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COURT OF APPEALS

ADMINISTRATIVE LAW – JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS – IN GENERAL – STATE BOARD OF PHARMACY’S DECISION NOT TO REFER A CONTESTED CASE TO THE OFFICE OF ADMINISTRATIVE HEARINGS WAS ONE COMMITTED TO THE AGENCY’S DISCRETION.

ADMINISTRATIVE LAW AND PROCEDURE – JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS – SCOPE OF REVIEW IN GENERAL – ARBITRARY, UNREASONABLE OR CAPRICIOUS ACTION; ILLEGALITY – SCOPE OF JUDICIAL REVIEW OVER STATE BOARD OF PHARMACY’S DECISION TO DENY A MOTION TO REFER A CONTESTED CASE TO THE OFFICE OF ADMINISTRATIVE HEARINGS, A DECISION COMMITTED TO THE AGENCY’S DISCRETION, WAS LIMITED TO WHETHER THE AGENCY’S DETERMINATION WAS ARBITRARY OR CAPRICIOUS.

ADMINISTRATIVE LAW AND PROCEDURE – IN GENERAL – COURT OF SPECIAL APPEALS’S ORDER REMANDING THE CASE TO THE ADMINISTRATIVE AGENCY DID NOT CREATE ISSUES OF DOUBLE JEOPARDY WHERE PURPOSE OF SANCTION WAS REMEDIAL, NOT PUNITIVE; NOR DID IT CREATE ISSUES OF RES JUDICATA WHERE CASE WAS ON APPELLATE REVIEW AND WAS NOT A SUBSEQUENT CAUSE OF ACTION.

Facts: Linda Ann Spencer, a pharmacist, continued to practice pharmacy after her license expired on July 1, 1999, until mid-August when it was renewed. The State Board of Pharmacy (“Board”) issued charges against her on February 16, 2000, alleging that she had practiced pharmacy without a license for a period of six weeks and that she had failed to maintain records of required continuing education credits. Spencer’s case went before the Board in a contested case hearing.

Spencer sought to have the contested case referred to the Office of Administrative Hearings (OAH). Spencer believed the Board incapable of giving her a fair and impartial hearing because some of the members of the adjudicating panel had been involved in prior, failed settlement negotiations with her. The Board denied the motion to refer and issued a Final Decision and Order adverse to Spencer.

Spencer then filed a Petition for Judicial Review in the Circuit Court for Baltimore City, alleging, *inter alia*, that she had been deprived of procedural due process because the representatives of the Board in settlement negotiations had also served as members of the panel adjudicating her case. Agreeing with Spencer’s arguments, the circuit court vacated and reversed the Board’s Final Decision and Order. The Board appealed to the Court of Special Appeals which agreed with the circuit court that

Spencer was denied her right to a fair and unbiased hearing. Instead of reversing the Board's Final Decision, the intermediate appellate court remanded the case to the circuit court "with instructions to remand the case to the Board, directing [the Board] to delegate the authority to conduct the contested case hearing and to issue the final administrative decision in this case to the OAH."

Spencer then filed a petition for writ of certiorari in the Court of Appeals requesting the Court to consider whether the Court of Special Appeals, by its order to the administrative agency to refer the case to the OAH, violated Article 8 of the Declaration of Rights and § 10-205 of the Maryland Administrative Procedure Act ("the APA") by performing a "non-judicial function." Spencer also questioned whether the order to remand the matter to the OAH contravened either *res judicata* or double jeopardy principles as applied to administrative proceedings. Before the Court of Appeals, the Board agreed with petitioner that the Court of Special Appeals performed a non-judicial function in violation of Article 8.

Held: Reversed and remanded to Board for further proceedings. The Court of Special Appeals exceeded its judicial authority, not under the Maryland Constitution, but rather because the intermediate appellate court did not apply the proper level of judicial review to the administrative agency action.

The Court explained that the proper understanding of the posture of the case was that of a judicial court reviewing the actions of an administrative agency. The intermediate appellate court's order, said the Court, amounted to a review of the Board's decision to deny the motion to refer the case to the OAH. But when a court reviews the Final Decision of an administrative agency, the court should first determine the proper scope of judicial review for the agency action in dispute and then apply it to the facts of the case. The Court of Special Appeals failed to make these critical determinations when it reviewed the Board's decision to deny referral to the OAH.

The Court then proceeded to review the Board's decision applying the proper scope of judicial review. The scope of judicial review over agency decisions is governed by § 10-222(h) of the APA, which varies the level of judicial scrutiny depending upon the nature of the disputed agency action. If the disputed agency action is limited to a pure question of law, then the reviewing court reviews the action *de novo* and may substitute its judgment for that of the agency. If the agency makes a finding of fact, then the court may only review the finding for substantial evidence and may not substitute its judgment for the agency's. Finally, if the agency acts in a discretionary capacity, the reviewing court

may review the action only to determine whether it was "arbitrary or capricious."

Here, the disputed agency action was the Board's decision to deny Spencer's motion to refer the case to the OAH. Such a decision was one committed to the agency's discretion by § 10-205(b) of the APA. As a discretionary function of the agency, the proper scope of judicial review was limited to whether the action was arbitrary or capricious. The Court held that the decision to deny the motion to refer to the OAH was not arbitrary or capricious, as the Board could easily have cured the procedural defects without referring the case to the OAH. Because such an option was open to the Board and because exercising that option could not be deemed arbitrary or capricious, the Court of Special Appeals erred in its order mandating referral.

The Court found the second argument by Spencer, that having her case remanded would create issues of double jeopardy or *res judicata*, without merit. Double jeopardy did not apply because the purpose of the sanction was remedial, not punitive; and *res judicata* did not apply because the case was on appellate review and was not a subsequent cause of action.

Linda Ann Spencer v. Maryland State Board of Pharmacy, No. 36, September Term, 2003, filed March 11, 2004 by Raker, J.

AUTOMOBILES - ADMINISTRATIVE LICENSE SUSPENSION HEARINGS - PURSUANT TO CLEAR AND UNAMBIGUOUS LANGUAGE OF MD. CODE (1977, 1999 REPL. VOL., 2003 SUPP.), § 16-205.1 (F)(7)(I) OF THE TRANSPORTATION ARTICLE, AN ADMINISTRATIVE LAW JUDGE IS NOT REQUIRED TO CONSIDER THE ISSUE OF WHETHER THE CHEMICAL BREATH TEST WAS PERFORMED WITHIN TWO HOURS OF APPREHENSION OF THE SUSPECTED DRUNK DRIVER WHERE THE STATUTE'S WORD "ONLY" LIMITS THE ISSUES TO BE CONSIDERED IN THE SUSPENSION HEARING TO THOSE SIX ISSUES ENUMERATED WITHIN THE STATUTE'S SUBSECTION.

Facts: On October 12, 2002, a Maryland Transportation Authority Police officer observed a Ford Explorer, driven by Keith D. Jones, facing sideways across the northbound traffic lanes of

Interstate 95. When the officer pulled his cruiser behind the vehicle and activated his lights, Jones made a U-turn and proceeded to drive south in the northbound lane of Interstate Route 95 in the direction of the Fort McHenry toll booth plaza, veering in front of several oncoming vehicles in the process. At approximately 1:59 p.m., other officers were called to assist in the apprehension of Jones. Jones finally stopped his vehicle after an officer stood in the road, and forced him to stop.

After Jones stopped his vehicle, an officer saw that he needed to use his vehicle for support and could not stand on his own. During the course of the stop, an officer smelled a strong odor of alcohol on Jones' breath. Jones also performed poorly on, and thus failed, the sobriety field tests administered during the stop. As such, the investigating officers believed that Jones had been driving his vehicle while under the influence of alcohol.

An officer then placed Jones in a patrol car and, according to the officer, read Jones his DR-15 Advice of Rights form at that time. After being read his rights, Jones stated that he would refuse all chemical breath tests (no exact time of the refusal was indicated). Jones did not actually sign the DR-15 advice form until sometime later at 4:40 p.m.

Jones requested an administrative hearing to show cause why his driver's license should not be suspended concerning the refusal to take the chemical breath test. At the hearing, conducted in front of an Administrative Law Judge, Jones argued that he had not been properly advised of the ramifications of a refusal to take the chemical breath test because over two hours had passed before he was advised about and asked to take the chemical breath test.

The ALJ found that Jones' argument was only relevant in a criminal prosecution and made no findings as to what time Jones was asked to take the test. The Motor Vehicle Administration (MVA) suspended Jones' privilege to drive in Maryland for 120 days.

Jones sought judicial review of the MVA's decision in the Circuit Court for Anne Arundel County and that court issued an Order reversing the decision of the Agency and vacating the 120-day suspension of Jones' Maryland driving privileges.

Held: Reversed. The Court of Appeals held that the plain language of Md. Code (1977, 1999 Repl. Vol., 2003 Supp.), § 16-205.1 (f)(7)(i) of the Transportation Article is clear and unambiguous. In doing so, the Court held that the word "only" in that subsection limits the issues to be considered in suspension hearings to those six issues enumerated within the statute's

subsection. As the issue of whether the chemical breath test was performed within two hours of apprehension of the suspected drunk driver is not included in that list, the Court of Appeals held that the Administrative Law Judge was not required to consider it in her review of the case. Accordingly, the Court of Appeals reversed the decision of the Circuit Court.

Motor Vehicle Administration of Maryland v. Keith D. Jones. No. 75, September Term, 2003, filed March 10, 2004. Opinion by Cathell, J.

CONDOMINIUM - COMMON ELEMENTS - MANAGEMENT AND CONTROL - REDESIGNATING A "GENERAL COMMON ELEMENT" OF A CONDOMINIUM TO A "LIMITED COMMON ELEMENT" CAN ONLY OCCUR WHERE THE UNANIMOUS CONSENT OF ALL UNIT OWNERS OF THE CONDOMINIUM IS GIVEN.

Facts: The New Phoenix Atlantic Condominium ("Condominium") is located in Ocean City, Maryland, and consists of 36 residential units. When the Condominium was established in 1975, the recorded Plats and Plans of the Condominium showed 31 parking spaces on Condominium property designated as "limited common elements" for the exclusive use of one specific unit at the time of the initial sale of each unit. Unit 505 was one of five units originally without a dedicated parking space on Condominium property. Before the first transfer of Unit 505, however, the developers of the Condominium created two new parking spaces on Condominium property, identified as parking spaces by numbers 32 and 33. The Condominium Declaration was never amended to reflect the existence of parking spaces 32 and 33.

Harold C. Jurgensen ("Jurgensen"), acquired title to Unit 505 in 1984. Thereafter, he used parking space number 32. In 1999, however, the Condominium, by its board of directors, reconfigured a portion of the Condominium parking area, thereby reducing the size of the parking space that bore the number 32.

Jurgensen sued the Condominium in the Circuit Court for Worcester County for breach of contract and promissory estoppel. He viewed the Condominium's action with respect to parking space

number 32 as an unwarranted invasion of a property right belonging exclusively to him as the owner of Unit 505. On February 7, 2001, the Circuit Court issued a one-page Order, granting summary judgment for the Condominium. Jurgensen then filed an appeal to the Court of Special Appeals. In the Court of Special Appeals, the parties filed a Joint Motion to Remand the Case, which was granted on December 26, 2001. On remand, the Circuit Court once again granted summary judgment in favor of the Condominium. Jurgensen again filed an appeal with the Court of Special Appeals. On June 13, 2003, in an unreported opinion, the intermediate appellate court affirmed the judgment of the Circuit Court. Jurgensen then filed a Petition for Writ of Certiorari to the Court of Appeals. The Court of Appeals granted the petition.

Held: The Court of Appeals held that Jurgensen did not acquire the exclusive right to parking space number 32 because that particular parking space was never designated as a "limited common element" of the Condominium. As such, Jurgensen had, under both the Maryland Condominium Act, Md. Code (1974, 2003 Repl. Vol.), §§ 11-101 et. seq. of the Real Property Article and the Condominium Declaration, only a percentage ownership interest in the parking space, a "general common element," and nothing more. Only the unanimous consent of all unit owners of the Condominium could amend the Declaration so that parking space number 32 would be redesignated a "limited common element." Such unanimous consent was never given.

The Court of Appeals further held that Jurgensen did not acquire the exclusive rights to the parking space on the theory of easement by prescription. The parking space was created by the developers of the Condominium for the use of an owner of a condominium unit. Therefore, Jurgensen's use of the parking space could not be said to have been adverse to the interests of the Condominium. Moreover, provisions in the Maryland Condominium Act prohibit any attempt by unit owners to partition "general common elements" absent the unanimous consent of all unit owners.

Lastly, the Court of Appeals held that equitable estoppel was not warranted where Jurgensen had ample access to the Condominium Declaration and Plats and Plans, which never established parking space number 32 as anything other than a "general common element" of the Condominium.

Harold C. Jurgensen v. The New Phoenix Atlantic Condominium Council of Unit Owners. No. 63, September Term, 2003, filed March 5, 2004. Opinion by Cathell, J.

CONSTITUTIONAL LAW - 14TH AMENDMENT - ONE-PERSON/ONE-VOTE, MARYLAND GENERAL ASSEMBLY, COUNTY DELEGATIONS, VOTE DILUTION, GOVERNMENTAL FUNCTIONS. - COUNTY DELEGATIONS, FOR WHICH THE PRIMARY RESPONSIBILITIES ARE TO REFER AND RECOMMEND LEGISLATION TO THE GENERAL ASSEMBLY OF PURELY LOCAL IMPACT, DO NOT PERFORM SUFFICIENT GOVERNMENTAL FUNCTIONS TO INVOKE THE ONE-PERSON/ONE-VOTE STANDARD MANDATED BY THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Facts: Each Maryland County is represented by a county delegation, which is comprised of members of the Maryland House of Delegates whose districts lie within or partially within the county from which the member was elected. These county delegations are primarily responsible for referring legislation of purely local impact to the General Assembly. Three members of the Anne Arundel County delegation represented District 21, the boundaries of which existed within both Anne Arundel and Prince George's Counties. Consequently, District 21 delegation members represented significantly fewer constituents than did members whose entire districts existed totally within Anne Arundel County. Prior to the November, 2002 election, the Anne Arundel County delegation voting rules dictated that each delegation member, except those in District 21, who would be entitled to one-third vote each, would be entitled to one vote,. With this vote allocation, the delegation was majority democrat. During the November, 2002 election, Republicans Herbert McMillan and Donald Dwyer, were elected to the House of Delegates replacing two Democrat members and, thus, given the rules in effect with respect to the vote allocation in the Anne Arundel County Delegation, the Delegation would be majority Republican.

On December 2, 2002, after the General Assembly election results were certified, but before the start of the 2003 legislative session, when the newly elected members would be sworn, the Delegation members, including the outgoing members of the Delegation and excluding the newly elected members, met. During that meeting, the delegation voting structure was amended to allot an equal vote to each member of the county delegation, including the District 21 members. The result assured that the Democrats would retain the majority in the Delegation.

On January 3, 2003, the petitioners filed in the Circuit Court for Anne Arundel County, a Verified Complaint for Declaratory and Injunctive Relief under 42 U.S.C. § 1983 against the Chair of the Anne Arundel County Delegation, respondent, Delegate Mary Ann Love. The petitioners alleged that that the amendment of the Anne Arundel County voting structure with respect to the allocation of the vote among the members of the delegation was intended to "preserve the democratic control and leadership of the delegation, and "to dilute [the petitioners'] votes in violation of the Equal Protection Clause guaranteeing one person one vote mandated by the Supreme Court of the United States." The respondent filed a Motion

to Dismiss/Opposition to Request for Preliminary Injunction, arguing that, pursuant to Vander Linden v. Hodges, 193 F.2d 268 (4th Cir. 1999) and DeJulio v. Georgia, 390 F.3d 1291 (11th Cir. 2002), the Delegation's activities were not substantial enough to constitute governmental functions and, therefore, did not trigger the protection afforded by the one-person/one-vote standard.

The Circuit Court granted the respondent's motion, reasoning that the County Delegation exercised neither "general" governmental powers, nor "final" legislative power so as to require apportionment consistent with the one-person/one-vote requirement of the 14th Amendment.

Held: Affirmed. The Court first recognized the rule that the one-person/one-vote standard of the 14th Amendment commands that legislative bodies that are popularly-elected and perform governmental functions must be apportioned based upon the population. Relying primarily on the reasoning of Hadley v. Junior College Dist. of Metro. Kansas City, 397 U.S. 50, 90 S. Ct. 791, 35 L. Ed. 45, Vander Linden v. Hodges, 193 F.2d 268 (4th Cir. 1999) and DeJulio v. Georgia, 390 F.3d 1291 (11th Cir. 2002), the Court of Appeals held that the actions of Maryland County Delegations do not amount to "governmental functions" sufficient to trigger the one-person/one-vote standard.

The Court pointed out that in Vander Linden, the Fourth Circuit held that a popularly-elected County Delegation violated the proportionality requirement of the one-person/one-vote standard mandated by the 14th Amendment because the county delegation performed extensive governmental functions including fiscal, regulatory and appointive functions. Similarly, in Hadley, the Supreme Court held that a Kansas City Junior College Board of Trustees was required to be elected in compliance with the one-person/one-vote standard because that board was given extensive responsibility over the operation of the State junior college including, inter alia collecting taxes, issuing bonds, hiring and firing teachers, making contracts and supervising and disciplining students. Conversely, the 11th Circuit held in DeJulio, that Georgia county delegations were not required to be proportionally elected because the delegations, which were primarily responsible for recommending and referring local legislation, did not perform sufficient governmental functions to trigger the one-person/one-vote standard.

The Court, distinguished the responsibilities of the Anne Arundel County Delegation from those in Vander Linden and Hadley, recognizing that the Anne Arundel County delegation did not have the substantial impact on the local communities as was present in those cases. Rather, the Court held that, because the only stated role of the Anne Arundel County Delegation was to refer and

recommend legislation of purely local impact, the local delegation did not control any aspect of local life directly and, thus, did not perform sufficient governmental functions to trigger the one-person/one-vote standard of the 14th Amendment.

McMillan v. Love, No. 116, September Term, 2002, filed February 17, 2004. Opinion by Bell, C.J.

CRIMINAL LAW - IMPERFECT SELF-DEFENSE - EVIDENCE OF "BATTERED CHILD SYNDROME" IS PERMISSIBLE TO ESTABLISH THAT DEFENDANT DID NOT HAVE REQUISITE MALICE TO BE CONVICTED OF MURDER CHARGE.

Facts: On the morning of Saturday, May 6, 2000, while several of his adopted siblings remained asleep upstairs in the family home, Bruno Smullen stabbed and cut his adopted father twenty two times with a large kitchen knife. He then proceeded to attack and threaten his adopted siblings when they investigated the noises they were hearing downstairs. After all three siblings escaped from their attacker, Smullen fled the scene. Upon finding Smullen sitting on a street curb, the police read him Miranda rights, and interrogated him at a nearby hospital. Smullen admitted to the events of that morning, at which point police recorded a formal confession. He claimed that he was trying to kill his adopted father before his father killed him. Smullen claimed the father was abusive in that he said threatening things to him, and had hit him in the chest with a piece of wood.

The trial court refused Smullen's request to introduce evidence of alleged abuse or expert evidence on "Battered Child Syndrome" after concluding he had not even raised enough evidence for a claim of imperfect self defense. On appeal, the Court of Special Appeals granted Smullen a new trial on the grounds that the trial court improperly excluded the evidence of battered child

syndrome. The Court of Appeals subsequently granted *certiorari*.

Held: Reversed. The elements of the battered spouse syndrome that help a jury understand why a spouse may perceive imminent serious harm from conduct that would not likely be regarded as imminently threatening from someone else, are also present in battered child syndrome. The battered spouse syndrome, as recognized in §10-916 of the Courts and Judicial Proceedings Article, applies as well to battered children. Consequently, when a defendant claiming self-defense offers foundational evidence, which, if believed, would establish the requisite pattern of abuse sufficient to provide a base for an expert opinion as to the battered spouse/child syndrome, it should be admitted. Here, Smullen did not present enough evidence of abuse to sufficiently raise the issue of consequence. Therefore, he is not entitled to a new trial.

State v. Smullen, No. 40, September Term, 2003, filed March 12, 2004. Opinion by Wilner, J.

CRIMINAL LAW - NATURE AND ELEMENTS OF CRIME - WEAPONS OFFENSES - MD. CODE (1957, 1996 REPL. VOL., 2001 SUPP.), ART. 27 § 449 (E)'S UNIT OF PROSECUTION TRIGGERING THE STATUTE'S MANDATORY MINIMUM SENTENCES FOR ILLEGAL POSSESSION OF A REGULATED FIREARM BY A PERSON WITH QUALIFYING CONVICTIONS WAS EACH PROHIBITED ACT OF FIREARM POSSESSION AND NOT EACH PRIOR FELONY CONVICTION, THUS, A DEFENDANT CAN ONLY BE CONVICTED ON ONE COUNT OF § 445(D)(1) WHERE HE POSSESSED ONLY A SINGLE FIREARM ON A SINGLE OCCASION.

Facts: Joseph Melton's convictions arose out of an incident involving a dispute between neighbors after the neighbors arrived in the parking lot of their apartment complex at approximately the same time. The first couple, Shikera Bibb and her fiancée, Duane David, testified that after Bibb and David approached the Meltons, David asked to speak to Melton and Melton's wife sprayed both Bibb and David in the face with mace. Bibb and David testified

that David then threatened Melton's wife and Melton responded by pulling out a gun and pointing it back and forth at them.

Melton was charged with three separate violations of Md. Code (1957, 1996 Repl. Vol., 2001 Supp.), Art. 27 § 445 (d)(1)(i), (ii) and (iii), because he possessed a regulated firearm and: 1- had been previously convicted of a crime of violence (second degree assault); 2- had been previously convicted of a violation classified as a felony (felony convictions for possession of controlled dangerous substances and a felony theft conviction); and 3- had been previously convicted of a violation classified as a misdemeanor that carries a penalty of more than 2 years (second degree assault). Although the State alleged only a single act of firearm possession, Melton was nonetheless charged with three separate criminal offenses because of his prior history of convictions.

Melton was convicted on all three charges and was sentenced to five years of incarceration on the (d)(i) count and a concurrent five years of incarceration for the (d)(ii) count. His sentence for the (d)(iii) conviction was suspended generally.

Held: The Court of Appeals held that Md. Code (1957, 1996 Repl. Vol., 2001 Supp.), Art. 27 § 449 (e) is unclear and ambiguous as to whether the phrase "Each violation shall be considered a separate offense" refers to each current act of illegal possession or to each prior qualifying felony conviction. Accordingly, the Court of Appeals held that the statute was meant to create punishments for each act of possession and not for each prior conviction. The Court used its case law, federal case law, the construction of the recodified Public Safety Article and the rule of lenity in holding that only one of Melton's convictions under § 445 (d)(1), specifically his conviction under § 445 (d)(1)(i) was proper. Accordingly, the Court of Appeals affirmed the conviction under § 445 (d)(1)(i) and reversed the remaining two convictions.

Joseph Melton v. State of Maryland. No. 61, September Term, 2003, filed February 12, 2004. Opinion by Cathell, J.

CRIMINAL LAW - SUFFICIENCY OF EVIDENCE - EVIDENCE WAS SUFFICIENT TO SUSTAIN A PERSON'S CONVICTION FOR POSSESSION OF CERTAIN DRUGS AND CONTRABAND WHERE THAT PERSON WAS AN OCCUPANT IN A STOLEN VEHICLE INVOLVED IN A HIGH-SPEED POLICE CHASE THAT RESULTED IN THE VEHICLE'S CRASH AND A LARGE AMOUNT OF DRUGS AND CONTRABAND WAS THEN FOUND STREWN THROUGHOUT THE PASSENGER COMPARTMENT OF THE VEHICLE.

Facts: At approximately 8:40 p.m on October 18, 2001, an officer with the District of Columbia's Metropolitan Police Department observed a Ford Explorer being driven with its headlights off. After the officer attempted to stop the vehicle, the Explorer fled the scene and a high-speed police chase ensued. During the chase, an officer recognized that the Explorer matched the description of a sports utility vehicle that recently had been carjacked and reported stolen. The chase continued into Maryland and concluded after the Explorer crashed and flipped over three times before stopping.

The officers on the scene of the crash apprehended four persons from the Explorer. Robert Suddith was identified as one of the passengers. None of the four occupants of the Explorer claimed ownership of the vehicle, which was confirmed as stolen. Thus, the officers arrested all of the occupants for the theft of the vehicle.

Officers discovered the following items strewn about in the interior passenger compartment of the stolen Explorer in a search of the vehicle incident to the arrest of its occupants: eleven green bags containing heroin; one green bag containing crack cocaine; nine bags containing a white powdery residue; three clear bags containing drug paraphernalia; one box of cigarette rolling papers; two empty green bags; one marijuana pipe; several metal bottle caps; one used roll of aluminum foil; nine bottles of clear liquid; twenty-five syringes; and four bottles of bleach. All of the occupants denied knowledge of the drugs.

A search incident to the arrest of Suddith revealed that he was carrying \$220 in cash. While drugs were found scattered throughout the vehicle, no drugs were found on Suddith's person.

At trial, Suddith moved for a judgment of acquittal on the argument that the State did not present sufficient evidence that he knew of or possessed the contraband found strewn throughout the vehicle. The trial court denied that motion. The jury subsequently found Suddith guilty on the charges of possession of heroin, possession of cocaine and possession of drug paraphernalia. The Court of Appeals reversed the trial court's decision saying that the evidence was insufficient to sustain a conviction.

Held: The Court of Appeals held that where it is reasonable

for a trier of fact to make an inference, courts must let them do so. The Court of Appeals held that appellate review of the sufficiency of the evidence asks not whether the trier of fact could have made other inferences from the evidence, but whether the actual inference made was supported by the evidence at trial. In a jury trial, the jury is the final arbiter of the facts and it is charged with the duty of resolving factual disputes at trial. The jury members must use their own common sense and backgrounds to make reasonable inferences from facts presented to reach an outcome. In this case, relying on the discussion of permissible inferences in the United States Supreme Court's decision in *Maryland v. Pringle*, 124 S. Ct. 795 (2003), the Court of Appeals held that the jury could infer the occupant's knowledge and possession of the contraband where a high speed pursuit of a stolen vehicle resulted in the vehicle flipping over three times, a substantial amount of contraband was found scattered throughout the vehicle when the police arrived at the accident scene, evidence suggested mutual use of the contraband, the passenger was in the vehicle when the drugs were scattered throughout it. Accordingly, the Court of Appeals reversed the decision of the Court of Special Appeals.

State of Maryland v. Robert Eric Suddith. No. 39, September Term, 2003, filed February 12, 2004. Opinion by Cathell.

HEALTH CLAIMS ARBITRATION OFFICE - CERTIFICATE OF ECPERT - MEDICAL MALPRACTICE - FILING OF A CERTIFICATE OF QUALIFIED EXPERT - "GOOD CAUSE" EXTENSIONS

Facts: Appellants Julio and Miryana Navarro-Monzo, filed a claim with the Health Claims Arbitration Office (HCAO) against Washington Adventist Hospital (WAH) and several doctors alleging a number of sequential episodes of medical malpractice. Under Md. Code Ann., Cts. & Jud. Proc., §3-2A-04(b)(1)(i), appellants had 90 days after filing their complaint, or until December 13th, in which to file a certificate of qualified expert. On the last possible day, the appellants filed for an extension in which to file the certificate. On January 11, a 69-day extension was granted by the

HCAO, although the order was ambiguous as to what date the extension was to commence on. Appellants assumed that the extension ran until March 21st and on that date filed for yet another extension in which to file the certificate. Appellees opposed that extension on the basis that the first extension expired on March 14th and that no further extension could be granted beyond the 90-day automatic extension provided for under Cts. & Jud. Proc., §3-2A-04(b)(i)(ii). No immediate ruling was made by the HCAO and on June 4th, appellants again requested an extension, stating that they were in the process of obtaining the certificate and that it would soon be forthcoming. The HCAO granted appellants a 30-day extension, and on July 5th, appellants filed a certificate of a qualified expert. Appellees subsequently waived arbitration and by order of the HCAO, the case was transferred to the Circuit Court of Montgomery County. Again, appellants submitted their claim of medical malpractice and the appellees moved to dismiss on the basis that appellants second and third extension requests were untimely and thus the certificate was also untimely filed. The Circuit Court agreed with appellees and dismissed the action.

Held: Reversed. Notwithstanding the mandatory extension under Cts. & Jud. Proc., §3-2A-04(b)(1)(ii), the HCAO director and the panel chairman retain the authority to grant further extensions, beyond 180 days from filing of the claim, upon a showing of good cause, pursuant to Cts. & Jud. Proc., §3-2A-04(b)(5) and/or §3-2A-05(j). Thus, despite the incorrect citation to the statute, appellant's extension request was timely and based on "good cause," and it was within the discretion of the HCAO director to grant such an extension. As a result, the subsequent filing of appellant's certificate of qualified expert was also timely.

Navarro-Monzo v. Washington Adventist Hospital, No. 69, September Term, 2003, filed March, 11, 2004. Opinion by Wilner, J.

INSURANCE - SURETY BONDS - PERFORMANCE & PAYMENT - INDEMNITY - GOOD FAITH - ROLE OF REASONABLENESS - CLAIM REIMBURSEMENT - RECOUPMENT OF ATTORNEYS' FEES, COSTS, & EXPENSES

Facts: Ulico Casualty Company ("the surety") sued Atlantic Contracting and Material Company, Incorporated ("the principal") in response to the principal's failure to reimburse under a surety bond and indemnity agreement the surety for payments made by the surety to a claimant. The surety issued the performance and payment surety bond ("the bond") on behalf of the principal to guarantee the performance of its contractual obligations on a road repair project. The surety sought to recover monies it paid to Clearwater Hydraulics and Driveshaft Services ("the obligee") on a claim on the bond, and the attorneys' fees it incurred in pursuing the principal.

The obligee informed the surety that it billed the principal \$21,843.48 for repairs to equipment the principal was using in connection with the road repair project. The obligee told the surety that the principal had not paid the bill and it was now looking to the surety for payment under the bond. In reply, the surety sent the obligee a Proof of Claim form with a letter requesting that the obligee return the form with supporting documentation as verification of its claim. The obligee completed and returned the Proof of Claim form.

The surety then wrote to the principal informing it that the obligee alleged it was owed \$21,843.48 and asked the principal for its reasons for not paying. The principal responded merely that it had sent the obligee a check for \$4,834.14 in partial payment and that the balance remaining was "being disputed and must be resolved prior to completion of payment." The surety responded with a letter seeking a copy of the \$4,834.14 check that the principal purportedly remitted and details of any defenses to payment that the principal had. Receiving no response from the principal, the surety again wrote to the principal asking for any documentation supporting the principal's dispute of the obligee's claim. After several months had passed and having received no further response the surety paid the obligee's claim. Subsequently, the principal refused to reimburse the surety.

Suit was initiated by the surety against the principal in the Circuit Court for Prince George's County. At trial, the principal pointed out that despite the indemnity agreement, the work performed by the obligee was not covered by the bond because the obligee provided 'parts and service' for the principal's equipment. The principal contended that these 'parts and service' repairs made by the obligee to the principal's hydraulic motors on a concrete belt placer were not 'labor and material' for the project, within the meaning of the bond, because the equipment in question was not bought for exclusive use on the project and because the life expectancy of the equipment extended beyond that of the project.

The Circuit Court concluded: (a) that only part of the

surety's claim was covered by the bond and, therefore, the surety was entitled to reimbursement only for that part of the claim; (b) under the language of the indemnity agreement, the surety was entitled to recover attorneys' fees, costs, and expenses; and, (c) an award of \$5,750 in attorneys' fees, costs, and expenses to the surety, out of a claim therefor \$16,716.67, was fair and reasonable. The Court of Special Appeals reversed the Circuit Court and held that the surety was entitled to its entire claim. The Court of Special Appeals held that under the good faith clause in the indemnity agreement, the surety was entitled to reimbursement from the principal for a claim the surety paid in good faith, without fraud, regardless of whether the surety was actually liable for the claim - either by virtue of a defense of the principal to the claim or by virtue of the claim's being outside the scope of the bond.

Held: The Court of Appeals concluded that the surety's payment of the obligee's claim was a reasonable, good faith settlement based on the information made available to it at the time. The Court held that the good faith standard allows the surety a discretion limited by the bounds of reasonableness, rather than by the bounds of fraud. The Court also held that the principal is bound by a reciprocal obligation of good faith and fair dealing, embedded within which is a duty to cooperate, and the principal may not ignore, without peril, the surety's pre-payment requests for information. Although a surety's payment may not be included entirely in 'labor and materials' as covered by a payment bond where the repairs made by the obligee to the principal's equipment add materially to the value of that particular equipment, in this case, the principal failed to inform the surety of the bond coverage issue in timely fashion and, after a diligent investigation and a considerable amount of time had passed, the surety reasonably and in good faith paid the obligee based on information in the obligee's Proof of Claim form indicating liability.

When a contract entitles a suing party to recover attorneys' fees, the court must determine whether the fee request is reasonable. Because the trial court awarded only a portion of the attorneys' fees, costs, and expenses sought, based on its view that only a partial recovery was appropriate on the bond claim, the reasonableness of the sums sought by the surety for attorneys' fees, costs, and expenses must be reconsidered in light of this opinion.

Atlantic Contracting & Material Co., v. Ulico Casualty Co., No. 51, Sept. Term, 2003, filed 12 March 2004. Opinion by Harrell, J.

WORKERS' COMPENSATION - OCCUPATIONAL DEAFNESS - STATUTE OF LIMITATIONS

Facts: Petitioner, Arnold Yox, worked as a press operator for respondent, Tru-Rol, for approximately 47 years, during which time he was exposed to loud noise. In 1987, Yox saw a ear, nose, and throat physician, who performed audiometric tests that revealed hearing loss in both ears. During the 1987 visit, however, the doctor did not calculate Yox's binaural measurement, which would have revealed that Yox suffered a compensable hearing loss for workers' compensation purposes. Instead, Yox was given hearing aids to reduce the ringing in his ears. Yox admitted that in 1987 he was aware that his hearing loss was related to his employment. Yox continued to work at Tru-Rol until 1999. He failed to seek further medical attention for his hearing loss until 2000 because his ears "were still working." In 2000, while working for a new company, Yox again visited the ear, nose, and throat physician. At that time his hearing loss was measured and Yox filed a workers' compensation claim against Tru-Rol for occupational disease due to exposure to industrial noise. Tru-Rol raised the two-year statute of limitations, Md. Code, Lab. & Empl., §9-711, as a defense. Yox responded that in 1987 he was not aware he had a compensable disablement. The Workers Compensation Commission disagreed and barred the claim, stating that the test was whether there was a disablement and whether petitioner knew it resulted from his employment.

Yox appealed to the Circuit Court for Baltimore County, which reversed the Commission after a de novo hearing. The Circuit Court held that because Yox had neither lost any time from work due to the hearing impairment nor suffered any loss of wages, he had suffered no disablement in 1987, and therefore the §9-711 statute of limitations had not yet run or expired.

Tru-Rol appealed the Circuit Court's decision and the Court of Special Appeals reversed. The intermediate appellate court held that in occupational deafness cases, the statute of limitations begins to run when the hearing loss becomes compensable or when the employee first has actual knowledge that the disability was caused by the employment.

Held: Affirmed. The two-year limitations period in Md.Code, Lab. & Empl., §9-711 begins to run, for occupational deafness claimants, when the hearing loss becomes compensable under Md. Code, Lab. & Empl., §9-650 and the employee has knowledge that the loss was caused by his/her employment.

Yox v. Tru-Rol, No. 31, September Term, 2003, filed March 15, 2004. Opinion by Wilner, J.

COURT OF SPECIAL APPEALS

APPEALS - JUVENILE CAUSES ACT - FINAL JUDGMENT UNDER COURTS AND JUDICIAL PROCEEDINGS ARTICLE SECTION 12-301.

APPLICATION FOR LEAVE TO APPEAL - SECTION 776 OF ARTICLE 27 (RECODIFIED AS SECTION 11-103 OF THE CRIMINAL PROCEDURE ARTICLE).

Facts: On February 29, 2000, DeShawn C., then age 16, shot Oscar Antonio Lopez-Sanchez, the appellant, in the back, causing him to become permanently paralyzed from the chest down. DeShawn was charged in the Circuit Court for Howard County with, *inter alia*, attempted murder, first and second degree assault, and reckless endangerment.

The circuit court granted a reverse waiver motion and transferred the case to the juvenile court. On August 23, 2000, the State filed a petition for delinquency against DeShawn. Following an adjudicatory hearing, a special master issued a report and recommendation, finding that DeShawn was involved in the shooting and had committed an act that in the adult criminal justice system would constitute the crimes of attempted murder, first and second degree assault, and reckless endangerment. On February 26, 2001, the juvenile court accepted the master's report and recommendation, and issued an order adjudicating DeShawn a delinquent child.

The appellant subsequently filed a written request for restitution and a hearing. DeShawn filed a motion to dismiss the appellant's request for restitution, which the State opposed. A hearing was scheduled, but was later postponed indefinitely at the request of the parties.

On or before June 19, 2002, DeShawn and the State jointly submitted a proposed "Consent Order for Restitution," which called for DeShawn to pay the appellant restitution totaling \$4,427.50 for medical expenses. The consent order did not include restitution for any of appellant's lost wages. The juvenile court signed the consent order on June 19, 2002. The appellant did not receive a copy of the consent order, and was not informed about it until June 27, 2002.

On June 28, 2002, the appellant filed a "Motion to Reconsider Order, or Alternatively, to Alter or Amend Judgment" and a request for a hearing. He argued that the State had violated his rights under Article 27, section 770(e), by not giving him a copy of the consent order; that the State did not have the authority to

compromise his request for restitution without his knowledge, consent, or approval; that he was denied an opportunity for a hearing; and that if the court had properly considered his request, it would have granted him restitution for at least some of his lost wages. The court held a hearing on the appellant's motion on April 16, 2003, and on May 1, 2003, issued a memorandum opinion and order denying the appellant's motion on the ground that he lacked standing to challenge the consent order.

The appellant filed a notice of appeal, as well as an application for leave to appeal, relying on Article 27, section 776, and Md. Rule 8-204. Neither DeShawn nor the State filed a response. On July 18, 2003, the Court of Special Appeals issued an order granting the application for leave to appeal.

Held: Appeal dismissed. A victim of a delinquent act is not a party to the juvenile delinquency case under the Juvenile Causes Act and also is not considered a party to the delinquency case for purposes of prosecuting an appeal. Accordingly, he may not prosecute an appeal under section 12-301 of the Courts and Judicial Proceedings Article. The Court noted that, although juvenile delinquency cases are "civil in nature," they are not civil actions in the sense of being court proceedings to vindicate or advance private rights. Rather, they primarily serve societal rights and interests. In this context, the Court concluded that a victim's interest in a delinquency case is most analogous to a victim's interest in a criminal case and, as the Court of Appeals has held, the victim in a criminal case is not a party to that case for purposes of prosecuting an appeal under section 12-301.

The Court also held that a victim of a delinquent act is not a "victim of a violent crime" within the meaning of the statute that confers the right to file an application for leave to appeal to the Court of Special Appeals. The Court noted that the plain language of Article 27, section 776, requires that the victim be a victim of a crime, and contemplates that the proceeding giving rise to the application for leave to appeal be for or in connection with the prosecution of a crime. Because the appellant was a victim of a delinquent act in a juvenile proceeding, and not the victim of a violent crime in a criminal proceeding, he was not authorized to file an application for leave to appeal under section 776.

Lopez-Sanchez v. State, No. 936, September Term, 2003, filed March 8, 2004. Opinion by Eyler, Deborah S., J.

CONSUMER PROTECTION ACT - MERCHANT - CONSUMER GOOD - FRAUD

Facts: Appellants filed a class action on behalf of all Maryland residents who have received dental fillings containing mercury, alleging a violation of the Maryland Consumer Protection Act, Md. Code Commercial Law sections 13-101, et seq. (1975, 2000 Repl. Vol.) and fraudulent concealment.

Appellants filed a complaint against the Maryland State Dental Association and American Dental Association (ADA). The trial court granted the ADA's motion to dismiss on the basis of lack of jurisdiction, and appellants did not challenge that ruling. Appellants proceeded solely against the Maryland State Dental Association, alleging that the appellee deceived consumers by concealing the health risks associated with implanted dental fillings which contained mercury. Specifically, appellants alleged that appellee did not warn of the toxicity of mercury, including a failure to warn in written materials disseminated in Maryland, and that in conjunction with the ADA, appellee has suppressed information through the ADA Seal of Acceptance Program and ethical codes. The trial court granted appellee's motion to dismiss.

Held: Affirmed. Appellants' complaint demonstrates, at most, the existence of a dispute in the scientific community as to whether dental fillings containing mercury pose a health risk, and the Maryland Consumer Protection Act was not intended to impose liability in a factual situation such as this.

The State professional association for dentists is not a "person" or a "merchant" under the Act because it did not participate in a sale or offer to sell. Section 13-101(g); Newman v. Motorola, Inc., 125 F. Supp. 2d 717 (D. Md. 2000), aff'd, 78 Fed. Appx. 292 (2003). Appellants did not allege that appellee participated in the sale of dental fillings in a manner that would support liability under the Act. Appellants alleged that appellee and the ADA "took an active role in controlling" how member dentists practiced their profession, involvement insufficient to establish an offer to sell or a sale for purposes of the Act. See Morris v. Osmostone Wood Preserving, 340 Md. 519 (1995).

Dental fillings are not "consumer goods" as defined by the Act, rather, dental fillings are selected and used as part of a professional service. Section 13-101(d). In addition, the facts alleged come within the express exemption in the Act applicable to the professional services of a "dental practitioner." Section 13-104(1). Accordingly, the Act does not apply in this situation.

Appellants' claim for fraud fails because the facts alleged were insufficient to establish fraud for two reasons: (1) there was no duty to disclose because there was no confidential or fiduciary

relationship between the parties; and (2) the issue of health risks has been widely discussed and debated, and the expression of an opinion does not give rise to fraudulent concealment.

Lisa Hogan v. The Maryland State Dental Association, No. 589, September Term, 2003, filed March 8, 2004. Opinion by Eyler, James R., J.

CRIMINAL LAW - CORPUS DELICTI - SUFFICIENCY OF EVIDENCE OF CORPUS DELICTI - NECESSITY OF JURY INSTRUCTION.

Facts: Paul Stephen Riggins, Jr. was convicted by a jury of the first degree murder of his wife, Nancy Riggins. He was sentenced to life imprisonment.

Sometime in 1992, Riggins began an affair with the Riggins' babysitter, who was a minor. Four years later, the victim learned of the ongoing affair and confronted the babysitter. On July 3, 1996, Riggins reported the victim missing. She has never been heard from or her body found. After several years of investigation, the police charged Riggins with murder.

At trial, the State called over fifty witnesses. Their testimony established that: the victim was aware of Riggins' ongoing affair with a minor; the victim had stated that she was going to report the affair to the police and leave Riggins; that on the night of the victim's disappearance, Riggins left work early and met with the babysitter, who saw Riggins go to his house; Riggins had asked co-workers about killing a person and disposing of the body; Riggins had asked friends about obtaining a gun; Riggins had stated to the babysitter that "he wanted to kill [the victim]," stating that he would either "shoot" or "strangle her," and "put her body in the truck with the waste," where "nobody would ever find her"; Riggins stated that the victim "wasn't coming back"; Riggins had conspired to fabricate an alibi; and that there had been an exhaustive search, with no trace of the victim for five years. A former prisoner testified on behalf of the State that Riggins, who was serving time for sexual child abuse of the

babysitter, confessed that he had choked the victim to death. The circuit court denied a requested instruction related to corroboration of the *corpus delicti* of the crime.

Held: Affirmed. The circuit court did not err in denying appellant's requested jury instruction. The sufficiency of independent corroborating evidence to establish the *corpus delicti* for purposes of considering an extrajudicial confession is a legal question ordinarily to be decided by the court. The corroborating evidence need only prove the major or essential harm involved in the charged offense. In the case of homicide, the essential harm is the death of a person by another's criminal agency. When the court makes the determination that the independent evidence is sufficient to establish the *corpus delicti*, the jury then considers all of the evidence, including the confession, in determining whether they are satisfied beyond a reasonable doubt that the crime with which defendant is charged has been committed and if the defendant committed it. It is not necessary to instruct the jury to weigh the independent evidence of the *corpus delicti* separately from the confession.

Riggins v. State, No. 2261, September Term, 2001, filed on February 26, 2004. Opinion by Kenney, J.

PRISONERS - DIMINUTION CREDITS - EFFECT ON PRE-PAROLE CREDITS OF COMMITTING CRIME WHILE ON PAROLE - QUALIFYING "IMPRISONMENT."

Facts: While on parole, Jones committed felony theft. After he was convicted and sentenced for that crime, the Maryland Parole Commission revoked Jones' parole. Jones served his post-parole sentence in the Wicomico County Detention Center, then returned to the Division of Correction (DOC) to resume serving the remainder of his pre-parole sentences. He petitioned for a writ of *habeas corpus*, complaining that the Department of Correction refused to credit diminution of confinement credits that he accrued before he was paroled against the remainder of his pre-parole sentences that he is now serving. Jones also complained that the judge who

sentenced him heard his *habeas* petition, in violation of Md. Rule 15-307.

Held: Denial of *habeas* relief affirmed. Md. Code (1999), section 3-711 of the Correctional Services Article prevents an inmate from using diminution credits accrued before parole after the inmate commits a new crime while on parole, the Maryland Parole Commission revokes the inmate's parole, and the inmate is sentenced to imprisonment for that new crime. Inmates convicted and sentenced to confinement for crimes committed while on parole forfeit any diminution credits that they accrued before parole.

Section 3-711 also applies to parolees who are sentenced to confinement in a county detention center rather than the DOC. Although the term "imprisonment" is not defined in the Correctional Services Article, the commonly understood meaning of "imprisonment" encompasses any confinement that occurs as a result of a criminal conviction. Given that broad meaning and the lack of any restrictive language in section 3-711, incarceration in a facility not operated by the DOC may be "imprisonment" within the meaning of section 3-711.

Any consideration of Jones' *habeas* petition by a judge who had sentenced Jones did not prejudice Jones.

Mark Durand Jones, Jr. v. W. O. Filbert, Warden, No. 0935, Sept. Term 2003, filed March 8, 2004. Opinion by Smith, J.

TORTS - NEGLIGENCE - ASSUMPTION OF THE RISK - IN LOCO PARENTIS
THIRD PARTY SCHOOL BOARD NOT LIABLE FOR SEXUAL ASSAULT OF STUDENT
WHO LEFT SCHOOL PREMISES WITHOUT PERMISSION WITH OLDER MAN, KNOWING
HIS INTENTIONS, AND DECEIVED SCHOOL OFFICIALS ABOUT HER INTENTIONS.

Facts: Appellant, Tanika Tate, was a fifteen year-old student at Suitland High School, under the management of the Prince George's County School Board (appellee), when she was raped by her uncle. Before the rape, Tate left the school with her uncle,

without permission from school officials, deceiving them as to her intentions, by pretending to return to class after meeting to "exchange a key" with the uncle. The uncle had called Tate earlier that day to say he wanted to have sexual relations with her that day and pre-arranged the meeting so she could leave school for that purpose.

Appellant argued that the school system was negligent in allowing Tate to leave school premises and, thus, liable for her injuries. The Circuit Court for Prince George's County granted the school system's motion for judgment finding that appellant voluntarily exposed herself to harm by leaving school with the uncle.

Held: Affirmed. Because appellant's attacker had made previous sexual advances, called her to request that she leave school early to have sex with him, and school officials did not allow appellant to leave with her attacker (she pretended to return to class and then left the building), the School Board was not liable for appellant's injuries. Appellant testified that she knew her attacker wanted to have sex with her if she left school grounds with him. On the facts, the acts that injured appellant were what her attacker promised; she assumed the risk of those injuries by leaving school property with him without permission.

Appellant's argument that she lacked the capacity to consent to sex because of her age (based on Maryland's statutory rape criminal law) was without merit. Appellant consented to the acts which placed her in her attacker's care, knowing his intentions. Tate was not too young or immature to understand the danger of the situation.

Tate v. The Board of Education of Prince George's County, No. 0036, September Term, 2003, filed March 5, 2004. Opinion by Sharer, J.

TORTS - NEGLIGENCE-COACHING LIABILITY-ASSUMPTION OF RISK

NEGLIGENCE-COACHING LIABILITY-TRAINING/INSTRUCTION

NEGLIGENCE-COACHING LIABILITY-ASSUMPTION OF SPORTS RISK-FACTORS

NEGLIGENCE-COACHING LIABILITY-ASSUMPTION OF RISK-TRAINING/INSTRUCTION

NEGLIGENCE-COACHING LIABILITY-ASSUMPTION OF RISK-INSTRUCTION

NEGLIGENCE-COACHING LIABILITY-ASSUMPTION OF RISK-MISMATCHING

PREMISES LIABILITY-NEGLIGENCE-SPORTS FIELDS-ASSUMPTION OF RISK-BREAKAWAY BASES

Facts: Tara Kelly, a 13 year old second baseman on a recreational softball league parish team sponsored by the Catholic Youth Organization and the Catholic Archdiocese of Washington, D.C., was injured when a player from another team slid into the stationary base. Tara believed she had to tag the runner out and to keep her foot on the base at the same time.

Held: Summary judgments in favor of the Archdiocese, Catholic Youth Organization, and opposing team's coach affirmed.

Assumption of risk principles applicable to claims alleging negligent play in a sports setting also apply to claims that a recreational league and coach negligently failed to provide adequate training, instruction, or supervision, or negligently failed to match athletes of similar competitive levels. Coaches and leagues have a duty to instruct and train their players in fundamental rules and skills of the sport, but do not have a duty to eliminate dangers and risks that are inherent in the sport.

An athlete can assume the risk of a sports injury even if she did not anticipate the precise nature, severity, or source of that injury. It is enough that the injury was within the range of possibilities that could happen under conditions that could occur while playing the sport. The more experience an athlete has in the sport, the more likely it is that he understood and appreciated its inherent risks.

One of the inherent dangers that athletes assume when playing recreational sports is that instruction and training may not be able to eliminate certain risks that are inherent in the sport. The risks associated with learning a sport may be inherent risks of playing that sport. Coaches and leagues are not insurers of athletic prowess; they cannot be expected to train players in a manner than eliminates all risks created by misplay, whether that misplay is caused by a young athlete's physical error or by her mental error.

In softball and baseball, fielders and base runners assume the

risk of being injured in a routine tag-out and slide play, because that is a known risk of a common play that is integral to the game. They also assume the risk that if they need further instruction on the rules governing this play, they can and should ask the coach questions before taking the field.

Coaches and leagues have a limited duty not to unnecessarily pit players of unequal skill, size, weight, or strength against each other. But recreational coaches and leagues need not exclude more skilled players that are otherwise eligible by age and other objective criteria, and need not refrain from encouraging players to play aggressively.

Assumption of risk by an athlete may be established by evidence that the athlete was familiar with the athletic facility, condition of the field, inherent risks of the sport, and existence of the allegedly dangerous condition. The fact that breakaway bases might have reduced the risk of injury does not negate assumption of the risk when the athlete knew that the field was equipped with stationary bases and remained free not to participate.

Tara Kelly, et al. v. His Eminence, Theodore Cardinal McCarrick, Catholic Archbishop of Washington, and His Successors in Office, A Corporation Sole, d/b/a The Catholic Archdiocese of Washington, D.C., et al., No. 2114, September Term, 2002, filed February 5, 2004. Opinion by Adkins, J.

TORTS - PREMISES LIABILITY - BUSINESS INVITEE - DUTY TO RESPOND TO NOTICE OF HAZARDOUS CONDITION - NO BREACH WITHOUT REASONABLE OPPORTUNITY TO RESPOND

Facts: After he slipped and fell on soda spilled by another patron, Rehn sued a mall, mall maintenance company, and an independent food court proprietor operating a Chik Fil A store,

Held: Summary judgment in favor of all defendants affirmed. When a business patron creates a danger to other patrons, the

proprietor may be liable if it has actual notice and sufficient opportunity to either correct the problem or warn its customers about it. The summary judgment record showed that this proprietor was notified of the spill, but that the fall occurred moments after, as proprietor's employee was calling the mall operator for assistance. Neither the mall manager nor the maintenance contractor had notice of the spill. There was no evidence that the proprietor had enough time after being notified of the spill to respond by warning patrons or notifying the mall manager to warn patrons or call in the clean up crew.

Henry Rehn v. Westfield America, et al., No. 1630, September Term, 2002, filed December 8, 2003. Opinion by Adkins, J.

ZONING - ZONING MAP AMENDMENT - DISTRICT COUNCIL CONDITIONS -
TRAFFIC ADEQUACY - NOISE STUDY - COMPLIANCE - PLANNING BOARD
AUTHORITY

Facts: The Prince George's County District Council amended its zoning map to impose certain conditions on undeveloped property located along the Potomac River, at the foot of the Woodrow Wilson Bridge. As a condition of that rezoning, the District Council required prospective developers to submit a "comprehensive concept plan" showing certain details of the proposed development concept. It also required the Prince George's County Planning Board to require, "as a condition of its final approval of the comprehensive concept plan," that the District Council must review and approve that plan.

After other development proposals failed, the Peterson Companies obtained approval from both the Prince George's County Planning Board and the District Council for a conceptual site plan featuring a mixed use "urban destination resort," to be called "National Harbor." Subsequent changes in these development plans resulted in traffic projections exceeding "trip caps" that the District Council had imposed as a condition on both the zoning map amendment and its approval of the conceptual site plan. The

changes also created additional noise sources from the reconfigured mix of retail, entertainment, hotel, and office space.

Against the advice of its staff, and accepting a ten year old noise study relating to an abandoned development proposal for the site, the Planning Board approved a preliminary subdivision plan for the reconfigured project. The Circuit Court for Prince George's County denied requests by residential neighbors of the site to vacate the Planning Board's approval of the plan.

Held: Reversed and remanded to the Planning Board. The Planning Board erred in approving the preliminary subdivision plan, because (1) the plan generates traffic that exceeds the limit on development imposed by the District Council as part of its conditions to the zoning map amendment and the conceptual site plan; (2) the developer did not submit required data showing the noise impact of the project on neighboring residential communities; (3) the Planning Board did not address whether the developer had submitted the water quality and engineering studies required by the District Council.

The Planning Board does not have authority to change or disregard conditions imposed by the District Council. Section 27-213(a) of the Prince George's County Code does not give the Planning Board authority to alter a condition adopted by the District Council in the exercise of its authority to impose conditions on a zoning map amendment. When read in the context of the entire enforcement scheme established in section 27-123, this subsection merely notifies developers that the Planning Board is not bound by the District Council's finding, at the time it initially adopts a zoning map amendment, that there are adequate traffic facilities. This provision means only that, even though a developer has shown traffic adequacy at the time it obtains a zoning map amendment from the District Council, the Planning Board may still decide at a later stage in the development review process that traffic facilities are inadequate.

K.W. James Rochow, et al. v. Maryland National Capital Park and Planning Commission, et al., No. 0744, September Term, 2002, filed June 27, 2003. Opinion by Adkins, J.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated March 5, 2003, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State:

M. JAYNE WRIGHT

*

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

MATTHEW GORDON TAYBACK

*

By an Opinion and Order of the Court of Appeals of Maryland dated March 11, 2004, the following attorney has been indefinitely suspended from the further practice of law in this State:

LEONARD J. SPERLING

*

By an Opinion and Order of the Court of Appeals of Maryland dated March 17, 2004, the following attorney has been disbarred from the further practice of law in this State:

GARY S. MININSOHN

*

By an Opinion and Order of the Court of Appeals of Maryland dated March 18, 2004, the following attorney has been disbarred from the further practice of law in this State:

STEVEN P. HERMAN

*

The following name has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective March 22, 2004:

THOMAS O'TOOLE

*