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# COURT OF APPEALS

ATTORNEYS - DISCIPLINE - MARYLAND RULES OF PROFESSIONAL CONDUCT:  
MRPC 8.1 (BAR ADMISSION AND DISCIPLINARY MATTERS), and 8.4  
(MISCONDUCT).

Facts: The Attorney Grievance Commission of Maryland acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Alan Edgar Harris, in which it alleged that he violated Maryland Rules of Professional Conduct ("MRPC"), 8.1 (a) (Bar Admission and Disciplinary Matters), and 8.4 (a), (c) and (d) (Misconduct).

The Circuit Court for Baltimore County held an evidentiary hearing and issued an opinion, which presented the findings of fact and conclusions of law. They found that Harris was married to Frances M. Harris until they were divorced sometime in 1985. A mutual fund, the "Washington Mutual Investors Fund-Class A," had been owned by both Mr. and Ms. Harris as tenants by the entireties during their marriage; upon their divorce, the Fund was automatically changed to tenancies in common by operation of law. After Ms. Harris' death, during the course of investigating the nature and extent of Ms. Harris' assets, Carroll Klingelhofer, III discovered a quarterly statement from the Fund, which listed the owners of the Fund, Mr. and Ms. Harris, as tenants by the entireties and reflected a value of approximately \$97,514.00. Mr. Klingelhofer sent Mr. Harris a letter, which informed Mr. Harris that the Fund was, by operation of law, held by Mr. Harris and Ms. Harris as tenants in common. Mr. Harris, however, subsequently executed a transfer authorization/stock assignment that had the effect of changing the title to sole ownership in his name. Thereafter Mr. Klingelhofer discovered that Mr. Harris had initiated the transfer and requested that a freeze be put on the account. The Estate of Ms. Harris eventually received one half of the Fund from Mr. Harris, which was not depleted in any manner. The Circuit Court rejected Mr. Harris' argument that he transferred the fund out of a concern for income taxes and to hold the account in trust and found that Mr. Harris misled Mr. Klingelhofer by saying that he would check the ownership status of the Fund rather than causing the transfer of the Fund to himself. They found that Mr. Harris did not intend to defraud the Estate of Ms. Harris when he transferred the Fund to himself.

The Circuit Court determined that Harris had violated Rule 8.4 (c) by executing an authorization to transfer the ownership of a Washington Mutual Investors Fund to himself. Judge Levitz did not conclude that there were violations of Rules 8.1 (a) or 8.4 (c) with respect to Respondent's explanation to Bar Counsel that he titled the Fund in his own name to hold the account in a "self imposed trust," nor of Rule 8.4 (a) or (d).

Harris took exception to most of the hearing judge's findings of fact, as well as to the Circuit Court's conclusion of law that he violated Rule 8.4 (c) when he executed the transfer order. Bar Counsel took exception to the hearing judge's conclusions of law that Harris did not violate Rules 8.1 (a) and 8.4 (c) by Harris' false explanation to Bar Counsel that he titled the Fund in his own name in order to hold the Fund in trust.

Held: Disbarment. The Court sustained Bar Counsel's exceptions and overruled Harris' exceptions. The Court concluded that Harris violated Rule 8.4 (c) when he executed the transfer order that gave him sole ownership of the Fund because Respondent knew that he was not entitled to 100% of the Fund, yet he still concealed the fact that he was no longer married to Ms. Harris and requested the transfer. The Court also concluded that Respondent violated Rules 8.1 (a) and 8.4 (c) when Harris explained to Bar Counsel that he titled the Fund, ostensibly held by Respondent and Ms. Harris as tenants in common, in his own name in order to hold the account in a "self imposed trust" because Harris acted dishonestly and deceitfully by knowingly making such false statements. Addressing the appropriate sanction, the Court stated that Harris' intentionally dishonest conduct, coupled with his extensive prior disciplinary record, five previous sanctions imposed by the Court, compelled a sanction of disbarment.

Attorney Grievance Commission v. Alan Edgar Harris, Misc. Docket, AG No. 50, September Term 2006. Opinion by Battaglia, J., filed January 16, 2008.

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ATTORNEYS - DISCIPLINE - MARYLAND RULES OF PROFESSIONAL CONDUCT: MRPC 1.4 (COMMUNICATION), 1.5 (FEES), 1.15 (SAFEKEEPING PROPERTY), 1.16 (DECLINING OR TERMINATING REPRESENTATION), 8.4 (MISCONDUCT), MARYLAND RULE 16-604 (TRUST ACCOUNT - REQUIRED DEPOSITS), AND MARYLAND RULE 16-609 (PROHIBITED TRANSACTIONS).

Facts: The Attorney Grievance Commission of Maryland, through Bar Counsel, filed a petition for disciplinary or remedial action against Jeffrey Lawson, in which it was alleged that Lawson violated Maryland Rules of Professional Conduct ("MRPC"), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15 (Safekeeping Property), 1.16 (Declining or Terminating Representation), and 8.4 (Misconduct), as well as Maryland Rule 16-603 (Duty to Maintain Account), Maryland Rule 16-604 (Trust Account -- Required Deposits), and Maryland Rule 16-609 (Prohibited Transactions), when, during the representation of Timothy Dean and two related corporate entities, he attempted to alter a fee agreement mid-way through representation through coercion, charged an unreasonable fee, refused to return unearned fees to his client, and failed to answer client questions about the status of a motion.

The Circuit Court for Baltimore County held an evidentiary hearing and issued an opinion, which presented the findings of fact and conclusions of law. They found that Lawson had been retained by Dean and the two related corporate entities and accepted a legal fee of \$5,000.00 from Dean, which he deposited in his operating account, and prepared and had Dean sign a written fee agreement. Lawson entered his appearance on behalf of Dean and the two related entities and confirmed in an e-mail to Dean that he would "vigorously represent all Defendants" in the litigation, acts which The Circuit Court found evidenced that Lawson knew he was representing all of the three defendants, from the beginning of the representation. In the midst of the representation Lawson began insisting that he be paid an additional \$5,000.00 to represent the two related corporate entities. Dean, on behalf of the other entities, refused. Lawson immediately began threatening to withdraw. During this time, Lawson also failed to respond to Dean's questions about scheduling and the resolution of the hearing on a Motion to Dismiss/for Summary Judgment. After Lawson was permitted to withdraw, Dean requested a refund of part of the \$5,000.00 fee and Lawson refused.

The Circuit Court found that Bar Counsel failed to establish a violation of MRPC 1.16 (d), because Lawson timely turned over his office file to Dean's subsequent attorney. Likewise he found no

violation of MRPC 1.3 because he concluded that Dean and the co-defendants were not prejudiced by Lawson's failure to file a Counterclaim as such a filing was not time-barred when Lawson ended his representation. They also found no violation of Maryland Rule 16-603 because he accepted counsel's proffer that Lawson did maintain an attorney trust account at the Chevy Chase Bank.

The Circuit Court found that Lawson violated MRPC 1.4 (a) by failing to inform Dean of the status of his Motion to Dismiss/for Summary Judgement. He found a violation of MRPC 1.5 because Lawson's fee of \$5,000.00 became unreasonable after he ended his representation before the case's resolution. They found Lawson violated MRPC 1.15 and Maryland Rules 16-604 and 16-609 by failing to deposit the \$5,000.00 fee into his attorney trust account upon receiving those funds. They also found the Lawson violated MRPC 8.4 (c) and (d) by attempting to renegotiate his fee agreement during the course of his representation under threat of withdrawal.

Bar Counsel took exception to the hearing court's failure to find that MRPC 1.16 (d) was violated by Respondent's failure to refund the unearned portion of the \$5,000.00 retainer. Lawson took exception to the finding that he knowingly agreed to represent all three defendants in the Wallace suit, arguing that as only Dean signed the April 24, 2005 written fee agreement, he was only obligated to represent Dean, regardless of his knowledge of the other co-defendants. Lawson also took exception to the conclusions that he violated MRPC 8.4 (c) and (d), 1.4 (a), and 1.15.

Held: Indefinite suspension with right to reapply after one year. The Court upheld Bar Counsel's exceptions. The Court overruled Lawson's exceptions, finding that there was clear and convincing evidence that Lawson knew he was representing all three defendants. The Court concluded that Lawson violated MRPC 8.4 (c) and (d) by attempting to renegotiate his fee agreement during the course of representation under threat of withdrawal, that he violated MRPC 1.4 (a) by failing to respond to his client's specific questions regarding the case and not informing his client of an upcoming hearing date or the results of the hearing, and that he violated MRPC 1.15, as well as Maryland Rules 16-604 and 16-609, by failing to deposit unearned fees into his attorney trust account upon receipt of those funds. The Court also concluded that Respondent violated MRPC 1.5 and 1.16 (d) by charging unreasonable fees and refusing to promptly refund unearned fees upon termination of representation. Addressing the appropriate sanction, the Court stated that Lawson's misconduct reflected dishonesty. Considering

both mitigating and aggravating factors, the Court noted that although Lawson was relatively young and inexperienced at the time of the misconduct, had no prior disciplinary record, and the instant violations were not part of pattern of conduct, he had not returned unearned fees to his client, had not demonstrated contrition, and showed a lack of comprehension of the responsibilities peculiar to the legal profession. For violating MRPC 1.4 (a), 1.5, 1.15, 1.16 (d), 8.4 (c) and (d), and Maryland Rules 16-604 and 16-609, the Court indefinitely suspended Lawson from the practice of law with the right to reapply for admission after one year.

Attorney Grievance Commission v. Jeffrey Lawson, Misc. Docket, AG No. 15, September Term 2006. Opinion by Battaglia, J., filed October 11, 2007.

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ATTORNEYS - DISCIPLINE - MARYLAND RULES OF PROFESSIONAL CONDUCT: MRPC 1.15 (SAFEKEEPING PROPERTY), 8.1 (BAR ADMISSION AND DISCIPLINARY MATTERS), 8.4 (MISCONDUCT), MARYLAND RULE 16-607 (COMMINGLING OF FUNDS), MARYLAND RULE 16-609 (PROHIBITED TRANSACTIONS), AND SECTION 10-306 OF THE BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE (MISUSE OF TRUST MONEY).

Facts: The Attorney Grievance Commission of Maryland, through Bar Counsel, filed a petition for disciplinary or remedial action against Jerold K. Nussbaum, in which it alleged that he violated Maryland Rules of Professional Conduct ("MRPC"), 1.15 (Safekeeping Property), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct), as well as Maryland Rule 16-607 (Commingling of Funds), Maryland Rule 16-609 (Prohibited Transactions), and Section 10-306 of the Business Occupations and Professions Article of the Maryland Code (Misuse of Trust Money).

The Circuit Court for Carroll County held an evidentiary hearing and issued an opinion, which presented his findings of fact and conclusions of law. They found that in 2003 Nussbaum began experiencing severe cash flow difficulties, rendering him unable to pay the normal operating expenses of his practice. Beginning in 2003 and continuing through 2005, Nussbaum began a practice whereby he would write checks from his escrow account and deposit the same in his operating accounts, as needed, and without legal authority. When funds were due to be remitted to proper payees, he would cover shortfalls with short term borrowing, by depositing rents he received for office space in his law building and/or by using other clients' funds. This misuse of escrow funds came to the attention of the Attorney Grievance Commission when a check drawn on Nussbaum's escrow account was returned by his bank for insufficient funds. Once contacted by Bar Counsel, Nussbaum submitted ledgers which he said had been contemporaneously maintained and which accurately documented his handling of client funds in the escrow account, but Nussbaum later told Bar Counsel that he had actually made several entries after the fact, and that the ledgers contained "multiple inaccuracies" and did not accurately reflect his handling of client funds.

The Circuit Court found that Bar Counsel failed to establish a violation of MRPC 1.15 (c) because the record did not support a finding that any of the monies Nussbaum received from his escrow account were for legal fees or expenses. He likewise found no violations of MRPC 1.15 (d) or (e), due to lack of clear and convincing evidence. Judge Hughes also found that Bar Counsel failed to prove a violation of MRPC 8.4 (b) because Nussbaum's misuse of trust money did not meet the statutory elements for theft or embezzlement, and Bar Counsel did not specify any other criminal act that Nussbaum had committed.

The Circuit Court also found that Nussbaum violated MRPC 1.15 (a), Maryland Rule 16-609, and Section 10-306 of the Business Occupations and Professions Article when he commingled personal and clients funds and improperly withdrew client funds from his escrow account for his own personal use, for the use of another client, or for the use of a third party. They likewise concluded that Nussbaum violated MRPC 1.15 (b) and Maryland Rule 16-607 by depositing personal loans and rents into his escrow account. The Circuit Court found that Nussbaum violated MRPC 8.1 (a) by submitting altered ledgers to Bar Counsel while purporting to have made the notations contemporaneously with the transactions in his escrow account, when in fact the ledgers had been made after the

fact and did not accurately reflect his handling of client funds. They also found that Nussbaum violated MRPC 8.4 (b) by implicitly or explicitly misrepresenting to his clients that their escrow funds would be safeguarded and that funds disbursed were those being held on their behalf, when in fact they were not. The Circuit Court found that Nussbaum's commingling of personal and client funds also violated MRPC 8.4 (c) as such actions bring the legal profession into disrepute.

Bar Counsel took exception to the hearing court's failure to find that MRPC 1.15 (c) and 8.4 (b) had been violated. Nussbaum did not note any exceptions.

Held: Disbarment. The Court sustained Bar Counsel's exceptions. The Court concluded that Nussbaum violated MRPC 1.15 (c) by not holding clients' legal fees in escrow. The Court concluded that Nussbaum violated MRPC 8.4 (b) because his willful violation of 10-306 of the Business Occupations and Professions Article was a misdemeanor under Section 10-606 (b) of that Article; the willfulness of Nussbaum's conduct was established by Judge Hughes' finding of "dishonesty and deceit/misrepresentation." The Court also concluded that Nussbaum repeatedly violated MRPC 8.4 (c) and (d) by willfully misappropriating client funds, violated MRPC 8.1 (a) by submitting altered ledgers to Bar Counsel, repeatedly violated MRPC 1.15 (a) and (c), Maryland Rule 16-609, and Section 10-306 of the Business Occupations and Professions Article by improperly withdrawing client funds, including monies for legal fees or expenses, from his escrow account for his own use, for the use of other clients, or for use of a third party, and violated MRPC 1.15 (b) and Maryland Rule 16-607 by depositing personal loans and rents into his escrow account. Addressing the appropriate sanction, the Court stated that Nussbaum's repeated willful misappropriations of client funds were dishonest, deceitful, and motivated by his own pecuniary interests in violation of MRPC 1.15 (a), (b), and (c), 8.4 (b), (c), and (d), Maryland Rules 16-607 and 16-609, and Section 10-306 of the Business Occupations and Professions Article, and that he should be disbarred.

Attorney Grievance Commission v. Jerold K. Nussbaum, Misc. Docket, AG No. 38, September Term 2006. Opinion by Battaglia, J., filed October 15, 2007.

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CRIMINAL LAW - DISMISSAL OF WRIT OF CERTIORARI

Facts: Kenneth Martin Stachowski, Jr., entered into separate written home improvement contracts with Darlene Wright, Ruth Daniels and Emma Daniels, but later refused to perform the requested work. Stachowski was separately charged three times in the District Court of Maryland, in Somerset County, with failing to perform home improvement contracts and with acting as a contractor without a license. Stachowski pled guilty to failing to perform home improvement contracts in two of the cases and to acting as a contractor without a license in the third case, received a suspended sentence, a suspended fine, supervised probation and was ordered to pay restitution to the victims as a condition of probation in each case; in none of them did he make the required payments. Subsequently, Stachowski was found in violation of probation in all three cases and sentenced to the suspended portion of his incarceration in each case, all to be served consecutively. Stachowski was also ordered to pay the \$1,000.00 fine, heretofore suspended, in all three cases. Stachowski timely appealed the disposition of the three violation of probation cases to the Circuit Court.

Stachowski subsequently pled guilty in the Circuit Court in the three violation of probation cases, now numbered Cases 8150, 8151 and 8152. Stachowski also agreed to plead guilty in an unrelated, separate matter, Case 8089 that originated in the Circuit Court, in which he was charged with theft under \$500.00. Pursuant to the plea agreement, Stachowski admitted guilt in Case 8089, the unrelated, separate, theft case, and was sentenced to eighteen months, with all but five months suspended, and five years probation. As part of his probation in Case 8089, the theft case, the Court ordered restitution to be paid to the victims in the home improvement contract cases and the Court also revoked Stachowski's probation in the three violation of probation cases and imposed the sentences of incarceration.

Stachowski filed Applications for Leave to Appeal in the three violation of probation cases, Cases 8150, 8151 and 8152, and in the unrelated theft case, Case 8089, in the Court of Special Appeals, challenging the restitution orders. The Court of Special Appeals transferred the Applications for Leave to Appeal in the three violation of probation cases pursuant to Maryland Rule 8-132, and the Court of Appeals granted certiorari.

Held: Writ of certiorari dismissed. The Court of Appeals

concluded that Stachowski's writ of certiorari must be dismissed because the legality of the restitution order in the theft case was not before the Court. Thus, any resolution of the issue presented would have had no effect on either Stachowski or the State.

Kenneth Martin Stachowski, Jr. v. State of Maryland, No. 55, September Term, 2007. Opinion by Battaglia, J., filed January 9, 2008.

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CRIMINAL LAW - JUVENILES - FINAL ORDERS - JUVENILE COURT MASTER'S RECOMMENDATION, ONCE APPROVED BY THE CIRCUIT COURT, BECOMES A FINAL ORDER ON THE MERITS EVEN WHEN THE PROSECUTOR PRESENTED NO EVIDENCE AND RESTED ITS CASE.

DOUBLE JEOPARDY - PRINCIPLES OF DOUBLE JEOPARDY APPLY TO BAR ANY FURTHER PROCEEDINGS ONCE A FINAL ORDER HAS BEEN ISSUED.

Facts: Kevin E., appellant, appeared before a juvenile court master for purposes of an adjudicatory hearing on charges of violating the controlled dangerous substance laws. On the date scheduled for adjudication of the charges, the State requested a postponement and the master assigned to hear the juvenile delinquency matter denied that request. The State then rested its case, defense counsel moved for dismissal, and the motion to dismiss was granted. On the same day, June 28, 2006, that the master submitted his report and recommendation, the juvenile court judge signed an Order adopting the master's recommendation. Although the State filed timely exceptions to the master's proposed dismissal, the Circuit Court did not conduct an exceptions hearing until July 12, 2006, approximately two weeks after the juvenile court judge had signed the Order adopting the master's recommendation of dismissal. Notwithstanding the action taken by the Circuit Court, another juvenile judge conducted an exceptions

hearing, sustained the State's exceptions, and ordered another adjudication on the petition. Kevin E. objected on the grounds of double jeopardy and filed a motion "to dismiss the case and in the alternative, to continu[e] the stay if [t]he request to dismiss is not granted."

On September 7, the State called the case for a hearing on Kevin E.'s motion to dismiss. Kevin E. argued that when the master entered a dismissal of the case, he was, in effect, acquitted of the charges and the case should have ended. The State's position during the argument on the motion to dismiss was that the new hearing would be a continuation of the previous Circuit Court hearing.

Kevin E.'s motion to dismiss was denied, with the judge concluding that the master had no authority to deny or grant a postponement and, in denying the State's request for a continuance, the master violated the court's policy on postponements. Although the exceptions judge and the motions judge were the same individual, at both proceedings, the court failed to address either the significance or the status of the Circuit Court's previous order, dated June 28, which adopted the master's findings and recommendations.

Subsequently, Kevin E. appealed based upon the motion judge's ruling of September 7 which denied Kevin E.'s motion to dismiss and ordered a new adjudicatory hearing. Kevin E. also requested a stay of proceedings. The parties agreed that a stay pending resolution of the appeal was proper.

The State filed a motion to dismiss the appeal as premature and argued that the new adjudicatory hearing would be a continuation of the Circuit Court proceeding. The State asserted that jeopardy did not attach because the prosecutor produced no evidence and no competent tribunal entered deliberate findings of fact amounting to an acquittal.

Kevin E. contended that he did not "appeal from an order of the circuit court rejecting the master's denial of a continuance."

To the contrary, he argued that he "ha[d] properly alleged that the proceedings below resulted in an acquittal for the purposes of double jeopardy."

Held: The State's motion to dismiss the appeal as premature is denied. The master granted Kevin E.'s motion to dismiss and

recommended that the juvenile court judge adopt that recommendation. The trial was held as scheduled, although it ended abruptly because the State failed to produce any witnesses. Whether jeopardy attached in this case is not dispositive because the actions of the court were tantamount to an acquittal. For purposes of the double jeopardy prohibition, a juvenile proceeding is treated as a criminal proceeding.

*In Re Kevin E.*, No. 27, September Term, 2007. Opinion filed on January 3, 2008, by Greene, J.

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CRIMINAL LAW - MIRANDA ADVISEMENTS - CROSS-APPEAL - INVOLUNTARINESS

Facts: On May 1, 2006, Petitioner, Cindi Renee Katherine Rush was arrested on a warrant charging her with murder in the first degree. Rush was later interviewed by a detective who advised her:

"I'm now going to read you your rights under the law. If you do not understand something that I say to you, please stop me and I will explain it to you. You have the right to remain silent. If you choose to give up this right, anything that you say can be used against you in court. You have the right to talk to a lawyer before you're asked any questions. You have the right, you have, you have the right to have a lawyer with you while being questioned. If you want a lawyer and can't afford one, one will be provided to you **at some time at no cost.**" If at some point in time during our questioning you decide you don't wanna talk anymore, that's your right as well. (emphasis added).

Rush responded "mm-hmm" to the above statement, and signed the Advice of Rights and Waiver Form. During the interview she made several inculpatory statements that she committed to writing.

Rush subsequently was indicted on one count of premeditated murder, two counts of robbery with a dangerous weapon, two counts of conspiring to commit robbery with a dangerous weapon, two counts of using a handgun in the commission of a felony or crime of violence, and one count of first degree assault. She timely filed a motion to suppress in which she alleged that her statements were obtained by Detective Jernigan following advisements that did not meet the requirements of *Miranda* and that, in addition, the statements were obtained through threats and inducements and, therefore, were not voluntary. The hearing judge ruled that Rush's statements had been obtained in violation of *Miranda*.

The State noted an appeal of the decision to the Court of Special Appeals. Rush noted what she termed a "cross-appeal," challenging the circuit court's ruling that the statements should not be suppressed on the alternative ground that they were involuntary. The intermediate appellate court held that the circuit court erred by suppressing Rush's statements on *Miranda* grounds, but determined that it had jurisdiction to consider whether the statements should have been suppressed on the alternative involuntariness ground. The court then upheld suppression on the involuntariness ground. *State v. Rush*, 174 Md. App. 259, 293, 921 A.2d 334, 353 (2007). Thereafter, Rush filed a Petition for Writ of Certiorari, and the State filed a Conditional Cross-Petition for Writ of Certiorari, both of which were granted.

Held: The Court of Appeals affirmed as to *Miranda*; reversed as to involuntariness.

1) *Miranda*- Assessing the totality of the advisements, both oral and written, the Court of Appeals held that the Detective sufficiently communicated all of the rights required by *Miranda*. The Court found that the modification of the advisements did not tie Rush's right to counsel to a future event or to her ability to obtain a lawyer herself; rather, the modified language only clarified, in a separate advisement, how and when appointed counsel would be provided. Read objectively, the Court concluded, the modified language did not suggest, as Rush argued, that appointed counsel could not be present during questioning.

2) *Involuntariness*- The Court of Appeals held that although Rush

could not file a "cross-appeal," she was entitled to raise the voluntariness issue in the State's appeal in order to defend the suppression ruling on an alternative ground raised by Rush and considered by the hearing judge. As to the Court of Special Appeals's finding of voluntariness, however, the Court reversed. The Court declined to follow the same path as the Court of Special Appeals because inferences drawn from viewing the interview DVD and through observation of the inflictions and demeanor exhibited by both Rush and Detective Jernigan may differ from those inferences that can be drawn from the bare transcript, thereby leaving the Court with a record that is not adequate upon which to base a decision.

Cindi Renee Katherine Rush v. State of Maryland, No. 31, September Term, 2007. Opinion by Battaglia, J., filed January 11, 2008.

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LABOR AND EMPLOYMENT - WORKERS' COMPENSATION - A JURY FINDING THAT AN EMPLOYEE WAS REGULARLY EMPLOYED IN MARYLAND PRECLUDES A DETERMINATION THAT HE WAS A CASUAL EMPLOYEE.

WORKERS' COMPENSATION - WHERE AN EMPLOYEE CANNOT FILE A SUCCESSFUL WORKERS' COMPENSATION CLAIM IN THE STATE WHERE HIS EMPLOYER IS INSURED, THE COURT WILL NOT EXTEND WORKERS' COMPENSATION INSURANCE COVERAGE TO COVER ACCIDENTS IN MARYLAND.

Facts: Andrew Smigelski, the owner of Columbia Roofing & Home Improvements, procured a workers' compensation insurance policy from Potomac Insurance Company of Illinois to cover his operations in Virginia. The policy provided residual coverage outside Virginia, except where operations were such that Smigelski was required by law to procure separate coverage in that state.

Smigelski was hired to do a project in Maryland, and subcontracted the work to Ruben Garcia. Ruben Garcia hired his

nephew, Alejandro Garcia, to work on the project. On February 25, 1999, Alejandro Garcia was injured when he slipped and fell from the roof where he was working. At the time of the accident, Alejandro Garcia was an illegal alien.

Alejandro Garcia filed a claim with the Maryland Workers' Compensation Commission, which awarded Alejandro Garcia benefits, but found that Smigelski's policy did not cover the accident because of Alejandro Garcia's status as an illegal alien. On petition for judicial review, the Circuit Court for Montgomery County granted summary judgment in favor of Potomac on the issue of insurance coverage, and the case proceeded to a jury trial on the remaining issues.

In a special verdict, the jury found, *inter alia*, that Alejandro Garcia was regularly employed in the state of Maryland. On appeal, the Court of Special Appeals affirmed the judgment of the Circuit Court. Smigelski filed a petition for a writ of certiorari to the Court of Appeals. *Smigelski v. Potomac Ins.*, 400 Md. 647, 929 A.2d 890 (2007).

Held: Affirmed. On appeal, Smigelski argued that Alejandro Garcia was a casual employee, and therefore Smigelski did not need to procure separate coverage for him in Maryland. The Court of Appeals disagreed, noting that the jury finding that Alejandro Garcia was regularly employed in Maryland precluded a determination that he was a casual employee. Since Smigelski conceded that he was the correct statutory employer, he was therefore required to procure coverage in Maryland, and the Potomac policy did not cover the incident.

Furthermore, Smigelski argued that *Kacur v. Employers Mut. Cas. Co.*, 253 Md. 500, 254 A.2d 156 (1969) was controlling. In *Kacur*, the Court of Appeals extended workers' compensation insurance coverage to cover an accident in Maryland, where the claim was denied merely because of the claimant's choice to file in Maryland, when the accident would have been covered if he had filed in Pennsylvania, where his employer was insured. The Court of Appeals in this case distinguished *Kacur*, because Alejandro Garcia could not have filed a proper claim in Virginia, where he was insured, because his status as an illegal alien disqualified him for benefits under the law in effect in Virginia at the time of his injury. Therefore, the Court declined to apply the reasoning in *Kacur* to the facts of this case.

*Smigelski v. Potomac Ins. Co. of Illinois*, No. 52, September Term, 2007. Opinion filed on January 10, 2008 by Greene, J.

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REAL PROPERTY - MORTGAGES - GENERALLY, IN THE ABSENCE OF A SUPERSEDEAS BOND, APPEAL OF A FORECLOSURE SALE BECOMES MOOT WHERE THE PROPERTY IS SOLD TO A BONA FIDE PURCHASER

Facts: Richard Atta Poku executed a Deed of Trust encumbering his property, where, through a series of assignments and merger, the secured party ultimately became Washington Mutual Bank. Mr. Atta Poku refinanced the indebtedness five separate times with three different lending institutions. The first of the refinancings involved Washington Mutual Home Loans, Inc. When this first refinancing was complete, no payoff was made from the refinancing proceeds to Washington Mutual Bank as to its original debt. There was also no payoff to Washington Mutual Bank following the four subsequent refinancings.

Eventually, Washington Mutual Bank attempted to collect on the original debt, but after eight months, Mr. Atta Poku had failed to pay off the loan. Consequently, Washington Mutual Bank foreclosed on the Deed of Trust, and the property was sold at foreclosure sale. Mr. Atta Poku, acting through counsel, filed exceptions to the foreclosure sale, which were subsequently overruled and the sale was ratified. He then filed an appeal to the Court of Special Appeals and filed a request for a stay of the proceedings with both the Circuit Court and the Court of Special Appeals. That request for a stay was conditionally denied, excepting the posting of a supersedeas bond in an appropriate amount. No request to set the amount for that bond, nor any supersedeas bond was filed with any court by Mr. Atta Poku.



Both the Court of Special Appeals and the Court of Appeals denied Mr. Atta Poku's request for a stay. The Court of Appeals also denied his petition for certiorari in respect to that denial of a stay. Additionally, the Court of Special Appeals dismissed the appeal of the foreclosure sale due to the failure of Mr. Atta Poku to file a supersedeas bond or to even ask for the setting of the amount of a supersedeas bond. We granted the resulting petition for certiorari.

Held: Dismissed as moot. The Court of Appeals held that in the absence of a supersedeas bond an appeal of a foreclosure sale becomes moot if the property is sold to a bona fide purchaser because a reversal on appeal would have no effect.

Richard Atta Poku v. Alvin E. Friedman, et al., No. 50 September Term, 2007, filed January 10, 2008. Opinion by Cathell, J.

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REAL PROPERTY - RIPARIAN RIGHTS - THE OWNERS OF WATERFRONT COMMUNITY LAND AND COMMUNITY LOT RETAIN THE ACCOMPANYING RIPARIAN RIGHTS TO THE WATERFRONT PROPERTY

PROPERTY LAW - ADVERSE POSSESSION - CLAIMS TO PIERS UNDER ADVERSE POSSESSION (EVEN IF SUCH CLAIMS COULD PROPERLY BE MADE) FAIL WHERE CLAIMANTS FAILED TO SHOW ACTUAL, OPEN NOTORIOUS, EXCLUSIVE, HOSTILE, UNDER CLAIM OF TITLE OR OWNERSHIP, AND CONTINUOUS OR UNINTERRUPTED POSSESSION OF CLAIMED PROPERTY

Facts: Over the course of the development of the residential community known as "The Pines," the Pines Community Improvement Association, Inc. acquired ownership to a ring of land surrounding Chase Creek (referred to as "Community Land") as well as a lot in the residential development (referred to as the "Community Lot"). The deeds granting the Pines Community Improvement Association that land, as well as several early conveyances to individual lot owners

included language granting each lot owner a use in common with others of the Community Land and Community Lot.

Over the course of time, several piers were constructed by various individual lot owners that extended channelward over the Community Land into the waters of Chase Creek. The Pines Community Improvement Association attempted, through their ownership of the Community Land, to manage the use of those piers by assigning slips to individual lot owners who were members of their association and who applied for them. Several lot owners objected to the Association's attempt to manage the piers that were located on the Community Land adjacent to their lots, and objected to the payment of wet storage fees charged by the Association for the use of those piers. They filed a complaint in the Circuit Court seeking declaratory and equitable relief, claiming ownership of the individual piers. The Association cross-claimed against the individual lot owners seeking damages. There, the Court declared the Association to be the owners of the Community Land and Community Property, and consequently the owners of the individual piers. It further declared that the Association had the right, power and authority to control the use of the Community Land and the Community Lot, including the improvements existing on them. Finally, it assessed the wet storage fees owed to the Association, and declared the amounts owed by each individual lot owner.

The individual lot owners appealed this holding to the Court of Special Appeals, which affirmed in part and reversed in part. It held that the Association was the owner of the Community Land and Community Lot, but that as such, was both a lot owner and a servient tenement, and could not therefore, interfere with the use and enjoyment of the other individual lot owners to the Community Land and Community Lot. Neither could the individual lot owners interfere with the use and enjoyment of the Association to the Community Land and Community Lot. It further found that the wet storage fees assessed by the trial court were inappropriate.

The Court of Appeals granted petitions for certiorari from several of the individual lot owners, a single lot owner, and a cross-petition from the Association. That Court granted all petitions.

Held: Affirmed in part and vacated in part. The Court of Appeals held that Court of Special Appeals was correct in its assessment of the ownership of the Community Land and Community Lot, and that consequently the Association was the owner of the

individual piers. The portion of the mandate of the Court of Special Appeals remanding the case to the Circuit Court was vacated.

White v. Pines Community Improvement Association, No. 29 September Term, 2007, filed January 10, 2008. Opinion by Cathell, J.

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# COURT OF SPECIAL APPEALS

## APPEALS - APPELLATE PROCEDURE - LAW OF THE CASE DOCTRINE - COSTS - RECOVERY OF ATTORNEY'S FEES

Facts: Appellants, Kenneth D. Schisler, individually and as Chairman of the Maryland Public Service Commission (PSC), and on behalf of all members of the PSC similarly situated, and the PSC, filed a complaint in the Circuit Court for Baltimore City against the State of Maryland, an appellee, challenging, as unconstitutional, certain provisions of legislation enacted by the Maryland General Assembly on June 23, 2006. The legislation was enacted to address anticipated increased energy costs affecting Maryland citizens, and the challenged provisions removed the Chairman and Commissioners of the PSC from office as of June 30, 2006, and provided for their replacement on or after July 1, 2006. After the circuit court denied appellants' request for preliminary injunctive relief, appellants appealed to the Court of Appeals. On July 7, 2006, the Court of Appeals placed a stay on enforcement of the challenged provisions pending further order of the Court, and in an opinion issued on September 14, 2006, the Court determined that the challenged provisions violated the State Constitution and ordered the circuit court to enter a declaratory judgment and permanent injunction in favor of appellants. While the Court of Appeals' order was on remand, appellants filed an amended complaint, adding Governor Robert L. Ehrlich, Jr., President of the Senate Thomas V. Mike Miller, Jr., and Speaker of the House of Delegates Michael E. Busch, Jr., additional appellees, and also added new claims under state and federal law, including an express request for attorney's fees. Upon motion by appellees, the circuit court dismissed the amended complaint.

Held: Affirmed. The Court of Special Appeals held the law of the case doctrine precluded appellants from adding new defendants and claims in their amended complaint without additional facts, once the Court of Appeals had finally decided the claims in appellants' original complaint. The Court concluded that the facts alleged in appellants' amended complaint and original complaint were the same, and that appellants could have included the additional defendants, new federal and state claims, and new claim for relief in their original complaint, but did not. The Court of Appeals addressed the merits of the claims in appellants' original complaint, and issued a final judgment on the merits, as well as a

mandate requiring the circuit court to enter a declaratory judgment and permanent injunction consistent with the Court's opinion, and the circuit court did so. The Court of Appeals' judgment was the law of the case as to the facts alleged in appellants' original complaint, and appellants could not then add new defendants and claims after the Court of Appeals' judgment, without pleading additional facts.

Furthermore, the Court of Special Appeals held appellants alleged no valid substantive basis for recovery of attorney's fees, to the extent the amended complaint repeated the original complaint. Maryland applies the "American Rule" regarding recovery of attorney's fees, under which the prevailing party in a lawsuit cannot recover attorney's fees as an element of damages or costs, unless there is a recognized exception. No such exception exists under Maryland common law permitting recovery of attorney's fees for violations of the Maryland Constitution, and the Court of Appeals decided appellants' case solely on the basis of state constitutional violations. Appellants could not recover under 42 U.S.C. § 1988 because the State was the only named defendant in appellants' original complaint, and a state is not a "person" within the meaning of 42 U.S.C. § 1983. Section 1988 does not permit recovery of fees against the State itself without naming as a defendant a state official acting in his or her official capacity. See Kentucky v. Graham, 473 U.S. 159, 171 (1985).

Kenneth Schisler v. State of Maryland, No. 3033, September Term, 2006, filed December 31, 2007. Opinion by Eyler, James R., J.

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# ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated January 3, 2008, the following attorney has been disbarred by consent from the further practice of law in this State:

STEPHEN THOMAS CONRAD

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The following name has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective January 3, 2008:

WILLIAM HENRY PORTER, JR.

\*

By an Order of the Court of Appeals of Maryland dated January 7, 2008, the following attorney has been suspended for thirty (30) days from the further practice of law in this State:

ALFRED AMOS PAGE, JR.

\*

By an Opinion and Order of the Court of Appeals of Maryland dated January 16, 2008, the following attorney had been disbarred from the further practice of law in this State:

ALAN EDGAR HARRIS

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# JUDICIAL APPOINTMENTS

On December 3, 2007, the Governor announced the appointment of the **HON. JEFFREY MICHAEL WACHS** to the Circuit Court for Anne Arundel County. Judge Wachs was sworn in on December 4, 2007 and fills the vacancy created by the retirement of the Hon. Joseph P. Manck.

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On December 3, 2007, the Governor announced the appointment of the HON. CRYSTAL DIXON MITTELSTAEDT to the Circuit Court for Prince George's County. Judge Dixon Mittelstaedt was sworn in on December 12, 2007 and fills the vacancy created by the retirement of the Hon. William B. Spellbring, Jr.

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On December 3, 2007, the Governor announced the appointment of the HON. BEVERLY JEAN WOODARD to the Circuit Court for Prince George's County. Judge Woodard was sworn in on December 12, 2007 and fills the vacancy created by the retirement of the Hon. Graydon S. McKee, III.

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On December 3, 2007, the Governor announced the appointment of TIMOTHY McCRONE to the Circuit Court for Howard County. Judge McCrone was sworn in on December 14, 2007 and fills the vacancy created by the retirement of the Hon. Dennis M. Sweeney.

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On December 3, 2007, the Governor announced the appointment of the HON. EMANUEL BROWN to the Circuit Court for Baltimore City. Judge Brown was sworn in on December 28, 2007 and fills the vacancy created by the retirement of the Hon. Allen L. Schwait.

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On December 3, 2007, the Governor announced the appointment of the Hon. ANGELA MICHELLE EAVES to the Circuit Court for Harford County. Judge Eaves was sworn in on December 28, 2007 and fills the vacancy created by the retirement of the Hon. Maurice W. Baldwin, Jr.

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