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COURT OF APPEALS

Attorney Grievance Commission v. Albert R. Snyder, Misc. Docket, AG No. 13, September Term 2007, filed September 9, 2008. Opinion by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2008/13a07aq.pdf>

ATTORNEY DISCIPLINE - MARYLAND RULES OF PROFESSIONAL CONDUCT: MRPC 1.1 (COMPETENCE), 1.16 (DECLINING OR TERMINATING REPRESENTATION).

Facts: The Attorney Grievance Commission of Maryland, through Bar Counsel, filed a petition for disciplinary or remedial action against Albert R. Snyder, in which it alleged that he violated Maryland Rules of Professional Conduct ("MRPC"), 1.11 (Competence) and 1.16 (Declining or Terminating Representation).

The Circuit Court for Wicomico County held an evidentiary hearing and issued an opinion, which presented her findings of fact and conclusions of law. The judge found that Mr. Snyder was retained by Gabriel Carmona, a Mexican citizen, to represent him in connection with removal proceedings instituted by the United States Department of Homeland Security and that Mr. Snyder represented Mr. Carmona at a hearing in the United States Immigration Court where he elected and was granted voluntary departure from the United States in lieu of removal. The judge also found that although cancellation of removal, which could be sought if Carmona could prove that he lived in the United States for ten years or more and that his removal would cause exceptional and extreme unusual hardship to his wife and children, would have been the most favorable option, Mr. Snyder did not pursue cancellation of removal and that his personal recollection and records failed to explain why cancellation of removal was not pursued.

The Circuit Court also addressed Snyder's delay in refunding the Carmona's attorney's fees and found that in September of 2006 Mr. Snyder proposed that he refund two-thirds of the Carmona's fee, which the Carmonas accepted, but that it was not until August of 2007, after the petition for disciplinary or remedial action was filed, that Mr. Snyder sent any refund to the Carmonas; the check that was eventually sent was for the entire fee plus interest. The judge concluded that Snyder's failure to properly

investigate, advise Mr. Carmona of and pursue cancellation of removal amounted to a failure to provide competent representation in violation of Rule 1.1 and that Snyder violated Rule 1.16 (d) when he failed to return the entire fee to the Carmonas within a reasonable period of time.

Neither Snyder nor Bar Counsel took exceptions to the findings of fact and conclusions of law.

Held: Public Reprimand. The Court of Appeals held that the Circuit Court's findings of fact supported her conclusions that Respondent violated MRPC 1.1 and 1.16 and noted that had Snyder interposed an exception to the hearing judge's conclusion that he violated Rule 1.1, the Court may have had to consider whether a single mistake constitutes sanctionable conduct under Rule 1.1 or is merely an oversight or negligence. The Court of Appeals addressed the appropriate sanction and noted that mitigating factors were present, because Snyder has had no prior disciplinary history in his over 37 years as a member of the Maryland Bar and was genuinely remorseful for his misconduct. For violating MRPC 1.1 and 1.16, the Court concluded that a public reprimand is the appropriate sanction.

State v. Adams, No. 38, September Term, 2007, filed 15 October 2008, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2008/38a07.pdf>

CRIMINAL LAW - POST-CONVICTION - WAIVER - AN ALLEGATION OF ERROR IN A JURY INSTRUCTION IS WAIVED GENERALLY FOR POST-CONVICTION PURPOSES BY A FAILURE TO OBJECT AT TRIAL OR RAISE THE ISSUE ON DIRECT APPEAL.

CRIMINAL LAW - POST-CONVICTION - WAIVER - STANDARDS OF POST-CONVICTION ACT FOR EXCUSING WAIVER APPLY ONLY TO RIGHTS REQUIRING A KNOWING AND INTELLIGENT WAIVER (*JOHNSON V. ZERBST*).

CRIMINAL LAW - POST-CONVICTION - WAIVER - COURT OF APPEALS RETAINS DISCRETION TO EXCUSE WAIVER WHERE TIMELY OBJECTION TO ERRONEOUS JURY INSTRUCTION COULD HAVE BEEN MADE AT TRIAL OR RAISED ON DIRECT APPEAL, REGARDLESS OF WHETHER A FUNDAMENTAL RIGHT IS IMPLICATED.

CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - COUNSEL IS NOT INEFFECTIVE FOR FAILING TO OBJECT TO SPECIAL VERDICT ON JURISDICTION WHERE COUNSEL'S ACTIONS ADEQUATELY PRESERVED THE ISSUE FOR AN APPEAL HAD THE POTENTIAL APPEAL NOT BEEN RENDERED MOOT BY THE JURY'S ANSWER TO THE SPECIAL VERDICT.

Facts: On or about 17 February 1979, Raymond Leon Adams, together with two associates, kidnapped Kathy P. from the parking lot of a bar in Prince George's County that was located approximately one and one-half miles from the border with the District of Columbia. Over the course of two hours, he and his confederates raped her repeatedly in the back of the van into which she had been forced. Adams was charged with kidnapping, robbery with a deadly weapon, and multiple counts of rape and first degree sex offenses. He was tried in the Circuit Court for Prince George's County by a jury in 1979. He argued that the State failed to prove that the rapes occurred in Prince George's County and, therefore, Maryland lacked territorial jurisdiction to try him on those counts. The trial judge, believing that there was sufficient evidence to submit the jurisdictional issue, as well as the other issues, to the jury, framed a special verdict sheet that included questions as to whether the jury found that each crime occurred in Maryland. Adams agreed to the special verdict sheet. In his jury instructions, the trial judge advised the jury, consistent with Article 23 of the Maryland Declaration of Rights, that it was the judge of the law as well as the facts, and that what he told them about the applicable law was advisory only. Adams did not except to this instruction. On 7 December 1979, the jury found Adams guilty on all twelve counts of the indictment, finding expressly that each offense occurred

in Maryland. Adams was sentenced to multiple concurrent life sentences for the kidnapping and rape convictions, 30 years consecutive for kidnapping, and 20 years consecutive for robbery. On direct appeal, the judgements were affirmed in an unreported opinion by the Court of Special Appeals in 1980. Although questioning the sufficiency of the evidence as to the jury's finding that the crimes occurred in Maryland, Adams mounted no challenge in his direct appeal regarding the jurisdictional challenge mounted at trial or the judge's Article 23 advisory instructions. The Court of Appeals denied Adams's Petition for Writ of Certiorari in 1980.

Twenty-four years later, on 1 April 2004, Adams filed his first Post-Conviction petition in the Circuit Court. The Petition alleged four bases for relief: (1) the trial court improperly gave only advisory jury instructions; (2) the trial court improperly instructed the jury on jurisdiction; (3) the trial court gave an incomplete reasonable doubt instruction; and (4) Adams's trial counsel was ineffective. In support of his claim of ineffective assistance of counsel, Adams alleged that his attorney failed to object to the improper jurisdiction and reasonable doubt instructions and failed to file a Motion for Modification of Sentence. The post-conviction judge granted the Petition on the grounds that the advisory jury instructions and the jury instructions on jurisdiction were improper. He also granted the Petition based on the ineffective assistance of counsel, specifically Adams's trial counsel's failure to object to the assertedly erroneous jurisdiction instructions. The Court also granted Adams the opportunity to file a belated motion for modification of sentence, a ruling that was not challenged in the subsequent appellate proceedings. On the State's appeal, the Court of Special Appeals, in a reported opinion, affirmed. *State v. Adams*, 171 Md. App. 668, 912 A.2d 16 (2006).

The Court of Appeals granted the State's Petition for Writ of Certiorari (399 Md. 595, 925 A.2d 634 (2007)), which contained three questions for consideration:

- (1) Under the Maryland Post Conviction Procedure Act, has Adams waived his post conviction complaint that the trial court's advisory jury instructions denied him his constitutional right to due process?
- (2) Under the Maryland Post Conviction Procedure Act, has Adams waived his right to challenge an instruction advising the jury that it could find jurisdiction under § 465 of Article 27 and, if not waived, in light of

the special verdict in this case, was the instruction harmless?

(3) Did the post conviction court err in concluding that Adams's counsel's performance was deficient because counsel failed to object to the court's instructions on jurisdiction as counsel's failure to object to the instructions was not error and, in any event, was Adams prejudiced?

Held: Judgment reversed. Whether Adams's argument as to the advisory jury instructions at his trial depended for success in large measure on whether the holdings in *Stevenson v. State*, 289 Md. 167, 423 A.2d 558 (1980) and *Montgomery v. State*, 292 Md. 84, 437 A.2d 654 (1981) (declaring that, Article 23 of the Maryland Declaration of Rights notwithstanding, a judge's instructions on the law, other than the "law of the crime" were binding on the jury) announced new law or were recognition only of the law of Maryland as it had been always. Because *Stevenson* answered that question by stating that its holding "did not make new law, but rather it merely clarified what has always been the law of Maryland," the Court in Adams's post-conviction case saw no reason to revisit that determination. Thus, because Adams failed to make a timely objection at trial as to the advisory nature of the judge's jury instructions on the law, his challenge in the post-conviction proceeding would be subject to waiver analysis.

Waiver analysis under the Uniform Post-Conviction Procedure Act. (UPPA) (Md. Code, Crim. Proc. Art., §§ 7-101 to 7-301) is limited to fundamental constitutional rights requiring a knowing and intelligent waiver (a *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938) threshold). Because the rights implicated in Adams's case were not fundamental constitutional rights, the waiver analysis set out in the UPPA was not applicable (neither are the "special circumstances" provision of the UPPA nor plain error review). Thus, his failure to object at trial to the advisory instructions resulted in waiver of the issue, unless the Court exercised its discretion to excuse waiver (outside of the UPPA). The Court declined to excuse Adams's waiver on this record.

The Court explained as its reasons for not exercising its discretion in favor of Adams as follows. The basis for a trial objection in 1979, when Adams was tried, to the giving of purportedly advisory jury instructions on the applicable law was not novel. The debate over the interpretation of and application to be accorded Article 23 of the Declaration of Rights had been percolating demonstrably for many years before his trial.

Although there were indicia of some confusion among the Maryland Bench and Bar about the proper interpretation and application of Article 23 before *Stevenson* and *Montgomery* were decided, the basis for a valid objection regarding the advisory jury instructions was available in Maryland law at the time of Adams's trial.

An additional reason for the court not to exercise its discretion to excuse Adams's waiver was the potential for unfair prejudice to the State should re-trial of Adams be directed. A delay of 24 years in asserting the waived argument (which argument was based on two cases decided in 1980 and 1981) posed a real potential for serious hardship and prejudice to the State's ability to mount a new prosecution. Adams's delay was especially inexcusable when he could have brought post-conviction proceedings at earlier times when the UPPA (in prior iterations) allowed multiple post-conviction petitions to be filed. To excuse Adams's waiver would not promote the orderly administration of justice under these circumstances.

In a similar vein, Adams's arguments regarding error as to the jury instructions given on the jurisdictional issue at trial also were deemed waived for failure to object at trial. Adams failed also to raise such a challenge in his direct appeal. The record revealed that Adams's trial counsel well knew the distinction between venue and jurisdiction and the legal basis for a pertinent objection.

Adams's only post-conviction argument not found to have been waived and unexcused was that his trial counsel had been ineffective in not objecting to the instructions on jurisdiction and impliedly the special verdict sheet in that regard. The Court concluded, however, that trial counsel's actual objection to the instructions based on lack of venue under former Article 27, § 465, and not objecting to the special verdict sheet, were not deficient performance, but rather a plausible tactical decision under the circumstances. Moreover, the Court was unpersuaded that trial counsel's performance, if assumed to be deficient, presented a substantial probability that the outcome of the case was altered thereby. The evidence was sufficient for the jury to have concluded, as it did, that the crimes occurred in Maryland.

Michael Blaine Shatzer, Sr. v. State of Maryland, No. 124, September Term, 2007, filed August 26, 2008. Opinion by Raker, J.

<http://mdcourts.gov/opinions/coa/2008/124a07.pdf>

CRIMINAL LAW - RIGHT TO COUNSEL - MIRANDA V. ARIZONS - EDWARDS V. ARIZONA - REINTERROGATION AFTER REQUEST FOR ATTORNEY

Facts: This case presents the question of whether a trial court erred in denying a motion to suppress statements obtained during a second interrogation, after a suspect invoked his right to counsel during a prior interrogation regarding the same offense and had been incarcerated continuously in the interim period. The question involves whether the protection against reinterrogation, provided by *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), had expired.

In August 2003, a social worker made a referral to the Hagerstown Police Department based on allegations that Michael Blaine Shatzer, Sr. had committed sexual child abuse regarding his three year old son. A detective investigating the matter met with Shatzer at the Maryland Correctional Institution in Hagerstown, where Shatzer was incarcerated on an unrelated offense involving sexual child abuse with a different child. Shatzer invoked his Fifth Amendment right to counsel, at which point the interview ended and the investigation was closed. Two years and seven months later, the investigation was re-opened, and a second detective interviewed Shatzer, who was still incarcerated but was now housed at the Roxbury Institute. At the second interview, Shatzer waived his Miranda rights and agreed to submit to a polygraph examination. During the interrogation Shatzer became upset and requested an attorney, and the interview ended.

Shatzer was charged in a criminal information with the offenses of second degree sexual offense, sexual child abuse, second degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer filed a motion to suppress the two statements taken by police at the second interrogation and during the subsequent polygraph examination, arguing that his prior request for counsel protected him against further interrogation.

The Circuit Court denied Shatzer's motion to suppress, finding a break in custody occurred because of the length of time that passed between the first and second interrogations. Shatzer waived his right to a jury trial and proceeded to trial before the court on a not guilty, agreed statement of facts. The court found Shatzer guilty of sexual child abuse and sentenced him to a

term of incarceration of fifteen years. Shatzer noted a timely appeal to the Court of Special Appeals. The Court of Appeals granted certiorari on its own initiative to consider whether, under *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, the statements should have been suppressed.

Held: The Court of Appeals held that the trial court erred in denying the motion to suppress. Under the rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), when a suspect invokes the Fifth Amendment right to counsel during interrogation, the suspect may not be further interrogated until counsel has been made available, or unless the accused initiates further communication.

The Court of Appeals determined that when a suspect remains in continuous incarceration, and the second interrogation involves the same matter as the prior interrogation that led to the invocation of counsel, no break in custody should be recognized. As to whether the passage of time alone is sufficient to dispel the need for *Edwards* protections, the Court of Appeals stated that recognizing a lapse in time exception would blur the bright-line rule of *Edwards*, which clearly prohibits reinterrogation of a suspect who invokes the right to counsel unless (1) counsel has been made available, or (2) the accused initiates further communication.

The Court stressed that it is up to the United States Supreme Court to determine whether and under what conditions *Edwards* protections may expire, quoting from the District of Columbia Court of Appeals *United States v. Green*, 592 A.2d 985, 989 (D.C. 1991), *cert. granted*, 504 U.S. 908, 112 S. Ct. 1935, 118 L. Ed. 2d 542 (May 18, 1992), *cert. dismissed*, 507 U.S. 545, 113 S. Ct. 1835, 123 L. Ed. 2d 260 (1993), that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered."

La Belle Epoque, LLC et al. v. Old Europe Antique Manor, LLC et al., No. 127, September Term, 2007. Opinion filed on October 8, 2008 by Greene, J.

<http://mdcourts.gov/opinions/coa/2008/127a07.pdf>

REAL PROPERTY - SUMMARY JUDGMENT - ASSIGNMENTS OF LEASEHOLD ESTATES - STATUTE OF FRAUDS - WAIVER - SURRENDER OF LEASEHOLD ESTATE - PREMISES LIABILITY

Facts: Francois Desbois entered into a five year lease with Double H Family, LLC for the premises located at 4124-F Howard Avenue in Kensington, MD. Desbois allegedly attempted to orally assign his leasehold interest in the premises to Old Europe, LLC, despite a lease provision stating that the lease could not be assigned without Double H Family's written consent. After the alleged oral assignment, Old Europe occupied the premises, paid rent to Double H Family, and notified an agent of Double H Family that it was taking over the premises because Desbois no longer wanted them. While occupying the premises, Old Europe allegedly sustained considerable water damage to its merchandise and the space it occupied when runoff water trapped by accumulated trash and debris infiltrated the premises. Subsequently, Old Europe brought a civil action seeking damages from Double H Family for breach of contract, negligence, and breach of covenant of good faith and fair dealing. Old Europe also brought suit against the tenant of neighboring property, La Belle Epoque, LLC, alleging that it negligently allowed the trash and debris to accumulate.

The Circuit Court for Montgomery County granted La Belle Epoque and Double H Family's motions for summary judgment on all counts. The court determined that Old Europe did not have a tenancy at 4124-F Howard Avenue, that Old Europe was either a trespasser or bare licensee on the premises, and that Double H Family and La Belle Epoque owed Old Europe only the duty to refrain from willful injury. The Court of Special Appeals held that the Circuit Court correctly concluded that Old Europe did not have rights under a lease, however, the intermediate appellate court ultimately held that the Circuit Court "erred in not treating [Old Europe] as a common law tenant for purposes of summary judgment. The Court of Special Appeals further held that the Circuit Court erred in granting summary judgment on Old Europe's negligence counts against Double H Family and La Belle Epoque.

Held: Judgment of the Circuit Court for Montgomery County reversed. Genuine issues of material fact exist regarding whether Double H Family waived the terms of the lease agreement and the requirements of the Statute of Frauds and granted Old Europe

possession of the leased premises by act and operation of law. Genuine issues of material fact also exist regarding whether Double H Family negligently breached duties owed to Old Europe under the lease agreement and/or Maryland law and whether La Belle Epoque is liable to Old Europe in negligence. The record before the Court does not support the Court of Special Appeals's analysis that a trier of fact could have determined that Old Europe acquired a common law periodic tenancy. Before the trier of fact can reach this issue, there must be a determination of whether the original lease between Double H Family and Desbois was surrendered.

Mary Gourdine v. Ellen Crews, et. al., No. 134, September Term 2007, filed September 4, 2008. Opinion by Battaglia, J.
<http://mdcourts.gov/opinions/coa/2008/134a07.pdf>

TORTS - DRUG PRODUCT LIABILITY - TORT LAW - DUTY

Facts: Ellen Crews, a Type I diabetic, took a combination of insulin medications and while driving, struck an automobile driven by Isaac Gourdine, who died. Petitioner, Mary Gourdine, the wife of Isaac Gourdine, individually, and as Personal Representative of the Estate of Mr. Gourdine, and as Next Friend of Monica J. Gourdine and Lamar T. Gourdine, filed suit against Respondent, Eli Lilly and Company ("Lilly"), the manufacturer of the insulin medications taken by Ms. Crews, alleging fraud, negligence and strict liability for failure to warn of known concealed defects.

The Circuit Court for Prince George's County, after a hearing on the matter, granted Lilly's motion for summary judgment and subsequently filed a memorandum opinion in which he determined that, "Plaintiffs have not raised any disputes as to material facts, and Defendant Eli Lilly is entitled to judgment as a matter of law, because Eli Lilly did not owe a duty to Mr. Gourdine, and because Plaintiffs' failure to warn claim is pre-empted by federal law." The judge stated that "the issue is what duty is owed the public by a drug manufacturer in a failure to warn case," and concluded that under the "learned intermediary" doctrine, no duty is owed to a non-patient.

Ms. Gourdine noted an appeal to the Court of Special Appeals, which affirmed in a reported opinion. *Gourdine v. Crews*, 177 Md. App. 471, 935 A.2d 1146 (2007). The intermediate appellate court concluded that the trial court did not err in granting Lilly's motion for summary judgment because "[Lilly] has no duty to warn a nonuser such as Gourdine" under the "learned intermediary" doctrine. The court also opined that even if Lilly's warnings were inadequate, the injuries to Mr. Gourdine were not foreseeable. Ms. Gourdine filed a petition for certiorari, which the Court of Appeals granted. *Gourdine v. Crews*, 403 Md. 612, 943 A.2d 1244 (2008).

Held: The Court of Appeals affirmed and concluded that Lilly did not owe the requisite duty to Mr. Gourdine to sustain the negligence, strict liability and fraud claims asserted in the instant case, and thus, that the Circuit Court did not err in granting summary judgment in favor of Lilly. The Court noted the divergence in its analysis from that of the trial court and the Court of Special Appeals, because both relied on the "learned intermediary" doctrine, which the Court of Appeals has not adopted. The Court's analysis first focused on the notion of duty under

common law and concluded that to impose the requested duty from Lilly to Mr. Gourdine would expand traditional tort concepts beyond manageable bounds, because such a duty could apply to all individuals who could have been affected by Ms. Crews after her ingestion of the drugs. The Court also noted that there was no direct connection between the drugs and accompanying warnings and the decedent and that the Court has historically not embraced the belief that duty should be defined mainly with regard to foreseeability, without regard to the size of the group to which the duty would be owed. The Court then addressed Ms. Gourdine's contention that the Federal Food, Drug and Cosmetic Act, 21 U.S.C. Section 321, *et seq.*, imposed a duty on Lilly and concluded that, because the statute was framed to protect the public in general, a statutory duty cannot be imposed between the two parties. The Court also concluded that the Circuit Court did not err in entering summary judgment in Lilly's favor on the fraud claim, because in order to sustain a cause of action based on fraud or deceit, the defendant must have made a false representation to the person defrauded and Mr. Gourdine was not a party to the alleged misrepresentations made by Lilly to Ms. Crews nor did Lilly owe a duty to Mr. Gourdine.

COURT OF SPECIAL APPEALS

Zitterbart v. American Suzuki Motor Corp., No. 897, September Term, 2007, filed October 7, 2008. Opinion by Eyler, Deborah S., J.
<http://mdcourts.gov/opinions/cosa/2008/897s07.pdf>

COMMERCIAL LAW - MARYLAND LEMON LAW - REPURCHASE REMEDY UNDER
COMMERCIAL LAW ARTICLE SECTION 14-1502(C)

Facts: In 2004, the Zitterbarts purchased a demo model 2004 Suzuki Verona from an authorized dealership. The vehicle had slightly fewer than 5,000 miles and was covered by a 36-month/36,000 mile New Vehicle Limited Warranty, as well as an 84-month/100,000 mile Limited Powertrain Warranty. Beginning in November 2004 and continuing through July 2005, the Zitterbarts had the vehicle serviced seven times at the dealership. Among the problems they cited (in addition to routine maintenance) were intermittent triggering of the "Check Engine" light, rough idle and engine operation, excessive RPM variation and "hesitation and loss of power." Eleven months later the oxygen sensor was replaced. There were no other service records.

In May 2006, the Zitterbarts sued in the Circuit Court for Harford County, alleging violations of the Maryland Automotive Warranty Enforcement Act, Md. Code, section 14-1501 *et seq.* of the Commercial Law Article ("CL") (a/k/a "Lemon Law"), the Magnuson-Moss Act, 15 U.S.C. § 2301 *et seq.*, and the Maryland Consumer Protection Act, CL § 13-101 *et seq.* ("MCPA"). The court granted summary judgment for the defendant Suzuki on all counts.

Held: The Court of Special Appeals affirmed the judgment below. Because the plaintiffs failed to forecast expert testimony to support their contention that the vehicle suffered from a "hesitation problem," and because their own expert testified unequivocally that, when he examined and test-drove the vehicle in February 2007 "the vehicle's powertrain system appeared to be operating as designed," they did not satisfy their burden of production on the Lemon Law claim. The Zitterbarts could not prevail on their demand for the replacement/repurchase remedy under CL § 14-1502(c) because they forecasted no evidence that the vehicle continued to have an uncorrectable defect that substantially impaired its use and market value. They likewise

forecasted no evidence to support their claim under CL § 14-1502(b) (correction remedy), because there was no evidence that the dealership had ever failed to correct an alleged defect within the statutory 30-day notice period.

Because the MCPA claim is derivative of the Lemon Law claim, the circuit court properly dismissed the MCPA claim. The Magnuson-Moss claim likewise could not withstand summary judgment. Because the plaintiffs were the beneficiaries of a limited rather than a full warranty, the circuit court correctly ruled that the plaintiffs' Magnuson-Moss claims merely provided a means to enforce the warranty provisions in the UCC. Therefore, the Court of Special Appeals applied the holdings of *Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008), and *Laing v. Volkswagen of America, Inc.*, 180 Md. App. 136 (2008), to affirm.

Antwan Derrell Smith v. State of Maryland, No. 614, September Term, 2007, decided on October 6, 2008. Opinion by Davis, J.
<http://mdcourts.gov/opinions/cosa/2008/614s07.pdf>

CRIMINAL LAW - REASONABLE ARTICULABLE SUSPICION - *Delaware v. Prouse*, 440 U.S. 648, 650 (1979); *Lewis v. State*, 398 Md. 349, 362 (2007)

Citing *Warren v. State*, 164 Md. App. 153 (2005), appellant challenged the circuit court's denial of his motion to suppress evidence, arguing that the officer did not have reasonable articulable suspicion to stop the vehicle in which he was riding because the court should have restricted its review of reasonable articulable suspicion to information contained in the citation, *i.e.*, the vehicle was been driven at a speed greater than reasonable under conditions in violation of Md. Code. Ann. (2006 Repl. Vol.), Transp. Art. II, §21-801(a), rather than the office's testimony that he stopped the vehicle because he believed the driver was exceeding the established speed limit (25 m.p.h.) in violation of Md. Code Ann. (2006 Repl. Vol.), Transp. Art. II, §21-801.1.

Trial Court's Interrogation of Witnesses: *Smith v. State*, 66 Md. App. 603, 619 (1986)

Appellant asserted that trial judge, who asked witnesses more than 125 questions during his jury trial, in the court's continued inquisitorial participation in the questioning of witnesses, created the perception in the minds of jurors that the court gave its imprimatur to the State's version of the evidence. In particular, and most egregiously, appellant complained that the court pointedly questioned the police officer who conducted the traffic stop of the vehicle in which appellant was riding as to the accuracy of his testimony that the stop occurred at 11:50 p.m., suggesting to the officer that the traffic stop may have occurred at a later time, in light of testimony of the victims who testified that the robbery occurred around the same time as the traffic stop.

Facts: Appellant and his co-defendant were tried by a jury on various counts of murder, armed robbery, robbery, conspiracy to commit robbery and assault arising from an alleged armed robbery committed against four victims during which another victim was shot and killed in the Brooklyn area of South Baltimore.

Appellant was arrested after a police officer stopped a vehicle, according to his testimony, at 11:50 p.m. driven by appellant's co-defendant, in which he was seated in the front

passenger side of the car. The officers noticed a rifle under appellant's legs and seized it as evidence, thereafter arresting appellant and his co-defendant. A traffic citation was issued to the driver, charging him with driving at a speed greater than reasonable under the conditions.

At a hearing on the motion to suppress evidence seized as a result of the traffic stop, appellant and his co-defendant argued that the officer lacked reasonable articulable suspicion to stop the car. The officer, who issued the traffic citation, testified that, prior to the traffic stop, he observed the vehicle traveling at a speed exceeding the posted limit. The court denied the motion to suppress.

At trial, only one of the four eyewitnesses testified affirmatively as to the time that the robbery occurred. The other eyewitnesses merely approximated, in response to questions posed by the prosecutor, that the robbery occurred leading up to midnight and into the early morning hours of the next day. Appellant's theory of the case and his argument to the jury was based on the fact that the arresting officer testified that the traffic stop was effectuated at the same time that the victims testified that the robbery/homicide occurred.

The trial court repeatedly intervened in the examination of witnesses, before and during the direct or cross-examination. In one such interjection, the trial court suggested to the officer who performed the traffic stop that his testimony regarding the time of the stop was incorrect and encouraged him to reconsider that testimony. At another point, the trial court's interrogation of a detective elicited improper hearsay testimony.

Held: Because the State's burden at the suppression hearing was only to show that the officer had a *reasonable articulable suspicion* sufficient to justify his initial investigatory stop of the vehicle, the holding, in *Warren*, that evidence of excessive speed alone is insufficient to support a *conviction, requiring proof beyond a reasonable doubt*, for driving at a speed greater than reasonable under the conditions, is inapplicable to a determination of reasonable articulable suspicion, to justify a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). The motions court properly credited the police officer's non-expert, lay opinion that the speed at which the vehicle was traveling was 45 miles an hour in a 25 mile per hour zone.

Although the court's articulated intention and objective was to clarify the testimony of witnesses and, even though the court's questioning manifested neither condescension, derision, dismissiveness, sarcasm or incredulity, his persistent

intervention in the examination of witnesses, in an attempt to assist the prosecution by prodding witnesses to testify in conformity with the theory of the State's case, conveyed a perception that the court favored that theory. In light of the intrusive, persistent and coercive conduct of the trial judge, the court's improper interference in the examination of witnesses during the trial undoubtedly had the effect of influencing the verdict of the jury and the error, therefore, was not harmless, compelling reversal of appellant's convictions.

Rodney Edward Brown v. State of Maryland, No. 945, September Term, 2006, filed October 2, 2008. Opinion by Hollander, J.
<http://mdcourts.gov/opinions/cosa/2008/945s06.pdf>

CRIMINAL LAW - USE OF A HANDGUN IN THE COMMISSION OF A CRIME OF VIOLENCE - WEARING, CARRYING, TRANSPORTING A HANDGUN, MD. CODE, CRIM. LAW §§ 4-201, 4-203, 4-204 - BALLISTICS EVIDENCE - ASSAULT - SERIOUS PHYSICAL INJURY - RECANTATION - *KUCHARCZYK V. STATE*, 235 Md. 334 (1964).

Facts: On June 18, 2005, Jermaine Hardy and Tory Burnett were in the home of Burnett's mother when one or more assailants burst into the home and began shooting at them. Burnett was killed, but Hardy survived. Following a trial in April of 2006, a jury in the Circuit Court for Baltimore City convicted Rodney Edward Brown, appellant, of first-degree and second-degree assault on Hardy. See Md. Code (2002, 2007 Supp.), §§ 3-202 & 3-203 of the Criminal Law Article ("C.L."). In addition, the jury convicted appellant of use of a handgun in the commission of a felony or crime of violence, see C.L. § 4-204, as well as wearing, carrying, or transporting a handgun. See C.L. § 4-203. However, Brown was acquitted of the murder of Burnett and the attempted murder of Hardy.

On appeal, Hardy asserted that the evidence was insufficient to show: (1) that Hardy was attacked with a "handgun"; (2) that Hardy suffered a "serious physical injury"; and (3) that appellant could be identified as the perpetrator of the assault on Hardy. As to the weapon, appellant argued that the State failed to prove "that the gun used in this instant case could not have been a shotgun, rifle, or antique firearm [incapable of being concealed on the person]—the statutory exceptions to the definition of a 'handgun.'" Noting that no weapons were recovered or produced at trial, including the weapon used by Hardy, appellant emphasized that "Hardy testified that he could not describe the weapons used in the shooting at all" When asked to "at least say whether they were pistols or rifles or what have you," Hardy responded: "I can say that they found an AKA 47 [sic] shell on the floor." Moreover, appellant asserted that the State's own ballistics expert "suggested . . . that a rifle, not a handgun, could have been used in the shooting of Mr. Hardy." Therefore, appellant argued that the ballistics evidence did not allow the jury to conclude beyond a reasonable doubt that Hardy's assailant used a handgun, rather than a rifle.

The State claimed that the ballistics evidence was sufficient to show that Hardy's assailant used a handgun. It asserted: "[S]ince all three types of ammunition found at the

crime scene could be fired from a handgun, there was sufficient evidence before the jury that Brown, found by the jury to be the criminal agent, used a handgun in perpetrating this crime." The State pointed out that only .45 and .41 caliber ballistics specimens were recovered from the basement. Because Hardy testified that his assailant shot at him in the basement, and because Hardy also testified that he used a weapon that was either a .44 or .45, the State maintained that "the other gun being discharged in the basement by the assailant was *arguably* a .41 caliber." (Emphasis added.) It continued: "[A]ccording to [the expert's] testimony, a .41 is a handgun round. Thus, [the expert's] testimony, coupled with the [expert's] report, provide sufficient circumstantial evidence" to conclude that Brown "used a handgun as he shot at Hardy."

Held: Handgun charges reversed; all other judgments affirmed. The expert did not testify as to the caliber of weapon used by Hardy's assailant. Nor did Hardy testify as to the type of weapon used by the assailant, even to say whether it was a handgun. In the absence of any descriptive witness testimony identifying a weapon as a handgun, and in the absence of production of the actual weapon, the State may establish, based on ballistics evidence recovered at the scene, that a weapon was a handgun. But, when the ballistics evidence is consistent with use of either a handgun or a firearm that is not a handgun, as defined in Criminal Law § 4-201, the State has not met its burden of proof with respect to the charges of use of a handgun in the commission of a crime of violence (C.L. § 4-204), or wearing, carrying, or transporting a handgun (C.L. § 4-203).

The Court stated: "Under appropriate circumstances, we are satisfied that ballistics evidence may give rise to such an inference. In this case, however, we conclude that such an inference cannot be properly drawn from the evidence so as to satisfy the State's burden of proof." It reasoned:

We find no support in our case law for the proposition that a person may be convicted of a handgun offense based on ballistics evidence that is consistent with use of either a handgun or a firearm that is not a handgun under C.L. § 4-201(c), even if the more likely use was of a handgun. Here, based on the ballistics evidence, the jury could not have determined, beyond a reasonable doubt, that Hardy's assailant used a weapon that met the statutory definition of a handgun. Therefore, appellant's two handgun convictions must be reversed.

As to the assault, the Court determined that a "serious

physical injury" is not necessary for a conviction for first-degree assault. Under C.L. § 3-202(a)(2), any assault with a "firearm" qualifies as first-degree assault. The court also concluded that the evidence was sufficient to sustain appellant's assault convictions, notwithstanding the recantation of the lone eyewitness. In its view, appellant's reliance on *Kucharczyk v. State*, 235 Md. 334 (1964), was misplaced.

Kortobi v. Kass, No. 0295, September Term 2007, filed October 6, 2008. Opinion by Sharer, J.
<http://mdcourts.gov/opinions/cosa/2008/295s07.pdf>

ESTATES AND TRUSTS - PERSONAL JURISDICTION OVER FOREIGN PERSONAL REPRESENTATIVE - Issue on appeal is whether jurisdiction lies in Maryland over a non-resident decedent's estate where the only contact with Maryland is the Maryland residence of the personal representative.

Facts: M'Hamed Kortobi was injured in a motor accident in the District of Columbia. Both drivers were residents of the District of Columbia; neither did business or owned property in Maryland.

The defendant died; thus an estate was opened in the Probate Division of the Superior Court of the District of Columbia. Brian L. Kass, as attorney, was appointed by the court as the personal representative of the defendant's estate. Kass is a member of the D.C. and Maryland bars, and a resident of Maryland. The defendant's only beneficiaries were residents of D.C. After Kass's appointment, Kortobi filed suit against the estate in the Circuit Court for Prince George's County. Asserting lack of personal jurisdiction in Maryland, Kass filed a motion to dismiss, which was granted.

Held: Affirmed. The language of Maryland Code, Estates and Trusts § 5-202(a) creates ambiguity in a situation where the "foreign" personal representative is actually a resident of Maryland. The legislative history of that article provides that "[t]he powers of a District of Columbia or any foreign representative will now be governed by the laws of the jurisdiction in which he was appointed." As a result, the personal representative steps into the shoes of the decedent for personal jurisdiction analysis. Under the laws of the District of Columbia, Kass has the same standing "to sue and be sued" as did the defendant immediately before his death.

Applying a personal jurisdiction analysis, it is clear that neither the defendant, nor his estate, established minimum contacts with Maryland, or that they purposefully availed themselves of its laws. Maryland does not, absent more, have jurisdiction over an estate solely on the fortuitous basis of the residence of the personal representative.

Furthermore, Maryland's choice of law principles, and the principle of *lex loci delicti*, govern since the motor accident occurred in the District of Columbia. Subject matter jurisdiction over the defendant's estate and of the alleged tort that gave rise to this litigation, rests in the District of Columbia, not Maryland.

In re: Damien F. and Terrell F., No. 320, September Term, 2008 and *In re: Christian D. and Jenna J.*, No. 322, September Term, 2008 (Consolidated Appeals), decided October 7, 2008. Opinion by Davis, J.

<http://mdcourts.gov/opinions/cosa/2008/320s08.pdf>

FAMILY LAW - CINA (Child in Need of Assistance) - Emergency Detention or Shelter Care; Shelter Care Hearing; Md. Code Ann., Cts. & Jud. Proc., § 3-815 ; Maryland Rule 11-112.

Cts. & Jud. Proc., § 3-815 provides that a local department of the Department of Human Resources may place a child in emergency shelter care before a hearing if placement is required to protect the child from serious immediate danger and that the court shall hold a shelter care hearing on the Department's petition before disposition to determine whether the temporary placement of the child outside of the home is warranted. Appellants assert that the juvenile court erred in instructing parents' counsel to controvert allegations of child abuse contained in Department's petition requesting order for emergency shelter care by way of proffers, rather than by permitting witnesses to testify at shelter care hearing because, they assert, the court had no way of judging the credibility of the witnesses who made the allegations. Appellants, in previous shelter care proceedings, have been unable to challenge the court's denial of the right to produce witnesses because § 3-815 (c)(4) provides that CINA adjudication in which allegations of abuse may be controverted by the testimony of live witnesses be held within 30 days; parents were, accordingly, without recourse during 30-day period between shelter care hearing and adjudication of CINA to challenge allegations of abuse - and hence shelter care placement - through live witnesses and the denial of the right to produce witnesses at shelter care hearing could not be subsequently challenged because, having produced witnesses at the CINA hearing, rendered the issue moot.

Facts: The Montgomery County Department of Health and Human Services and the Montgomery County Department of Health and Mental Hygiene (collectively, the "Department") filed a shelter care petition concerning Damien F. and Terrell F., Appeal No. 320, and a shelter care petition concerning Christian D. and Jenna J., Appeal No. 322. A separate hearing was held on each petition, at which counsel for the parties were instructed that the court would hear proffers as to what the testimony of the witnesses would be, but it would not hear testimony from witnesses on behalf of the parents or the Department. Following the hearings, the circuit court found placement was required to protect the children from serious immediate danger and that it was in the best interests of the children's welfare that they not

be returned to their homes.

Held: Because parenting is a fundamental right, an order of shelter care deprives a parent of that fundamental right, even if only temporarily, and this case presents an issue that is of public concern; the issue of the right to produce witnesses, although moot, may be considered by the appellate court.

As to Appeal Nos. 320 and 322, the court erred in its determination that its discretion as to whether a witness should be allowed to testify was unlimited; it should not have directed counsel that it would proceed by considering only their proffers, without permitting counsel to denote the Department's material and relevant allegations which could be controverted by live testimony. When presented with a request by counsel for the parent or parents to be allowed to present witnesses at a shelter care hearing, the court should determine the disputed allegations. Unless any disputed allegation is probatively inconsequential to a determination of whether placement is required to protect a child from serious immediate danger or that removal from the home is necessary to provide for the safety and welfare of the child, the court must receive testimony as to the material, disputed allegations and a denial of the request to produce witnesses, in that instance, is an abuse of discretion. The only limitation that the court should impose in a shelter care hearing is that only testimony of witnesses which directly contradicts the allegation of abuse may be offered.

John French v. Mary Ann Hines, et vir., No. 970, September Term, 2006, filed October 3, 2008. Opinion by Hollander, J.
<http://mdcourts.gov/opinions/cosa/2008/970s06.pdf>

CONSTITUTIONAL LAW - MOTIONS FOR JUDGMENT AND JNOV -
PUNITIVE DAMAGES - MALICE - JURY VERDICT - IRRECONCILABLE
INCONSISTENCY - JURY INSTRUCTIONS - INSUFFICIENCY OF PLEADING -
WAIVER - USE OF EXCESSIVE FORCE - PRIVILEGE - SUBSTANTIAL INJURY
-COSTS.

Facts: The plaintiff, Mary Ann Hines, alleged that appellant, John French, a sheriff, used excessive force in the course of an arrest, in violation of State and federal law. The jury found that appellant did not act with malice in effecting the arrest of Ms. Hines. For the purpose of qualified immunity under State law, the court had defined malice consistent with actual malice. Based on its finding of no malice, the jury did not reach the question of whether appellant used excessive force in violation of the Maryland Constitution. But, the jury expressly found that appellant used excessive force in violation of the U.S. Constitution, and then awarded punitive damages for that claim, even though the court did not instruct as to the malice standard for the federal claim, and appellees had not requested punitive damages.

Appellant did not move for judgment as to punitive damages for excessive force. In his motion for JNOV, however, he argued that the award of punitive damages was irreconcilably inconsistent with the jury's finding that he acted without malice.

Held: Affirmed. Appellant did not waive his right to complain in the motion for JNOV as to inconsistency of the verdict because, when appellant moved for judgment, the jury had not rendered its verdict and thus the issue of inconsistency could not have been raised. But, appellant waived his claim that punitive damages were improperly submitted to the jury based on deficient pleadings, because he never objected to the jury instructions as to punitive damages or to the verdict sheet, which specifically addressed punitive damages.

Moreover, the verdict was not irreconcilably inconsistent. As a proposition of *Maryland law*, a jury verdict that finds that the alleged tortfeasor acted without actual malice is irreconcilably inconsistent with an award of punitive damages. But, the finding of no malice, barring recovery for punitive damages for State claims did not preclude an award of punitive damages for a claim of excessive force under 42 U.S.C. § 1983. The punitive damage standard for § 1983 actions is not an "actual malice" standard. Rather, under § 1983, a jury may award

punitive damages when the defendant's conduct is shown to be motivated by evil motive or intent, *or when it involves reckless or callous indifference to the federally protected rights of others*, akin to implied malice.

Maryland courts ordinarily must apply federal standards in § 1983 actions with respect to punitive damages. The jury's finding that appellant did not act with actual malice did not foreclose a finding that he acted with implied malice. Because the jury was not asked to determine whether appellant acted with implied malice, the verdict was not inconsistent. Appellant's failure to object to the content of the jury instructions as legally deficient was not preserved.

In order to proceed with a claim of unconstitutional excessive force, a plaintiff need not prove "substantial injury." But, the privilege of a law enforcement officer to commit a battery in the course of a legally justified arrest extends only to the use of reasonable force, not excessive force.

Because of appellees' conduct with regard to preparation of record extract, a portion of the costs was assigned to appellees, despite affirmance of the verdict in their favor.

Linda Ann Senez v. Ann Collins, et al., No. 111, September Term, 2007, filed October 3, 2008. Opinion by Hollander, J.
<http://mdcourts.gov/opinions/cosa/2008/111s07.pdf>

REAL PROPERTY - ADVERSE POSSESSION - ACTUAL POSSESSION -
CONTINUITY OF POSSESSION - RE-ENTRY ON THE LAND - HOSTILITY.

Facts: The parties had a dispute as to the ownership of a 291-square-foot sliver of land situated along the boundary of two adjoining waterfront properties in the Middle River area of Baltimore County. The disputed area also included a portion of a concrete boat ramp that straddled the common boundary. Linda Ann Senez, appellant, is the owner of 341 Worton Road (the "Senez Property"); Ann and Steve Collins, appellees, own 339 Worton Road (the "Collins Property"). Both properties front on Norman Creek, a tributary of the Chesapeake Bay, and each contains a single family home.

In September 2004, appellees filed a quiet title action in the Circuit Court for Baltimore County, and also alleged claims, *inter alia*, of trespass and nuisance. Appellant filed a counterclaim based on adverse possession. Following a bench trial in 2006, the court ruled in favor of appellees as to most of their claims, including adverse possession.

Held: Vacated and remanded. The court erred in its resolution of appellant's adverse possession claim. The maintenance and improvement of the disputed land area by appellant and her predecessors, which included yard work, construction of a bulkhead, and installation of a boat ramp, constituted actual use and possession. Appellees' recreational use of the boat ramp did not constitute re-entry sufficient to re-take possession; such use does not have the characteristics of maintenance, upkeep, and improvement of land that constitutes possession. The court erred in equating cooperative relations between landowners as evidencing a failure to establish the element of hostility; the element of hostility pertains to the land.

Herschell B. Claggett, Sr. v. Maryland Agricultural Land Preservation Foundation, et al., No. 578, September Term, 2007, filed October 6, 2008. Opinion by Hollander, J.
<http://mdcourts.gov/opinions/cosa/2008/578s07.pdf>

REAL PROPERTY - AGRICULTURAL PRESERVATION EASEMENT -DEED -
CONTRACT - RELEASE - MD. CODE, AGRICULTURE ARTICLE, § 2-513 -
RETROACTIVITY - STATUTORY INTERPRETATION

Facts: In February of 2000, Herschell Claggett, appellant, conveyed an agricultural preservation easement conveyed to the Maryland Agricultural Land Preservation Foundation (the "Foundation"), appellee, a division of the Department of Agriculture, in February of 2000. The easement pertained to a tract of land in Kent County, over 200 acres in size (the "Property").

Under the terms of the Deed of Easement, as well as the law then in effect, appellant retained the right to apply to the Foundation for release from the easement restrictions of a lot of up to two acres, "for the purpose of constructing a dwelling house" for his use (the "Owner's Lot"). For that purpose, in 2002 appellant received a "preliminary release" of a two-acre lot. Thereafter, effective October 1, 2004, the General Assembly amended the applicable statute to require that, absent the approval of MALPF, "[a]ny release or preliminary release . . . shall include . . . [a] statement that the owner's . . . lot may not be transferred for 5 years from the date of the final release." In 2005, the Foundation tendered to appellant a proposed "Final Release," which incorporated the provision required by the amended statute.

Appellant refused to sign the proposed release, and proceeded with construction of a residence on the Owner's Lot. He also filed a declaratory action against the Foundation in the Circuit Court for Kent County, contending that he is not bound by the five-year restriction on his right to alienate the Owner's Lot. The circuit court granted dismissal or summary judgment in the Foundation's favor as to all counts of appellant's Complaint.

Held: Reversed. Under the applicable version of Ag. § 2-513, a landowner who obtained the release of an owner's lot from the terms of the easement is permitted to construct a dwelling on it and to sell the house and lot free of easement restrictions. Because the owner executed his Deed of Easement and received his preliminary release before the statute was amended, he was not required to obtain approval to transfer his lot to a third party. Any statutory amendment that substantively altered vested rights of landowner cannot be applied retroactively.

Rhee v. Highland Development Corporation, et al., No. 1765, September Term, 2007, filed October 7, 2008. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2008/1765s07.pdf>

REAL PROPERTY - FRAUDULENT CONCEALMENT IN SALE OF REAL PROPERTY - SCOPE OF DUTY NOT TO CONCEAL BY FRAUD A MATERIAL DEFECT IN REAL PROPERTY - EXTENSION OF DUTY TO SECONDARY PURCHASER.

Facts: James and Linda Rhee owned and lived in a single-family house in Clarksville for thirteen years before they discovered that there was a desecrated cemetery on their property. In the 1980s, Highland Development Corporation ("Highland") and Fisher, Carter & Collins ("FCC") oversaw construction of Brighton Pines Development, which includes "Lot 20," the Rhees' property. When Highland, FCC, Richard Demmitt, and Ronald Carter, the appellees, were developing Brighton Pines, they discovered on Lot 20 a small cemetery. The appellees removed the headstones, moved the building lot restriction lines, and removed all references to the cemetery from the worksheets that were submitted to State or County agencies. Lot 20 was then sold to the initial purchasers of the property, who never knew of the desecrated cemetery. In 1991, the initial purchasers sold the property to the Rhees, who likewise knew nothing about the cemetery. It was not until 2004 that the Rhees learned of the cemetery on their property, after a person who was involved in developing Brighton Pines told them about the cemetery. The Rhees thereafter sued the appellees for fraud.

The trial court dismissed the Rhees' fraud claim, reasoning that with fraud, there must be a duty to the plaintiff, and the appellees did not owe the Rhees a legal duty. The Rhees appealed, claiming the trial court erred in granting the appellees' motion to dismiss the Rhees' claim for fraudulent concealment because the appellees' duty not to fraudulently conceal the presence of the desecrated cemetery on Lot 20 extended to them as subsequent purchasers. They relied on *Diamond Point Plata Ltd. Partnership v. Wells Fargo Bank, N.A.*, 400 Md. 718 (2007), which held that a defendant's duty to refrain from fraudulently misrepresenting a material fact extends to all people that the defendant has "reason to expect" will rely upon the misrepresentation, to argue that a development/seller's duty to refrain from fraudulently concealing a materially adverse condition of real property extends beyond the initial purchaser of the property to all people the defendant has "reason to expect" will rely upon the concealment.

Held: Judgment reversed and case remanded for further proceedings. The Court of Special Appeals held that the appellees' duty not to fraudulently conceal the presence of a

cemetery on the property extended beyond the initial purchasers, to the Rhees as subsequent purchasers.

The Court explained that in *Diamond Point*, the Court of Appeals adopted the principles of sections 531 and 533 of the RESTATEMENT (SECOND) OF TORTS, and held that the maker of a fraudulent misrepresentation owes a duty not only to the one to whom the misrepresentation is made but also to the members of a class of people whom he intends or has reason to expect will act or refrain from acting in reliance upon the misrepresentation. The Court of Special Appeals reasoned that the principles from sections 531 and 533 of the RESTATEMENT (SECOND) OF TORTS should likewise apply to extend liability of a developer/seller of real property to a subsequent purchaser for fraudulent concealment of an adverse material fact about the property because: (1) the common law causes of action for fraudulent misrepresentation and fraudulent concealment are substantively indistinct, and (2) in either a fraudulent misrepresentation or fraudulent concealment context, parties in subsequent transactions who rely upon the misrepresented or concealed facts will be similarly misled, and the fraud tortfeasor has reason to expect that secondary misrepresentations will occur. The Court found that the facts alleged by the Rhees permit a reasonable inference that the appellees knew that the concealed defect on Lot 20 would remain concealed as the property was sold to subsequent purchasers, and thus the factual allegations were sufficient to show that the Rhees belonged to the class of people to whom the duty not to defraud was owed.

The Court of Special Appeals further found that the facts as asserted, that as a consequence of the appellees' fraudulent concealment, the Rhees own land in which human remains are buried, are sufficient to allege a material defect in the Rhees' property and to state a cause of action for fraudulent concealment. The Court also found that the Rhees' complaint sufficiently alleged that the Rhees had suffered damages because of the concealed cemetery.

ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in this Court effective October 3, 2008:

KYRIAKIS P. MARUDAS

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By an Order of the Court of Appeals of Maryland dated October 7, 2008, the following attorney has been disbarred by consent from the further practice of law in this State:

ROBERT EDWARD MITTENDORFF

*

By an Order of the Court of Appeals of Maryland dated October 24, 2008, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State:

MICHAEL T. FARNAN

*

By an Order of the Court of Appeals dated October 27, 2008, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

MICHAEL W. RYAN, JR.

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