in § 2-105(1) to include animals and the unborn young of animals. Therefore, the UCC applies to contracts for the sale of pigs.

Although a contract to buy and sell and pigs also necessarily involves some services, the UCC may apply to contracts involving both services and the delivery of goods. In assessing the UCC's applicability, the court must analyze the predominant purpose of a mixed sales and services contract to see if it is primarily a contract for the sale of goods with labor incidentally involved. *See Burton v. Artery Co., Inc.*, 279 Md. 94 (1977). Although the Weaner Pig Purchase Agreement at issue called for Lohman to provide certain services, the trial court had properly determined that those services were incidental to the sale and delivery of the pigs, and did not constitute the main thrust or predominant purpose of the agreement. Therefore, the UCC applies to the Weaner Pig Purchase Agreement.

Finding that the UCC applied to the agreement necessarily meant it must also satisfy the requirements of UCC § 2-201 - statute of frauds. In order to satisfy the statute of frauds, UCC § 2-201 requires a contract for the sale of goods in excess of $500 must be evidenced by a writing signed by the party to be charged and the writing must specify a quantity. The trial court concluded that the Weaner Pig Purchase Agreement did not contain a quantity term, and therefore, was not an enforceable contract. Moreover, the trial court did not accept Lohman's argument that the "300" figure that Lohman inserted into the agreement satisfied the statute's requirement for a quantity term, because there was no evidence that Wagner ever gave Lohman the authority to insert this figure.

Charles D. Lohman, et. al. v. John C. Wagner, et. al., No. 2185, September Term, 2003, filed September 30, 2004. Opinion by Meredith, J.

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CRIMINAL LAW - CONFESSIONS - MIRANDA RIGHTS - CUSTODY - Trial court did not err in concluding that appellant was not in custody at store parking lot because he is the one who summoned the sheriffs, and they asked him only limited questions, in public, during the day, and without the use of restraints. Trial court also did not err in concluding that appellant was not in custody at sheriff's office, when he submitted to his first interview, even though he had previously been handcuffed for about fifteen minutes, while in police car searching for murder victim's residence.

FELONY MURDER - ROBBERY - AFTERTHOUGHT ROBBERY - Court did not err in its jury instruction as to robbery by advising that appellant could be found guilty of robbery even if intent to steal was formed after the application of force to the victim. But, court did err in its instruction to the jury for felony murder by stating, in effect, that a felony murder conviction could be based on a robbery even if the intent to steal was not formed until after the application of force. An afterthought robbery cannot be the predicate felony for felony murder.

Facts: Appellant, Jeffrey E. Allen, spent the evening with the victim, John Butler, at Butler's residence. The next morning, October 24, 2001, Allen woke up and decided he wanted to go home. Butler told him to "chill out," but Allen did not want to wait, so he jingled Butler's keys and stated that he would drive himself home. Butler said, "wait a minute damn it," and entered the kitchen where Allen stood. Allen then pushed Butler back into the living room and fatally stabbed Butler. After the stabbing, Allen took Butler's keys and fled in Butler's car. Allen ran the car into a ditch and flagged down a passerby, who brought him to Ironsides Store, where Allen telephoned the police. He reported that he had stabbed someone and asked for the police to respond to the store.

Sheriffs were dispatched to the store and to the vehicle. Sheriff Johnston was the first officer to arrive at the store. She noted that appellant was covered in blood and asked him if he was injured. Appellant responded that he was unhurt and then "started talking." Appellant stated that he "didn't know where he was. He didn't know who the person was. Didn't know where he was then. That he had stabbed a man ... and he was at - in a shack on top of a hill."

Officer Burroughs then arrived and asked appellant "what happened." According to Burroughs, appellant stated:

> He said that he had come home with the victim the previous night, gotten up in the morning and attempted to leave. He said at that point he was confronted by the victim, who had his hands up in a fighting stance, he put his hands up.
>
> He said he didn't know if the victim had a weapon or not, and at that point observed a knife on the counter, I guess in the kitchen area, and picked it up and stabbed the victim a few times; took his car keys and fled the scene. And wrecked the vehicle on 425 while attempting to execute a U-turn.

Thereafter, Burroughs handcuffed appellant "for safety," advised appellant that he was not under arrest, and placed him in the back of his police cruiser so that the officers could try to locate the victim's residence. In the vehicle, appellant blurted, "that's the house." After the victim's body was located, Allen was transported to Rose Hill Farm, where he was uncuffed. By that time, Allen had been handcuffed for a total of fifteen to twenty minutes.

Detective Almassy met Officer Burroughs and appellant at Rose Hill Farm knowing few details of appellant's situation. He asked appellant if he would be willing to "discuss the incident." He also told appellant that he was "not under arrest"; that he was "free to leave"; and that he did not have to discuss the incident. Allen agreed to talk and was transported to the sheriff's office and placed in an interview room. He was not advised of his *Miranda* rights. Appellant admitted to the stabbing. After two hours, appellant agreed to reduce his oral statement to writing. At the end of the interview, Det. Almassy transported appellant to his parents' house in Prince George's County.

When appellant was taken to his parents' home, Detective Piazza was directed to monitor Allen's parents' apartment building,

pending the issuance of an arrest warrant for appellant. Allen was arrested pursuant to that warrant approximately 25 minutes after arriving at the apartment. At the scene, Allen was advised of his *Miranda* rights and transported to the sheriff's office, where he was again advised of his rights. He then provided another oral and written statement, consistent with his earlier statements.

Appellant moved to suppress all the statements that he gave to the police, beginning with the statements made at the store parking lot. Appellant argued that the officers were required to provide appellant with his *Miranda* warnings because, for purposes of the interrogation, Allen was in custody. Also, appellant asserted that appellant's second oral and written statement, made after appellant was advised of his *Miranda* rights, should have been suppressed as the tainted "fruit of the poisonous tree."

The trial court suppressed only those statements made by appellant when he was handcuffed in the back of Officer Burrough's patrol car, with the exception of appellant's blurt, because it was not made in response to a question. The trial court stated that appellant was not in custody at the store, considering that appellant had summoned the police and the sheriffs were "just trying to figure out what was going on." Moreover, the court found that the first interview was not custodial, because Allen's handcuffs had been removed and he was told that he was free to go. The statements at the second interview were not suppressed because, although it was a custodial interrogation, the officers advised appellant of his *Miranda* rights.

At trial, the State played the 911 tape to the jury and admitted the series of statements made by appellant, along with other evidence. The jury convicted appellant of first degree felony murder; second degree murder (specific intent to kill); robbery with a deadly weapon; robbery; misdemeanor theft; and two counts of carrying a weapon openly with intent to injure. The jury acquitted appellant of first degree premeditated murder.

Held: First degree felony murder conviction vacated; all other judgments affirmed. The Court of Special Appeals concluded that the trial court erred in instructing the jury that appellant could be convicted of first degree felony murder even if he did not form the intent to steal the keys and the car until after the stabbing was completed. However, the trial court did not err in its instruction as to robbery or in denying appellant's suppression motion.

The Court ruled that Allen was not in custody when he made the statements at the store, because appellant voluntarily "started talking" to Officer Johnston when she had only asked him whether he

was injured. In addition, the Court noted that appellant was the one who summoned the sheriffs to that location; the questioning was of a limited nature; it occurred in a public place; it was during the day; and the police did not use any weapons or physical restraints.

Although appellant was not advised of his *Miranda* rights during his first interview at the sheriff's office, the Court agreed with the circuit court that appellant was not in custody at that time, pursuant to the "reasonable person" analysis. Allen had been physically restrained only briefly; his physical freedom was restored when the handcuffs were removed at Rose Hill Farm; Allen was advised that he was not under arrest; he was told he was free to leave; and Allen was told he did not have to "discuss the incident" with the detectives. In addition, the Court held that the trial court did not err in refusing to suppress the statements made at the second interview, because no illegality had occurred in regard to the statements at the first interview.

However, the Court held that the trial court erred in giving the following felony murder instruction to the jury:

> The elements [of robbery] are pretty simple and straightforward. To convict someone of robbery the Government must prove that the defendant in this case took the car and keys from Mr. Butler or from his presence and control and they have to prove that he did so by force or the threat of force and that in doing so he intended to steal the property, that is to deprive John Butler of the property. ... *even if the intent to steal here was not formed until after the victim had died taking his property thereafter would still be robbery, if it was part and parcel of the same occurrence which involved the death.*

(Emphasis added).

The Court concluded that if an "afterthought" robbery cannot constitute an "aggravating circumstance" for imposition of the death penalty in regard to first degree premeditated murder, pursuant to *Metheny v. State*, 359 Md. 576 (2000), it cannot support a conviction for felony murder. Put another way, appellant could not be found to have committed felony murder on the basis of a determination that he formed the intent to rob the victim only *after* he inflicted the fatal injuries. In contrast, the court found no error in the jury instruction as to robbery, noting that the intent to rob could be formed after the application of force.

Jeffrey E. Allen v. State of Maryland, No. 02268, September Term,

2002, filed September 2, 2004. Opinion by Hollander, J.

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CRIMINAL LAW - CONFESSIONS - RIGHT TO REMAIN SILENT - WAIVER - SILENCE AS AN INVOCATION OF RIGHT TO REMAIN SILENT - APPLICABILITY OF DAVIS V. UNITED STATES - PROMPT PRESENTMENT.

Facts: A jury in the Circuit Court for Calvert County convicted Adele Florence Freeman, appellant, of first degree premeditated murder, as well as first degree assault and use of a firearm in the commission of a felony.

Shortly after she shot her boyfriend, Kevin Gross, Freeman entered the Prince Frederick State Police Barrack, with the firearm still in her purse, and announced: "I just shot someone." Shortly thereafter, Freeman was advised of her *Miranda*[1] rights. However, when asked if she would "knowingly waive these rights," appellant "didn't say anything." Subsequently, the arresting officer asked appellant "what happened tonight," to which Freeman responded "'I don't want to talk about it right now.'"

Approximately three hours after her arrival at the Barrack, and after officers obtained food and Freeman's medication, a second officer advised Freeman of her rights, which she waived. Freeman then gave an oral confession, which she later unsuccessfully sought to suppress. Appellant was brought before a Commissioner eight hours after she confessed, but was not questioned during that eight hour period.

Held: Judgment affirmed. Appellant argued on appeal that the trial court erred in finding that she did not invoke her Fifth Amendment privilege by remaining mute when asked if she was willing to waive her rights. Moreover, appellant insisted that, because her silence was an invocation of her right to remain silent, "all questioning was required to cease." Therefore, she claimed that

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[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

her statement, "I don't want to talk about it right now," as well as her oral confession, were "erroneously admitted at trial in violation of *Miranda*," because both were obtained after she invoked her right to silence.

The State sought to rely on *Davis v. United States*, 512 U.S. 452 (1994), which involved an ambiguous invocation of the right to counsel during an interrogation. The Court of Special Appeals observed that, unlike *Davis*, in which the alleged invocation "occurred *during* an interrogation and *after* a waiver of rights," Freeman's "alleged invocation of her right to silence occurred *prior* to a waiver of rights, and before interrogation ensued...." Because appellant's silence occurred in a pre-waiver context, the Court declined to apply the rationale of *Davis* to appellant's silence. The Court said that "the logic of *Davis* does not extend to an ambiguous invocation that occurs prior to the initial waiver of rights."

The Court concluded that the suppression court erred in failing to construe Freeman's pre-waiver silence as an invocation of the right to remain silent. Consequently, the Court held that Freeman's subsequent statement, "I don't want to talk about it right now," was erroneously admitted in evidence at trial. Nevertheless, the Court determined that the error was harmless.

Moreover, with regard to appellant's subsequent confession, made three hours after she had elected to remain silent, the Court relied on *Michigan v. Mosley,* 423 U.S. 96 (1975), and said that, "even if a defendant invokes the right to silence, the police are not necessarily forever barred from attempting to question the suspect." The Court noted that, in certain instances, police may reinitiate communication with a suspect who has invoked his/her right to silence, "'if a significant period of time has elapsed and if the police have re-advised the suspect of his or her rights.' *Raras v. State*, 140 Md. App. 132, 154 (discussing *Mosley*), *cert. denied*, 367 Md. 90 (2001)." Here, "[a]lthough the locale and the topic were the same, the interrogator was different." Accordingly, the Court held that the suppression court did not err in denying appellant's motion to suppress, because "a reasonable period of time elapsed" between appellant's invocation of her right to remain silent and the interrogation.

Appellant also maintained that the court below erred in failing to apply the "heavy weight standard" to the alleged violation of the prompt presentment rule. The Court rejected that contention. Although the trial court did not use the words "heavy weight," as described by the cases of *Williams v. State*, 375 Md. 404 (2003); *Facon v. State*, 375 Md. 435 (2003); and *Hiligh v. State*, 375 Md. 456 (2003), the Court concluded that "it would have

no reason to do so, because there was no evidence that the delay was deliberately occasioned for the sole purpose of seeking to interrogate appellant." Accordingly, the Court held that, "under the totality of the circumstances," there was no error in the lower court's denial of appellant's suppression motion based on a delay in presentment.

Adele Florence Freeman v. State of Maryland, *No. 3047, September Term, 2002,* filed September 8, 2004. Opinion by Hollander, J.

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CRIMINAL LAW - POSTCONVICTION PROCEEDINGS- REQUEST TO REOPEN A PREVIOUSLY CONCLUDED PROCEEDING

Facts: Julian Gray was convicted of the second degree murder of Randy Hudson and for the felonious use of a handgun. On direct appeal, the Court affirmed the convictions in an unreported *per curiam* opinion. Gray then challenged his convictions under the Uniform Postconviction Procedure Act ("UPPA"), arguing that he had ineffective assistance of counsel because his trial attorney failed to investigate affirmative defenses.

At trial, Erika McCray testified that she had observed the murder from the porch of Peggy Riddick's home. During his postconviction review, Gray contended that trial counsel had rendered ineffective assistance by failing to investigate whether McCray could have observed the murder from her location on Riddick's front porch. He explained that because of the architecture of the home, McCray could have only observed the murder if she was standing on the steps leading down from the porch. The circuit court denied Gray's request for postconviction relief, and he filed leave to appeal, which was denied in an unreported *per curiam* opinion.

Gray then filed a petition to reopen the postconviction proceeding. In support, he filed an affidavit from McCray wherein she recanted her trial testimony, averring that she had lied about witnessing the murder. Gray argued that reopening his case was

necessary to remedy the violation of his due process rights. The circuit court denied his petition. Gray argues that the circuit court erred because it did not file a supporting statement or memorandum.

Held: Affirmed. Maryland Rule, 4-407(a)expressly requires a circuit court to prepare and file a detailed statement when disposing of a petition for postconviction relief. The Rule does not address whether such a statement, or if any statement, is required when a circuit court denies a petition to reopen a previously concluded postconviction proceeding. But, if the proceeding is not reopened, it remains "closed," and thus, there is no reason to evaluate the asserted grounds on the merits and prepare a statement that complied, or substantially complied, with Rule 4-407(a). When it denied the petition to reopen a previously concluded postconviction proceeding based on its determination that reopening was not in the interests of justice, it was sufficient for the court to file an order to that effect.

Gray v. State, No. 1945, September Term, 2003, filed September 13, 2004. Opinion by Kenney, J.

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CRIMINAL LAW - SEARCH AND SEIZURE - FOURTH AMENDMENT - LEGITIMATE EXPECTATION OF PRIVACY IN PREMISES RENTED BY ANOTHER - SENTENCING - RULE OF LENITY

Facts: On October 10, 2002, four plainclothes officers were on duty in an unmarked police car in Baltimore City when they observed several people on the sidewalk in front of 54 West Talbot Street. Two of the people waved for the officers to pull over to the curb. Based on prior experience and the knowledge they were in a high-drug area, the officers believed the people were going to offer to sell them drugs. When the officers stopped and showed badges, the two people fled. A third person, later identified as appellant, remained standing on the sidewalk. The officers watched appellant reach into his waistband and pull out a semi-automatic handgun. Holding the handgun, he turned and ran through the open front door into 54 West Talbot Street.

Three of the officers ran into the building, where they heard someone running downstairs from the second floor to the basement. After the footsteps reached the basement, the officers heard no footsteps for 35-40 seconds, and then they heard footsteps running upstairs. When an officer opened a door to the stairway, he intercepted appellant, who no longer was holding the handgun. Appellant was placed under arrest and searched. The officers performed a cursory search of the basement and found the handgun stashed on an open ceiling rafter.

At trial, appellant's motion to suppress the handgun was denied on the basis that he lacked a legitimate expectation of privacy in the premises and the search and seizure were justified by exigent circumstances. A jury in the Circuit Court for Baltimore City convicted appellant of unlawful possession of a regulated firearm by a person previously convicted of a felony; unlawful possession of a regulated firearm by a person previously convicted of a misdemeanor carrying a statutory penalty of more than two years; and wearing and carrying a handgun. The court imposed a five-year prison sentence, without the possibility of parole, for the felon-in-possession conviction; a consecutive two-year term for the misdemeanor-based possession conviction; and a concurrent two-year sentence for the wearing and carrying a handgun conviction.

Appellant challenged the denial of his motion to suppress and his conviction under Article 27, section 449(e), arguing that, under the plain language of that section, the mandatory minimum sentence of five years without suspension or eligibility for parole applies only when a person has been convicted of possessing a regulated firearm when previously convicted of a crime of violence *and* a felony. Alternatively, appellant argued, under the rule of lenity, he should not have been sentenced under section 449(e) because on the date of the crime section 5-622 of the Criminal Law Article also prohibited the same conduct, but authorized a less severe penalty. He further contended that, under *Melton v. State*, 379 Md. 471 (2004), his two-year prison term for the misdemeanor-based possession conviction must be vacated.

Held: Affirmed in part, vacated in part. The Court held that a defendant who was an occasional overnight guest of a renter of premises and had an intimate relationship with her, but was not an overnight guest when the entry and search happened, did not have control over the premises. He did not have a key or keep belongings there, and he entered the premises in flight from police to evade arrest and deposit evidence. Appellant had no legitimate expectation of privacy in the premises, and therefore did not have standing to raise a Fourth Amendment violation.

The Court also held that, for the reasons explained in the majority opinion in *Stanley v. State*, 157 Md. App. 363 (2004), it was not necessary for appellant previously to have been convicted of a crime of violence, in addition to his CDS distribution felony, for the mandatory minimum penalty in section 449(e) to apply.

And the Court held that the rule of lenity did not apply when two statutes proscribed the same conduct but applied different penalties and the appellant was convicted under the statute carrying a stiffer penalty. Applying the reasoning of *U.S. v. Batchelder*, 442 U.S. 114 (1979), the Court held there was no ambiguity to resolve when both statutes clearly specified the activity proscribed and the penalties available upon conviction, and that the prosecutor has discretion as to which crime to charge, so long as the State is not discriminating against a class of defendants.

Finally, applying the holding of *Melton v. State*, *supra*, the Court held that appellant's conviction and sentence for unlawful possession of a regulated firearm by a person previously convicted of a misdemeanor carrying a statutory penalty of more than two years must be vacated when there was but a single act of handgun possession and he already had been convicted and sentenced for the same act of handgun possession as a felon-in-possession.

Alston v. State of Maryland, No. 1350, September Term, 2003, filed October 5, 2003. Opinion by Eyler, Deborah S., J.

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ESTATES and TRUSTS- SPOUSE'S STATUTORY SHARE

Facts: Eldridge Downes, IV, ("decedent"), the husband of appellant, Shirley L. Downes, died testate on October 23, 1997. Decedent was also survived by a son from a previous marriage, Gregory Downes, appellee.

In his last will and testament, decedent bequeathed to appellant all of his personal property and a marital trust. The

trust was to be funded by any assets that exceeded the credit shelter equivalent amount, *i.e.*, all sums exceeding $600,000.00, which, in 1997, was the amount a decedent could pass to other beneficiaries free from federal tax. The amount of appellant's inheritance, therefore, depended on the net value of the decedent's estate.

The credit shelter equivalent amount was bequeathed to a residuary trust for the benefit of decedent's parents and descendants. At the time of decedent's death, appellee was the sole living beneficiary of the residuary trust.

Appellant was named as personal representative of the estate. She experienced difficulties in ascertaining the value of decedent's estate due to several unresolved claims against the estate and disputes over decedent's ownership interests in three businesses.

The problems encountered by appellant in valuing the estate resulted in her seeking to extend the period within which she could elect to renounce the will and take what is known as the "statutory" or "elective" share of the estate, *i.e.*, a one-third share of the decedent's estate if, as in this case, the decedent also has a surviving child. *See* Maryland Code (1974, 2001 Repl. Vol.), § 3-203 (a) of the Estates and Trusts Article ("ET").

Extensions of time to elect the statutory share are authorized by ET § 3-206(a). Appellant filed five petitions for extension of time. The first four of these were timely filed and granted by the orphans' court.

The election period under the fourth petition expired on June 2, 1999. Twenty-two days later, appellant filed a "Fifth Petition for Extension of Time to File Election to Take a Statutory Share" ("fifth petition"). The orphans' court denied this petition as having been filed late. Appellant filed a motion to reconsider the denial of the petition, arguing that she had substantially complied with the statutory deadline. By order entered on September 28, 1999, the orphans' court denied the motion to reconsider. In a separate opinion, the orphans' court rejected appellant's substantial compliance argument, explaining that it lacked the authority to grant the petition because it was filed after the expiration of the preceding extension period.

Eventually, through litigation and other means, the estate's financial affairs were resolved and its net worth was determined to be approximately $1,000,000.00. Consequently, about a year and a half after the orphans' court denied the fifth petition, appellant

filed the fifth and final administration account of the decedent's estate.

The orphans' court approved the final account on February 13, 2001. The court determined that appellant was entitled to take under the will only the personal property valued at $66,155.00.

Appellant filed an appeal in the circuit court challenging the orphans' court's denial of her fifth petition to extend the time to elect a statutory share. And, as she had done in the orphans' court, she filed in the circuit court a "Motion to Grant the Fifth Petition for Extension of Time to File Election to Take a Statutory Share."

Appellee filed a motion to intervene, which the court granted. Appellee also filed a motion to dismiss the appeal on the ground that the appeal was late because the orphans' court's denial of appellant's motion for extension of time and motion for reconsideration were appealable orders. The circuit court agreed that the appellant's appeal was untimely and dismissed it.

Appellant appealed to this Court, and we reversed in an unreported opinion, *Downes v. Downes*, No. 2162, September Term, 2001 (filed November 14, 2002), *cert. denied*, 373 Md. 407 (2003). We held that the orphans' court's orders denying appellant's fifth petition and subsequent motion to reconsider were not immediately appealable. We explained that appellant's claim was not resolved until the orphans' court approved the fifth and final administration account on February 13, 2001, and only then did the claim become final, and thus appealable. Slip op. at 14. Consequently, we remanded the case to the circuit court for further proceedings. *Id.* at 16.

The parties appeared for a hearing in the circuit court on August 29, 2003, to address appellant's motion to grant the fifth petition. Appellant argued that the court had the equitable discretion to "extend the time to permit the filing even though it is technically late." After hearing argument the court rendered its decision denying appellant's motion to grant the fifth petition for the reasons stated in its oral ruling. The basis of the court's decision was its belief that it was bound by the dictates of ET § 3-206, and therefore could only extend the time for electing the statutory share if a petition for extension of time was timely filed before the expiration of the period of time the petition was seeking to have extended. As a result, the court held that appellant lost her right to elect the statutory share of decedent's estate by failing to file within the period of time prescribed by ET § 3-206.

Held: The period of time established in Maryland Code (1974, 2001 Repl. Vol.), § 3-206 (a) of the Estates and Trusts Article for a spouse to renounce a decedent's will and take the spouse's statutory share of the decedent's estate may not be enlarged by either the orphans' court or the circuit court on *de novo* appeal. Because ET § 3-206 (a) must be strictly construed, neither court has the inherent authority to excuse a late-filed petition for extension of time. Furthermore, neither Maryland Rule 1-204, nor Rule 6-104 or Rule 6-107 authorizes the circuit court or the orphans' court to enlarge the period of election established by Md. Code (1974, 2001 Repl. Vol.), § 3-206 (a) of the Estates and Trusts Article. The orphans' court's authority to grant an extension of time for election of the statutory share is limited to timely filed petitions, that is, petitions that are filed before the expiration of the period originally prescribed in the statute or as extended by prior court order.

Shirley L. Downes v. Gregory Downes, No. 1697, Sept. Term, 2003, filed September 13, 2004. Opinion by Barbera, J.

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EVIDENCE- CHARACTER EVIDENCE

EVIDENCE- CHARACTER EVIDENCE- SEXUAL PROPENSITY EXCEPTION

EVIDENCE- HEARSAY

Facts: Jennifer Hyman, while unloading Christmas presents from her car, was approached by appellant, her estranged husband. He threatened her with a knife and told her to follow him to his car. He told her to disrobe from the waist down and to get on the floorboards of the car. According to Ms. Hyman, she believed that he was going to rape her. She was able to escape, however, and flagged down a passing car. Ms. Hyman went to the police station, reported the incident, and explained that one month earlier, on November 23, 2002, appellant had raped her in their home.

At trial, Ms. Hyman was permitted to testify about the prior alleged rape. She explained that on November 22, 2002, she and appellant had an all night conversation about their marriage. She told him that it was over, and then went to bed. The next morning, appellant got up, locked the door, and raped Ms. Hyman. She later obtained a protective order from the court.

Appellant was charged with rape in addition to other charges. He was convicted of second degree assault and false imprisonment, but was not convicted on the rape charge. He later pleaded guilty to violation of an ex parte protection order.

Held: Affirmed. The circuit court did not err in admitting the evidence concerning the November 23, 2002 incident on two bases: 1) pursuant to Maryland Rule 5-404(b) to show appellant's intent to commit rape; and 2) under the "sexual propensity exception," explained in *Vogel v. State*, 315 Md. 458, 554 A.2d 1231 (1989).

The suppression court determined that the evidence concerning the November 23, 2002 incident was admissible to prove intent pursuant to Rule 5-404(b). The court then determined that the November 23, 2002 rape was established by clear and convincing evidence and that the probative value of admitting the evidence outweighed any impermissible prejudice.

The evidence concerning the November 23, 2002 incident was also admissible to show propensity to commit a particular sexual crime pursuant to *Vogel v. State*. That case states that evidence is admissible when 1) "the prosecution is for a sexual crimes"; 2) "the prior illicit sexual acts are similar to that for which the accused is on trial"; and 3) "the same accused and victim are involved." *Vogel*, 315 Md. at 465. The trial court concluded that all three requirements were present.

At trial, Ms. Hyman's co-worker, Joy Robinson, testified about the November 23, 2002 incident. Appellant contended it was hearsay testimony. The trial court properly concluded that the testimony was a prior consistent statement pursuant to Maryland Rule 5-802.1(b) because Robinson's testimony was consistent with Ms. Hyman's testimony and it was offered after there was an explicit charge by appellant that Ms. Hyman had fabricated her testimony.

Hyman v. State, No. 1759, September Term, 2003, filed September 13, 2004. Opinion by Kenney, J.

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HEALTH LAW – MALPRACTICE – CERTIFICATE OF QUALIFIED EXPERT UNDER SECTION 3-2A-04(b) OF COURTS & JUDICIAL PROCEEDINGS ARTICLE (HEALTH CARE MALPRACTICE CLAIMS STATUTE) – VERIFICATION OF DEPARTURE FROM STANDARDS OF CARE OF NAMED DEFENDANT(S) – CLAIM PROPERLY DISMISSED WHERE CERTIFICATES DID NOT STATE THAT THE DEFENDANTS DEVIATED FROM THE APPROPRIATE STANDARD OF CARE.

Facts: Vincent D'Angelo died in March 2001 from complications related to a brain infection after being treated by various physicians and hospital staff at St. Agnes Hospital. Relatives of D'Angelo and his personal representative filed a wrongful death/survivorship action in the Health Claims Arbitration Office, naming thirty-one defendants. The claim was accompanied with certificates from two qualified experts. The caption of each certificate mentioned only "St. Agnes Hospital" as a defendant, but the hospital was not named as a defendant in the statement of claims. Both expert certificates stated, *inter alia*, "Based upon my training, expertise, and review, I have concluded that the foregoing medical providers failed to comply with the standards of care and that such failure was the proximate cause of the injuries to Claimant, Vincent D'Angelo." These certificates did not identify any individual health care provider who had deviated from the standard of care nor did the certificate state that the departure from the standard of care by any specific defendant was the proximate cause of the injuries alleged. The filing also did not contain a report from the expert as required by section 3-2A-04(b)(3) of the Health Care Malpractice Claims Statute.

Both experts later admitted in deposition testimony that, at the time they signed the certificates, they did not know the identity of the health care providers who were going to be sued.

The defendants waived arbitration and the case was transferred to the Circuit Court for Baltimore City. All defendants filed motions to dismiss or, in the alternative, for summary judgment based on the plaintiffs' failure to comply with the requirements of section 3-2A-04(b). The plaintiffs responded by arguing that a strict reading of section 3-2A-04(b)(1) suggests that the certifying expert is not required to identify each defendant but rather must only certify that a breach of the standard of care occurred that caused the injuries in question. Plaintiffs also maintained that the court should focus upon the effort made by

claimants to arbitrate rather than on technical compliance with the certificate requirement. They also maintained that they acted in good faith at all times.

The circuit court dismissed, without prejudice, all plaintiffs' claims against all defendants.

Held: The motions judge properly dismissed plaintiffs' claims due to the fact that plaintiffs' expert certificates did not attest that any of the named defendants harmed plaintiffs due to a deviation from the appropriate standard of care. The filing of a certificate meeting the requirements of section 3-2A-04(b) of the Courts and Judicial Proceedings Article is a condition precedent that must be met before a plaintiff can proceed against a named defendant. A good-faith effort to meet the certificate requirement is irrelevant if the statute's requirements are not met.

Michael D'Angelo, Personal Representative for the Estate of Vincent D'Angelo, et al. v. St. Agnes Healthcare, Inc., et al., No. 961, September Term, 2003, filed July 15, 2004. Opinion by Salmon, J.

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JUDGMENTS - FINAL JUDGMENT RULE; VOLUNTARY DISMISSAL; VOLUNTARY DISMISSAL WITHOUT PREJUDICE; MD. RULE 2-506; MD. RULE 2-602(b)

Facts: The case arises out of a tragic incident in which Samuel Juster, Stephon Collins, Jr., and Kyle Chapman were overnight guests in the Chapman home. The Chapmans rented from the owners of the property, appellees Dr. and Mrs. Gui-Fu Li. On the evening of June 13, 1998, thunderstorms caused an electrical power outage. At the time, the children were playing in the basement rooms and because of the lack of electricity, the room was illuminated by candles. After the boys went to bed, one candle was left lighted in the basement rec room. Sometime after 5:00 a.m. on June 14, 1998, that single candle caused a fire taking the lives of Samuel Juster and Stephon Collins, and causing Kyle Chapman to suffer severe burns resulting in the amputation of both of his legs.

Although the basement was equipped with a smoke detector, it did not sound because it was hardwired into the home's electrical system, and was not functioning due to the power outage. According to plaintiffs/appellants, the events that gave rise to their claims originated with the construction of the home. They allege negligence by appellees Ryland and Summit for not having installed smoke detectors with alternate battery power, despite the availability of such devices when the home was built in 1989. Subsequent events, they allege, created liability on the part of other defendants.

The original plaintiffs were Stephon Collins, Sr., individually and as Personal Representative of Stephon Collins, Jr.; and Daniel and Patricia Juster, individually and as Personal Representatives of Samuel Juster. The defendants were Dr. Gui-Fu and Chung Ling Li; Pittway Corp.; Michael Chapman; First Alert, Inc., Sunbean Corp.; BRK Brands, Inc.; Honeywell International, Inc.; Keith and Catherine Chapman; The Ryland Group, Inc.; and Summit Electric Company. A later complaint was filed by Michael Chapman and Carolyn Hill, individually and as Parents and Legal Guardians of Kyle, Keith, and Brandon Chapman, against the same defendants and also David E. Dieffenbach, t/a Dedhico Home Improvements, and his employee, Kevin T. Hightower.

Creating this appeal was the circuit court's consent to the dismissal, without prejudice, of all claims between appellants Michael Chapman and Carolyn Hill and appellees Dr. and Mrs. Li. By earlier orders, the circuit court had granted appellee/cross-appellant Ryland's motion to dismiss. Subsequently, the court granted Summit Electric's motion to dismiss, or in the alternative, for summary judgment. Thereafter, appellants moved to certify the orders of dismissal as a final judgment under Rule 2-602(b)(1), to permit an immediate appeal, effectively for the purpose of litigating Ryland's liability. The manufacturer appellants joined the motion, which the circuit court properly denied.

Appellees Dieffenbach's and Hightower's Motions for Summary Judgment against appellants were granted. Appellee Ryland's Motion to Dismiss was also granted, along with appellee Summit Electric's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment.

Held: Affirmed. Appellants' dismissal without prejudice of remaining claims of complaint, after unsuccessful attempts to obtain certification under Maryland Rule 2-602(b), to gain final appealable judgment was improper. As no Maryland case has addressed this issue, the court aligns itself with the Federal line of cases that encourages minimal review of partial dispositions or orders, unless they fall within limited exceptions to the final

judgment rule. The final judgment rule cannot be circumvented by voluntary dismissal pursuant to Maryland Rule 2-506 and Maryland Rule 2-602 may not be used to certify questions of law from the circuit courts to the appellate courts. The Circuit court's grant of appellants' dismissal without prejudice is not a final appealable order, as appellants may choose to resurrect their dismissed claims, therefore the appeal must be dismissed for lack of finality of judgment.

Collins, et al. v. Li, et al., No. 2533, Sept. Term, 2002, filed September 2, 2004. Opinion by Sharer, J.

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SURETYS - SURETYSHIP CONTRACTS

Facts: Clark Construction Group, Inc. ("Clark") contracted with the Maryland Economic Development Corporation ("MEDCO") to construct the Hyatt Regency Chesapeake Bay Resort in Cambridge. For the purpose of guaranteeing completion of the construction, Clark executed a payment bond in favor of MEDCO in the amount of $70,864,000.00. This bond secured Clark's obligation to pay all labor, material, and equipment costs necessary to construct the resort. The payment bond also provided that if a claim of non-payment is filed, the Sureties must either answer in dispute of the claim within 45 days of receiving it, or promptly pay the claim (or make arrangements for payment).

Clark subcontracted with Wadsworth to build an 18-hole golf course, and to complete excavation and rough grading work for all buildings, parking lots, and roads located on the resort. According to Wadsworth, it completed construction of the golf course and the required site work sometime before March 2002. At that time, Wadsworth unsuccessfully attempted to collect the monies Clark still owed it. Clark discontinued payments to Wadsworth because sometime in late 2001, MEDCO discontinued payments to Clark.

In March 2002, Wadsworth notified the Sureties by certified letter of its claim for payment under the payment bond. By letter dated April 5, 2002, AIG, the lead surety, acknowledged receipt of

Wadsworth's claim. AIG requested that Wadsworth document its claim against the payment bond by submission of a completed Proof of Claim form (a blank form was enclosed with the letter) and supporting materials. The letter further stated: "Please be advised that this action is taken at this time without waiver of or prejudice to any of the rights and defenses, past or present, known or unknown which either the above referenced Surety (National Union Fire Insurance Company) or Principal (The Clark Construction Group, Inc.) may have in this matter."

On May 3, 2002, Wadsworth submitted to AIG the completed Proof of Claim form and supporting documentation. Shortly thereafter, AIG notified Wadsworth by letter that it had received the documents, and that it would "immediately take[] this matter up with the above referenced Principal (The Clark Construction Group, Inc.), in order to ascertain their position on [the] claim as presented." The letter further stated that AIG would be in contact with Wadswroth in due course regarding Clark's position on the Proof of Claim. Wadsworth, however, received no further information from the Sureties regarding its claim, despite having sent a second letter, on July 23, 2002, requesting an answer to its claim.

On November 6, 2002, Wadsworth filed a single count complaint in the Circuit Court for Dorchester County against the Sureties. The complaint alleged breach of contract and sought $752,738.72 in damages, plus pre-judgment and post-judgment interest. That same day, Wadsworth also filed a motion for summary judgment, arguing that the Sureties had waived the right to challenge Wadsworth's claim under the payment bond because the Sureties had not answered Wadsworth's claim within 45 days of receiving notice of it.

In response, the Sureties filed a motion to stay proceedings pending the outcome of litigation that Clark had initiated against MEDCO. The Sureties also filed a cross-motion for summary judgment, raising as grounds for relief that pursuant to the subcontract, the money Clark owed to Wadsworth was not then "due" because MEDCO had not paid Clark; and the Sureties' payment obligation under the terms of the payment bond arose only when Clark failed to pay amounts "due."

Following a hearing, the court granted summary judgment in favor of Wadsworth because the Sureties failed to answer Wadsworth's claim within 45 days of receiving it as required by the payment bond, and, as a consequence of that failure, the Sureties were foreclosed from disputing the claim.

Held: When a payment bond contract between a surety and a subcontractor provides the surety a specific period of time in

which to dispute a subcontractor's claim for payment, the surety's failure to answer within that time period is a waiver of the surety's right thereafter to dispute the claim.

National Union Fire Ins. Co. of Pittsburgh, et al. v. Wadsworth Golf Constr. Co. of the Midwest d/b/a Wadsworth Golf Constr., No. 517, Sept. Term, 2003, filed September 9, 2004. Opinion by Barbera, J.

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WILLS - JUDICIAL PROBATE - STANDING TO FILE PETITION

Facts: Marion I. Knott (the "decedent") died testate on April 15, 2003. In her Will, she left all of her "tangible personal property" to her surviving children. The property included her "furniture and furnishings, household and personal effects," and was to be divided "among them in shares nearly equal in value as practicable." She left the balance of her estate to the Marion I. and Henry J. Knott Foundation, Inc. (the "Foundation") and named two of her children, appellees Patricia K. Smyth and Fracis X. Knott, as the personal representatives of her estate.

Shortly after Decedent's death, appellees filed a petition, requesting administrative probate of a small estate, with the Register of Wills. In that petition, they also requested that they be appointed, in accordance with the terms of the Will, personal representatives of the estate. That request was granted and notice of their appointment was sent to all "interested persons."

In response to the notice of appointment, seven of the decedent's surviving children, including the six appellants, as "interested persons," filed a petition for judicial probate in the Orphans Court. In doing so, they requested "the appointment of an independent person selected by the Court to serve as Personal Representative of the Estate" and "demand[ed] a plenary hearing to determine testamentary capacity of the decedent, the validity and proper execution of the Will and Codicil, and for the appointment of an independent Personal Representative."

Appellees filed a motion to dismiss, disputing appellants' standing to request judicial probate. Relying on matters presented by extra-pleadings sources, the Orphans' Court granted that motion, stating, in a written opinion, that appellants had "failed to show that they [were] Interested Parties to the Estate" and "thus that they ha[d] standing to bring the Petition for Judicial Probate." Specifically, the Orphans' Court found that although appellants were the decedent's heirs, they were no longer "interested persons" after the register of wills gave them notice of appellees' appointment as personal representatives of the decedent's estate. Furthermore, although the decedent's will left her tangible personal property to appellants, the court found, that that property had been adeemed. Therefore, according to the Orphans' Court, appellees were no longer legatees, and thus were without standing to file a petition for judicial probate.

Held: Vacated and remanded for further proceedings. Only "interested persons" may file a petition for judicial probate. "Interested persons" includes heIrs of testate decedents, but an heir of a testate decedent ceases to be an interested person when the register of will gives notice of appointment of the personal representative. In this case, as the register of wills had given notice of the appointment of appellees when appellants filed their petition, appellants were no longer interested persons and therefore were without standing to file a petition for judicial probate of the decedent's estate.

Furthermore, the definition of "interested persons" also include "legatees in being, not fully paid." A legatee is "a person who under the terms of a will would receive a legacy." But if, at the time of the testator's death, a legacy has been adeemed, the person who was to receive that legacy would no longer be entitled to receive it under the terms of the will and, therefore, would no longer be a "legatee." In this case, although appellees insisted that appellants' legacy, the tangible personal property, had been transferred to a revocable trust prior to the decedent's death, and therefore adeemed, the appellants disputed that fact - a dispute seemingly ignored by the Orphans' Court. The Orphans' Court therefore erred in granting appellees' motion to dismiss, which, because of the court's reliance on matters presented by extra-pleadings sources, had been transformed into a motion for summary judgment.

Marion Knott McIntyre v. Patricia K. Smyth, et al., Administrators of the Estate of Marion I. Knott, No. 1928, September Term, 2003, filed Sept. 17, 2004. Opinion by Krauser, J.

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ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective October 5, 2004:

CRAIG J. HORNIG

*

By an Opinion and Order of the Court of Appeals of Maryland dated October 13, 2004, the following attorney has been disbarred from the further practice of law in this State:

DIMITRI G. DASKALOPOULOUS

*

By an Opinion and Order of the Court of Appeals of Maryland dated October 14, 2004, the following attorney has been indefinitely suspended from the further practice of law in this State:

SHUAN HAIG MACAULAY ROSE

*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective October 18, 2004:

KIRK DWAYNE CRAWLEY

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