Amicus Curiarum

VOLUME 27
ISSUE 1 JANUARY 2010
A Publication of the Office of the State Reporter

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COURT OF APPEALS

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http://mdcourts.gov/opinions/coa/2009/134a08.pdf

APPELLATE JURISDICTION – FINAL JUDGMENT – INTERLOCUTORY ORDERS – COLLATERAL ORDER DOCTRINE

Facts: Lochearn Nursing Home, LLC, d/b/a FutureCare Lochearn, Inc. sued Beulah Addison in the Circuit Court for Baltimore City alleging breach of contract for delinquent nursing home payments. After Ms. Addison filed counterclaims, FutureCare responded with a motion to compel arbitration, which the judge denied. The judge then denied FutureCare's motion to certify the denial as a final judgment under Rule 2-602(b). On appeal, and in response to Ms. Addison's motion to dismiss the interlocutory appeal as premature, the Chief Judge of the Court of Special Appeals stated that because Section 12-303(3)(ix) of the Courts and Judicial Proceedings Article permits an interlocutory appeal of an order, "granting a petition to stay arbitration pursuant to § 3-208 of this article," FutureCare's appeal was not premature and that, "[t]here is little difference between the denial of a motion to arbitrate and a CJ § 12-303(3)(ix) order staying arbitration: both stop arbitration." The Chief Judge of the Court of Special Appeals left open the opportunity for the intermediate appellate court to enter final judgment under Section 8-602(e)(1), and after oral argument, a panel of the intermediate appellate court, in an unpublished opinion, certified as final the denial of the motion to compel arbitration and reversed with instructions for the circuit court to enter an order compelling arbitration and staying litigation.

Held: The Court of Appeals vacated the judgment of the Court of Special Appeals and directed that FutureCare's appeal be dismissed. The Court concluded that the appellate court may not direct entry of final judgment when the trial court denied the motion to certify the denial as a final judgment under Rule 2-602(b). FutureCare argued that the denial of the motion to compel arbitration was an appealable interlocutory order because the dictionary definitions of "petition" and "stay" demonstrate

that Ms. Addison's opposition to FutureCare's "Motion to Compel Arbitration" was, in fact, a "Petition to Stay Arbitration," and that the denial of FutureCare's Motion to Compel Arbitration was equivalent to the grant of a petition to stay arbitration. FutureCare further argued that the legislative history of the Section confirmed its interpretation. FutureCare alternatively argued that the collateral order doctrine applied because the denial of their motion would be effectively unreviewable on appeal. Ms. Addison argued, conversely, that an order denying a motion to compel arbitration is not an appealable interlocutory order because Section 12-303, pursuant to the Legislature's recodification of the Courts and Judicial Proceedings Article, explicitly identifies an order granting a petition to stay arbitration under Section 3-208 as an appealable interlocutory order, but excludes orders denying motions to compel arbitration under Section 3-207. The Court reasoned that the Legislature knew what it was doing during the recodification by omitting the denial of a motion to compel arbitration as an explicitly appealable interlocutory order. The Court also noted that for the denial of a motion to compel arbitration to be considered the same as a grant of a motion to stay arbitration, the provisions would have to be identical. By comparing the procedural outcomes of a trial court's ruling, noting that a grant of a motion to stay could conceivably deny a forum altogether and the denial of a motion to compel would likely keep the parties in court and not preclude future arbitration, the Court held that the motions were not identical, thereby distinguishing the appealability of these interlocutory orders. The Court held that the denial of a motion to compel arbitration did not constitute either an appealable interlocutory order under Section 12-303 or collateral order from which FutureCare could appeal.

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Prioleau v. State, No. 40, September Term 2008, filed December 9, 2009. Opinion by Murphy, J.

http://mdcourts.gov/opinions/coa/2009/40a08.pdf

CRIMINAL LAW - THE "FUNCTIONAL EQUIVALENT" OF CUSTODIAL INTERROGATION

Facts: Maurice Darryl Prioleau was convicted in the Circuit Court for Baltimore City of conspiracy to distribute cocaine and several related violations of the Maryland Controlled Dangerous Substances Act. At a pretrial motion for suppression, a Baltimore City Police Detective, the only witness to testify, recounted the events leading up to Petitioner's arrest. He testified that after Petitioner had been handcuffed, arrested, and taken back to the doorway of a stash house he had been using, the officer said, "What's up, Maurice?" An incriminating statement followed which Petitioner sought to suppress. The trial court admitted the inculpatory statement, which was then included in the State's case-in-chief. The Court of Special Appeals affirmed, holding that Petitioner's statement that followed on the heels of the officer's greeting was not the product of interrogation, but rather was "a classic 'blurt'" volunteered by Petitioner. The Court of Appeals issued a writ of certiorari to address the question of whether "What's up, Maurice?" was the functional equivalent of interrogation under all the circumstances of this case.

Held: The Court of Appeals affirmed, holding that the Petitioner was not subject to either actual interrogation or the functional equivalent. As to whether, "What's up, Maurice?" constituted actual interrogation, the Court noted regardless of whether the phrase was a question rather than a greeting, "it is very well settled that not every question constitutes 'interrogation' of a suspect who is in custody when the question is asked." The Court cited federal and state cases in support of this proposition, including Hughes v. State, 346 Md. 80 (1997), in which the Court of Appeals stated that "the critical inquiry is whether the police officer, based on the totality of the circumstances, knew or should have known that the question was reasonably likely to elicit and incriminating response." The Court also expressly agreed with Arnett v. State, 122 S.W.3d 484 (Ark. 2003), in which the Supreme Court of Arkansas held that it was not reasonable to view an arresting officer's salutation to a defendant, "What's up?" as designed to elicit an incriminating

response. As to whether "What's up, Maurice?" constituted the functional equivalent of interrogation, while acknowledging that under Rhode Island v. Innis, 446 U.S. 291 (1980) it is well settled that the functional equivalent of interrogation can occur even if defendant is not asked a single question, the Court held in the case at bar Petitioner presented no evidence in support of his argument that his statement resulted from the functional equivalent of custodial interrogation. Noting that Petitioner was entitled to testify at the suppression hearing without running the risk that the State could use his testimony in its case-in-chief, but declined to do so, the suppression hearing court was not required to speculate that he actually believed that he was being subjected to custodial interrogation.

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COURT OF SPECIAL APPEALS

Anne Arundel County Ethics Commission v. Robert J. Dvorak, et al., No. 2714, September Term, 2007 . Opinion filed on November 24, 2009 by Hollander, J.

http://mdcourts.gov/opinions/cosa/2009/2714s07.pdf

ADMINISTRATIVE LAW - ETHICS LAW - COUNTY ETHICS COMMISSION - CONFLICTS OF INTEREST - IMPACT FEE LITIGATION.

Facts: Anne Arundel County lodged ethics complaints against two former high ranking employees who subsequently became involved in class action impact fee litigation against the County. One, a lawyer, served as an attorney in the impact fee case, and the other assisted in the litigation. As a result, the Anne Arundel County Ethics Commission issued an Order requiring the former employees to cease their participation, which the circuit court affirmed. In the impact fee case, however, the circuit court denied the County's motion to disqualify the attorney as counsel for the plaintiffs. Because the appellees failed to comply with the Commission's Order, the Commission filed a petition in the circuit court for injunctive relief, seeking to enforce its original Order. The circuit court denied that motion.

Held: The circuit court erred in denying the petition to enforce the Commission's Order. In an action for injunctive relief pertaining to legislation enacted to protect or benefit the public interest, the circuit court must consider the public interest, among other factors, in deciding whether to grant injunctive relief to enforce an administrative order. The court need not adhere to the traditional balancing of equities. Although the circuit court was entitled to consider the denial of the motion to disqualify counsel in the impact fee litigation, the circuit court failed to consider the public interest.

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Dorianne Thomas, et al. v. Capital Medical Management Associates, LLC, No. 545, September Term 2008. Opinion filed on December 7, 2009 by Wright, J.

http://mdcourts.gov/opinions/cosa/2009/545s08.pdf

CIVIL PROCEDURE - PLEADING AND PRACTICE

CONTRACT LAW - TYPES OF CONTRACTS - IMPLIED-IN-LAW CONTRACTS - CONTRACT CONDITIONS AND PROVISIONS - INDEMNITY

Facts: Appellee, a medical billing company, filed a one-count complaint for breach of contract in the Circuit Court for Montgomery County against appellants, a doctor and a limited liability company. In their answer to the pleading, appellants stated that: "a contract was entered into, he terms of which speak for themselves. All other allegations contained in this Paragraph of the Complaint are hereby denied." Following a three day bench trial, the Court issued and oral opinion, finding that appellants "waived their availability to challenge being sued by filing an answer, filing a counterclaim, and failing to timely raise the issue." The court also found that appellants breached the contract by failing to pay appellees monies past due and failing to perform their duties under the contract. Subsequently, the court awarded appellee contract damages in the amount of $55,396.83; attorney's fees in the amount of $119,909.80; and costs in the amount of $4,442.53. This appeal followed.

Held: The circuit court properly found appellants to be parties to the contract because, in their answers to the pleading, appellants did not raise a negative defense pursuant to Maryland Rule 2-323(f). Though the court erred in reasoning that appellants' failure "to timely raise the issue" precluded them from moving to dismiss the case, such error was harmless because appellants were, indeed, parties to the implied contract. Further, the court did not wee in finding that, based on parol evidence, appellants failed to perform their duties under the contract; not did it err in awarding appellee %55,396.83, because contract damages of such amount was proven with reasonable certainty. The circuit court, however, erred in awarding appellee attorney's fees because the contract between the parties provided for payment of attorney's fees only as a part of indemnification against a third-party suit.

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Wilkens Square, LLLP, et al. V. W.C. Pinkard & Co., Inc. T/A Colliers Pinkard, No. 707, September Term, 2008, filed November 30, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/707s08.pdf

CORPORATIONS AND ASSOCIATIONS - REAL ESTATE BROKERS - DUAL AGENCY - BROKER'S DUTY TO DISCLOSE MATERIAL FACTS TO CLIENT - FORFEITURE OF COMMISSION

Facts: The appellee, W.C. Pinkard & Co., Inc. ("Colliers Pinkard"), a commercial real estate broker that typically represented sellers, entered into an agreement with a prospective buyer of commercial real estate ("brokerage agreement") under which Colliers Pinkard would be paid a monthly retainer for recommending properties for purchase in the Baltimore-Washington area. In addition, the agreement provided that the potential buyer would pay Colliers Pinkard a commission on any purchases it made, unless Colliers Pinkard could negotiate an equal or greater fee from the seller. The parties understood that the agreement did not apply to any properties listed by Colliers Pinkard.

The parties eventually agreed to terminate the brokerage agreement as of December 31, 2005. Approximately six weeks before that date, Colliers Pinkard entered into an agreement with the appellant, Wilkens Square, LLLP ("listing agreement"), to sell an office building in Baltimore ("the property"). During the period when both contracts remained in effect, Colliers Pinkard suggested to the potential buyer that it should look at the property, but it did not accompany the buyer to view the property or at any time represent the buyer with respect to its possible purchase of the property.

After the brokerage agreement expired, the buyer participated in an auction to purchase the property and, after placing the highest bid, entered into a contract of sale with Wilkens Square. The buyer's local counsel represented it in the sale, and Colliers Pinkard represented Wilkens Square. During the negotiations, Wilkens Square's principal learned of the brokerage agreement between Colliers Pinkard and the buyer, but nonetheless proceeded with the sale.

In June 2006, after the sale was consummated, Wilkens Square refused to pay Colliers Pinkard's commission under the listing agreement on the ground that Colliers Pinkard had acted as a dual

agent in the sale of the property. Colliers Pinkard sued Wilkens Square for breach of contract to recover the unpaid commission. Wilkens Square responded by filing several counterclaims. A jury in the Circuit Court for Baltimore City found that Colliers Pinkard was not in a dual agency and that Wilkens Square breached the listing agreement by withholding the commission. The jury also found in favor of Colliers Pinkard on all of Wilkens Square's counterclaims.

Held: Affirmed. A dual agency exists when a broker represents a seller and a buyer in the same transaction. Colliers Pinkard did not represent the buyer when the auction or the sale of the property took place, and thus did not occupy a dual agency as a matter of law. In addition, the jury could reasonably have found that Colliers Pinkard did not act as a dual agent during the period when the brokerage agreement and listing agreement overlapped because its actions during that period were entirely consistent with its fiduciary duties to Wilkens Square.

Finally, there was no evidence of any material facts, unrelated to dual agency, that Colliers Pinkard was obligated to disclose to Wilkens Square and did not disclose. Consequently, the trial court was not required to instruct the jury that Colliers Pinkard was obligated to disclose any material facts to Wilkens Square besides its position as a dual agent (if in fact the jury found there was a dual agency, which it did not).

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Donald Ray Gregory v. State of Maryland, No. 2204, September Term, 2007. Opinion filed November 24, 2009 by Hollander, J.

http://mdcourts.gov/opinions/cosa/2009/2204s07.pdf

CRIMINAL LAW - JURY INSTRUCTIONS - MISTAKE OF FACT.

Facts: Donald Ray Gregory, appellant, was charged with attempted felony theft and attempted unlawful taking of a motor vehicle. At his jury trial in the Circuit Court for Wicomico County, Gregory claimed that he did not intend to steal the vehicle, and took it because he mistakenly believed that he was God. The jury convicted appellant of both offenses. On appeal, Gregory alleged, *inter alia*, that the trial court erred in failing to propound a jury instruction on mistake of fact.

Held: The court did not err in refusing to propound a mistake of fact jury instruction with respect to appellant's claim that he took the victim's vehicle because he mistakenly believed he was God. Appellant's belief did not negate the willfulness of his actions or his intent to deprive the owner of her vehicle.

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Davon Nathan Markham v. State of Maryland, No. 424, September Term, 2008, filed November 25, 2009. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2009/424s08.pdf.

CRIMINAL LAW - SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL - FINGERPRINT EVIDENCE - *FRYE-REED* HEARING - *HICKS* DATE - MARYLAND RULE 4-271 - C.P. § 6-103.

Facts: On June 28, 2007, appellant was indicted in the Circuit Court for Prince George's County for the murder of Michael Lamont Stewart and Duane Edward Nichols, attempted murder of Daryl Fitzgerald, and three counts of use of a handgun in the commission of a felony.

On January 25, 2008, the State was advised, and then informed appellant, that fingerprints on the vehicle in which Michael Stewart was shot had been identified as appellant's fingerprints. Appellant promptly moved to exclude the recently-obtained fingerprint evidence. The court denied the motion, and appellant then moved to continue the trial. On January 30, 2008, appellant "renewed" his motion to exclude the "last-minute fingerprint evidence" and, in the event that the court again denied the motion to exclude the evidence, appellant filed a motion requesting a *Frye-Reed* hearing, arguing that there "is no scientific basis for fingerprint examiners to opine as to 'individualization' or 'matches.'"

On February 4, 2008, the day trial was scheduled to begin, the court denied appellant's motion to exclude the testimony of the fingerprint examiner and to compel discovery. Appellant then asked the court to "grant leave for a *Frye-Reed* hearing," arguing that this hearing was necessary to "force the State to meet it's [sic] burden to show that the methodology used by this latent print examiner in this case . . . is the methodology generally accepted in the community." The court denied appellant's motion for a *Frye-Reed* hearing, finding that the ACE-V methodology "is a generally accepted method of fingerprint analysis that is in the scientific community."

After addressing the preliminary motions on February 4, 2008, the court conducted voir dire and the jury was chosen. The next day, February 5, 2008, before opening statements, appellant moved to dismiss the proceedings, arguing that he was tried in violation of Md. Code (2008 Repl. Vol.) § 6-103 of the Criminal Procedure

Article ("C.P.") and Maryland Rule 4-271, which require the State to bring a defendant to trial within 180 days. Appellant contended that the 180 day deadline (the "*Hicks*" date) had expired the day before. He argued that, because the proceedings the previous day ended before the jury was sworn, and there had been no attempt by the State to seek or obtain a good cause postponement by which the *Hicks* date could be exceeded, his charges must be dismissed. The court denied the motion to dismiss.

Beverly Lancaster, appellant's aunt, testified for the State. Pursuant to the State's request, and over appellant's objection, the court closed the courtroom and ordered all nonessential court personnel to leave the courtroom during Ms. Lancaster's testimony.

The jury returned a guilty verdict on the charges of first degree murder of Michael Stewart and Duane Nichols, attempted murder of Darryl Fitzgerald, and the three counts of use of handgun in the commission of a felony.

Held: Judgment reversed. Although a trial court may close the courtroom in some circumstances without violating a defendant's right to a public trial, the court must make the case-specific findings required by *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). The trial court failed to make these findings, and pursuant to *Carter v. State*, 356 Md. 207 (1999), appellant is entitled to a new trial.

Given the long-standing consensus that fingerprint evidence is reliable, the absence of any suggestion that the ACE-V method of identification differs from that used in the past, and the lack of any reported decision holding that the ACE-V method is unreliable, a trial court is not required to revisit this issue and expend scarce judicial resources on a *Frye-Reed* hearing. The proper method to address concerns regarding fingerprint identification is cross-examination of the fingerprint examiner.

For purposes of Rule 4-271 and C.P. § 6-103(a), which require the State to bring a defendant to trial within 180 days, trial begins upon the start of voir dire.

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Board of Education of Somerset County v. Somerset Advocates for Education, No. 2587, September Term, 2008, filed December 1, 2009. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2009/2587s08.pdf

EDUCATION - Maryland Public Charter School Program: Md. Code Ann. (2008 Repl. Vol., 2009 Supp.), Education Article (Ed.), § 9 -101 *et seq.*; *Baltimore City Bd. of Educ. v. City Neighbors Charter School*, 400 Md. 324 (2007).

Appellant contended that the Maryland State Board of Education (MSBE) did not act arbitrarily and capriciously in declining to reverse the decision of the Board of Education of Somerset County (the Local Board) not to approve appellee's application for a charter school based on its failure to provide appellee with the numerical scoring rubric. Appellee, averring that ". . . the State Board boldly ignored its own prior ruling [in *Potomac Charter School v. Prince George's County Board of Education*, MSBE Op. No. 05-08 (Mar. 11, 2005)] and failed to provide a legitimate basis for doing so," maintained that the MSBE's decision was arbitrary and capricious.

When the MSBE interprets a statute that it administers and applies, "'the paramount role of the State Board of Education in interpreting the public education law sets it apart from most administrative agencies.'" *City Neighbors Charter School*, 400 Md. at 342 (quoting *Bd. Of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 790-91 (1986)). "What that statement means is that *[MSBE] rulings must be given heightened, not less, deference*." *Id*. (emphasis supplied). Appellate review of decisions of the MSBE, in reviewing the decisions of a local board, are guided by the precepts embodied in COMAR 13A.01.05.05:(1) decisions of a local board involving a local policy or a dispute regarding rules or regulations of the local board shall be considered by MSBE as *prima facie* correct, and MSBE will not substitute its judgment for that of the local board in such cases unless the local decision is arbitrary, unreasonable, or illegal, but (**2**) MSBE shall exercise its independent judgment on the record before it in the explanation and interpretation of the State public school laws and State Board regulations. A local board decision will be regarded as arbitrary or unreasonable if "[i]t is contrary to sound educational policy" and it will be regarded as illegal if it "[m]isconstrues the law"or is "an abuse of discretionary powers." COMAR 13A.01.05.05.B.(1) and C.(3) and (5). *City Neighbors Charter School*, 400 Md. at 343-44.

Facts: Appellee, SAFE, a corporation established for the purpose of creating and operating a charter school in Somerset County, Maryland, submitted an application to create a charter school to the Local Board. Appellee completed the application pursuant to the Public Charter School Guidance Materials published by Somerset County Public Schools (SCPS). The Charter School Review Committee (the Committee) initially reviewed appellee's application and determined that the application was "technically incomplete."

The Committee, including the Superintendent, after reviewing the amended application and meeting with appellee's representatives, scored the amended application based upon an "analytical scoring rubric" that was developed by the Anne Arundel County Public Schools. The Local Board did not provide the numerical scoring tool to appellee until after the conclusion of the scoring process. Out of a maximum possible score of 530, appellee's application received a score of 189. A score of 318 would have been sufficient to grant appellee's application.

After holding the four meetings, the Committee prepared a detailed document, listing the strengths and weaknesses of the various aspects of the application. The Local Board held a special meeting to review the Committee's findings after scoring. At the conclusion of the meeting, the Local Board voted 4-0 to deny the charter. Appellee appealed to the MSBE. The MSBE, employing the standard of review set forth in COMAR 13A.01.05.05(A), affirmed the decision of the Local Board. Appellee filed a Petition for Judicial Review in the circuit court and the circuit court thereafter reversed the decision of the MSBE. Appellant appealed the circuit court decision, arguing that the MSBE's decision, affirming the Local Board, was not arbitrary and capricious, nor was there any evidence that the MSBE's decision was influenced by a general bias against charter schools.

Held: MSBE, as it had done in earlier cases, looked to whether the applicant had other means of ascertaining what information was required to be in the charter school application. Although the scoring tool is an important part of the evaluation process, it is not mandatory and the evaluation process, as a whole, was a fair one because applicants had ample opportunity to discuss evaluation criteria with the Review Committee. The MSBE properly concluded that local Board did not act arbitrarily or capricious. There was no evidence that the MSBE's decision was influenced by bias against charter schools. ***

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated November 24, 2009, the following attorney has been disbarred by consent from the further practice of law in this State:

JOHN LYSTER HILL
*

By an Order of the Court of Appeals of Maryland dated December 1, 2009, the following attorney has been placed on inactive status by consent from the further practice of law in this State:

L. DAVID RITTER
*

By an Opinion and Order of the Court of Appeals of Maryland dated December 4, 2009, the following attorney has been disbarred from the further practice of law in this State:

ADEKUNLE B. OLUJOBI (AWOJOBI)
*

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

CHARLES OWUSU KWARTENG
*

By an Order of the Court of Appeals of Maryland dated December 16, 2009, the following attorney has been indefinitely suspended from the further practice of law in this State:

CONSTANDIN ALIVIZATOS
*

RULES ORDERS AND REPORTS

Amendments to Rule 16-104 (Judicial Leave) was filed on December 15, 2009:

http://mdcourts.gov/rules/ruleschanges.html

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