

# Amicus Curiarum

VOLUME 27

ISSUE 6

JUNE 2010

A Publication of the Office of the State Reporter

## Table of Contents

### COURT OF APPEALS

Appellate Jurisdiction	
Final Judgment	
Schuele v. Case Handyman	3
Civil Procedure	
State Interest in Maintaining Prison Security	
Commissioner of Corrections v. Reid	8
Constitutional Law	
Criminal Procedure	
Dallas v. State	10
State v. Lockett	12
Contracts	
Percentage Leases	
RRC v. BAA	14
Criminal Law	
Fourth Amendment	
Williamson v. State	20
Evidence	
Garner v. State	22
Immunity	
Diallo v. State	24
Supplemental Jury Instructions	
Sidbury v. State	31
Sentencing	
Briggs v. State	33
Health	
Medicaid	
Crofton Convalescent v. Dept. of Health	35
Discrimination	
Employment	
WSSC v. Phillips	39
Labor & Employment	
Workers' Compensation Act	
Schlosser v. Uninsured Employers' Fund	43
Municipal Corporations	
Baltimore City Board of Estimates	
120 W. Fayette Street v. Baltimore	45

Statutory Interpretation	
Wrongful Discharge Under HealthCare Worker Whistleblower Protection Act	
Lark v. Montgomery Hospice	50
COURT OF SPECIAL APPEALS	
Agency Law	
Administrative Standing	
Chesapeake Bay Foundation v. Clickner	52
Civil Procedure	
Judgment	
Andrulonis v. Andrulonis	53
Jury Instructions	
Barksdale v. Wilkowsky	55
Criminal Law	
Conduct of Trial	
Reeves v. State	57
Effect of Good Faith Nol Pres of Charges	
Collins v. State	60
Reckless Endangerment	
Marlin v. State	61
Waiver of Counsel	
Turner v. State	64
Real Property	
Zoning	
MBC v. Baltimore	66
ATTORNEY DISCIPLINE	68

# COURT OF APPEALS

*Judith and Albert Schuele v. Case Handyman and Remodeling Services, LLC and Case Design/Remodeling, Inc.*, Case No. 7, September Term, 2009 filed on February 19, 2010 and decided by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/41a08.pdf>

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

Facts: On November 21, 2006, Petitioners Judith and Albert Schuele entered into a home improvement contract with Shaun Arnold, a Baltimore County contractor and franchisee of Respondents Case Handyman Services, LLC and/or Case Design/Remodeling, Inc. The contract consisted of eight pages, set forth a payment schedule, and described the work Mr. Arnold was expected to complete. Printed on the back of each page of the contract were the "General Conditions," which contained an arbitration clause. The arbitration clause provided:

2. CLAIMS - Any controversy/claim arising out of or relating to this contract or its breach thereof, shall be settled by final and binding arbitration before a single arbitrator in the Baltimore metropolitan area in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

(Underlining in original).

Under the contract, Mr. Arnold agreed to perform "remodeling and/or repair work" on Petitioners' home in Towson, Maryland. After accepting Petitioners' down payment, however, Mr. Arnold performed no work on the contract except to draft written plans for the remodeling project, for which Petitioners paid an additional \$2,700. During the next several months, Petitioners made several requests that Mr. Arnold set a work schedule and begin work, but in March 2007, Mr. Arnold told Petitioners that "he no longer had their funds" and would not begin work on the project. Mr. Arnold also told Petitioners that he was considering filing for bankruptcy. Petitioners alleged in their complaint that Mr. Arnold has since filed for personal bankruptcy, naming PHR as his home improvement company in the filings.

On June 6, 2007, Petitioners filed a class action complaint against Respondents in the Circuit Court for Baltimore County. Petitioners alleged breach of contract, fraud by misappropriation, fraud or deceit, violations of the Maryland Consumer Protection Act, and negligence. In response, based on the arbitration clause in the contract between Petitioners and Mr. Arnold, Respondents filed a "Motion to Dismiss, or in the Alternative, to Compel Arbitration and Stay Proceedings." In an order dated September 7, 2007, without a hearing, the Circuit Court granted Respondents' motion to compel arbitration without explanation. On September 17, 2007, in an open court proceeding conducted without the parties' knowledge, the Circuit Court struck its order and denied Respondents' motion without written order. On November 2, 2007, Respondents noted an appeal to the Court of Special Appeals.

The Court of Special Appeals held that the Circuit Court erred in denying Respondents' motion to compel arbitration. *Case Handyman & Remodeling Servs., LLC v. Schuele*, 183 Md. App. 44, 49, 959 A.2d 833, 836 (2008). The court held that, because "the Schueles' allegations [arose] out of and directly relate[d] to their contract with PHR," Respondents, non-signatories to the contract, could enforce the contract's arbitration clause against Petitioners based on principles of equitable estoppel frequently applied by federal courts in arbitration cases. This federal theory of equitable estoppel allows non-signatories to a contract to enforce a contract's arbitration provision when the signatory's claims rely on the terms of the written agreement and allege interdependent misconduct by both the non-signatory and one or more of the signatories. Additionally, the Court of Special Appeals held that the arbitration clause was valid even though it did not fully comply with the Code of Maryland Regulations ("COMAR") 09.08.01.25, in part, because "COMAR 09.08.01.25 does not contain any penalty provisions or state that an arbitration clause is invalid if it fails to comply with the requirements of the regulation." Moreover, the court noted that any instances of non-compliance were minor and the clause was sufficiently conspicuous to give Petitioners notice of the arbitration provision. *Id.* at 70, 959 A.2d at 848-49.

On February 11, 2009, the Court of Appeals granted Petitioners' petition for *writ of certiorari*, *Schuele v. Case Handyman & Remodeling Servs., L.L.C.*, 707 Md. 275, 964 A.2d 675 (2009), which presented the following three questions:

I. Did the Court of Special Appeals err in adopting federal law as controlling on the issue of whether equitable estoppel could be invoked by a non-party to a contract in order to enforce an arbitration provision,

rather than applying state law to determine the provision's enforceability?

II. Did the Court of Special Appeals err in holding that Petitioners were equitably estopped from avoiding contractual arbitration with a non-party, where the non-party disavows any cognizable connection to the contract at issue, and where the agreement does not manifest any intent or agreement to arbitrate the legal or factual issues related to Respondents' own wrongdoing?

III. Did the Court of Special Appeals err in holding that a home improvement contract's arbitration provision may be judicially enforced even though the provision does not comply with the notice requirements imposed on such provisions under COMAR?

On September 9, 2009, the Court heard oral argument in the case, and on November 10, 2009, issued an opinion in *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 983 A.2d 138 (2009), which also involved an appeal from the denial of a motion to compel arbitration. In *Addison*, the Court dismissed the appeal on the ground that it was not taken from an appealable judgment. Accordingly, before issuing an opinion in *Schuele*, the Court requested the parties to submit supplemental briefs to address whether *Addison* was dispositive of the jurisdictional issue presented in *Schuele*.

Held: A trial court order denying a motion to compel arbitration, but not adjudicating all claims in a controversy, is not a final judgment as contemplated by § 12-301 of the Courts and Judicial Proceedings Article of the Maryland Code ("C.J."). A trial court order denying a motion to compel arbitration is not an immediately appealable interlocutory order because: 1) C.J. § 12-303 does not expressly provide for appeals from orders denying a party's motion to compel arbitration; 2) an order denying a motion to compel arbitration is not final in the traditional sense and, therefore, cannot be certified as final under Maryland Rule 2-602(b) and, consequently, Maryland Rule 8-802(e); and 3) an order denying a motion to compel arbitration is not effectively unreviewable on appeal and, therefore, is not appealable under the collateral order doctrine.

The Court began by noting that appellate jurisdiction in Maryland is statutorily granted under C.J. § 12-301, "which authorizes appeals only from 'a final judgment entered in a civil or criminal case by a circuit court.'" A final judgment is one that "either decide[s] and conclude[s] the rights of the parties

involved or den[ies] a party the means to prosecute or defend rights and interests in the subject matter of the proceeding." Moreover, a judgment is not final if it does not dispose of all claims in an action. Because the Circuit Court order denying Respondents' motion to compel arbitration did not dispose of all claims in the action, the Court concluded that it was an interlocutory order, not a final judgment.

Accordingly, the Court addressed whether the order at issue was an appealable interlocutory order under one of the "three narrow exceptions to the final judgment rule." The exceptions are "appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals from interlocutory rulings allowed under the common law collateral order doctrine." As to the first exception, the Court concluded that the order was not appealable because C.J. § 12-303 does not provide for appeals from an order denying a motion to compel arbitration.

Similarly, the Court held that an order denying a motion to compel arbitration is not appealable under the second exception, Maryland Rule 2-602. Under Rule 2-602, only orders that are "final in the traditional sense" may be certified for appeal. To be "final in the traditional sense" an order must not only settle an entire claim but also "be intended by the court as an unqualified, final disposition of the matter in controversy[.]" The Court explained, however, that this requisite is satisfied by an order that "terminat[es] the action in that court and remand[s] the parties to another tribunal for resolution of their dispute" even though the order did not address the merits of the case because such an order has the effect of "putting the parties out of court." An order denying a motion to compel arbitration does not effectively "put the parties out of court," and, therefore, the Court held that such an order cannot be certified as a final judgment under Maryland Rule 2-602 and, consequently, Maryland Rule 8-602.

As to the third exception, the collateral order doctrine, the Court held that an order denying a motion to compel arbitration does not satisfy the doctrine's fourth prong, which requires the order to be effectively unreviewable on appeal, and thus is not appealable under that doctrine. The collateral order doctrine permits appeals from cases in which the order appealed does not adjudicate all claims against all parties but "(1) conclusively determines the disputed question, (2) resolves an important issue, (3) resolves an issue that is completely separate from the merits of the action, and (4) would be effectively unreviewable if the appeal had to await the entry of a final judgment." The Court

concluded that the Circuit Court order in this case, denying Respondents' motion to compel arbitration, satisfied the first three prongs of the doctrine but failed the fourth prong. The Court reasoned that a party asserting a right to arbitrate a dispute is effectively asserting a right to avoid trial, which the Court has held is generally unappealable under the collateral order doctrine. Moreover, the Court emphasized that a party's purported right to arbitration was reviewable upon appeal from a final judgment because the right guarantees only that "the *final and controlling* decision in the relevant controversy will be obtained through arbitration," not that it will be the only decision. Such a right, the Court determined, "may be vindicated [on appeal] by vacating any intervening judicial decree and relegating the controversy to arbitration for final resolution."

\*\*\*

*Commissioner of Correction v. Reid*, No. 54, Sept. Term, 2009. Opinion filed on April 19, 2010, by Greene, J.

<http://mdcourts.gov/opinions/coa/2010/54a09.pdf>

CIVIL – THE STATE’S INTEREST IN MAINTAINING PRISON SECURITY, ORDER, AND DISCIPLINE IS A FIFTH FACTOR TO CONSIDER WHEN DETERMINING, IN A JAIL OR PRISON SETTING – INMATE’S RIGHT TO REFUSE OR WITHDRAW MEDICAL TREATMENT

Facts: Troy Reid, an adult male, was committed to the custody of the Commissioner of Correction in 1995 to serve a forty year sentence. Reid’s medical history, while in the institution, revealed a diagnosis of high blood pressure, human immunodeficiency virus and end-stage renal disease. In July 2007, prison medical personnel diagnosed Reid with end-stage renal disease and prescribed the application of kidney dialysis three times per week. Initially, Reid consented to the dialysis treatment; however, even though he understood the medical consequences of ceasing dialysis (serious bodily injury and even death), he eventually requested that all treatment be terminated.

Reid argued that the evidence did not support the conclusion that his refusal to accept medical treatment constituted a threat to maintenance of prison security and order and he contended that his decision to refuse medical treatment did not threaten the integrity of the medical profession because it was an informed decision made with full knowledge of the risks involved in refusing medical treatment.

As a result of his refusal to submit to kidney dialysis in April 2008, the Commissioner of Correction, filed a complaint in the Circuit Court for Baltimore City seeking declaratory and injunctive relief to compel Reid to submit to kidney dialysis and medical treatment. A hearing was held and the request for an injunction was denied. The Commissioner noted a timely appeal to the Court of Special Appeals. Pending that appeal, the Commissioner obtained a temporary injunction permitting Reid’s physicians to continue providing Reid with dialysis and other necessary medical treatment. Prior to expiration of the temporary injunction, the Commissioner filed a petition for a writ of certiorari and a motion for injunction pending appeal, which the Court of Appeals denied. Subsequently, the Court of Special Appeals affirmed the judgment of the Circuit Court denying the Commissioner’s request for an order requiring that Reid submit to kidney dialysis. The Commissioner then filed an additional petition for a writ of certiorari in the Court of Appeals, which was granted.



Held: Affirmed. Considering the specific circumstances and Reid's right to refuse medical treatment, absent evidence that Reid was a direct threat to the safety and well being of others or that he was protesting any prison policies or attempting to manipulate an official, the Court agreed with the Court of Special Appeals that the State had not shown a valid penological interest in compelling Reid to submit to dialysis. The Commissioner's non-specific claim of preservation of life, safety, and security was insufficient to demonstrate that Reid's refusal of medical treatment would cause a disruption or impact safety in the institution, or endanger the ethics of the medical profession.

\*\*\*

*Isaac E. Dallas v. State of Maryland*, No. 17, September Term, 2009, filed April 26, 2010, opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/122a09.pdf>

CONSTITUTIONAL LAW -CRIMINAL PROCEDURE - DEFENDANT'S ELECTION TO TESTIFY OR REMAIN SILENT

EVIDENCE - MARYLAND RULE 5-609: IMPEACHMENT BY PRIOR CONVICTION

Facts: Petitioner Isaac E. Dallas was charged with possession of cocaine with the intent to distribute that controlled dangerous substance and related offenses. During trial, Petitioner sought a ruling concerning whether the court would permit the State, under Maryland Rule 5-609, to impeach him with two felony drug convictions if he elected to testify. The Circuit Court decided that any ruling concerning the admissibility of such evidence must await Petitioner's direct testimony, if any. Petitioner elected not to testify. The jury convicted Petitioner of all three charged offenses.

Petitioner raised a single issue on appeal to the Court of Special Appeals: "Did the trial court err in refusing to rule on the admissibility of prior convictions under Md. Rule 5-609 until after Appellant completed his direct testimony before the jury?" The State countered that Petitioner, by opting not to testify, did not preserve his challenge to the court's decision to await his direct testimony before ruling on the admissibility of the State's proposed impeachment evidence. The State further argued that, even if Petitioner's claim was preserved for review, the trial court did not abuse its discretion in deferring its ruling until after Petitioner testified on direct. The Court of Special Appeals affirmed the convictions, holding in an unreported opinion that Petitioner failed to preserve the claim for review because he decided not to testify. The court therefore did not address whether the trial court abused its discretion in deferring its ruling on the admissibility of the evidence of Petitioner's prior convictions. The Court of Appeals granted Petitioner's petition for writ of certiorari to answer the following question: "Did the trial court err in refusing to rule on the admissibility of prior convictions under Md. Rule 5-609 until after [Petitioner] completed his direct review testimony before the jury?"

Held: Affirmed, albeit on a ground other than that relied upon by the Court of Special Appeals. The Court disagreed with the Court of Special Appeals that the defendant had waived his

right to contest the issue because he did not testify at trial. The Court concluded that *Luce v. United States*, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984), and *Jordan v. State*, 323 Md. 151, 158-59, 591 A.2d 875, 878-79 (1991), upon which Respondent relied, did not apply to the case *sub judice* because here, the Court considered a challenge to the trial court's refusal to issue a ruling before Petitioner elected whether to testify, rather than a challenge to a trial court ruling that, unless the defendant testifies, is incapable of meaningful appellate review.

With regard to the merits of Petitioner's contention, the Court concluded that the trial court did not abuse its discretion in delaying its ruling until after the court had the opportunity to hear Petitioner's direct testimony. Specifically, the Court held that a trial court's decision to defer its ruling on a motion to exclude prior conviction impeachment evidence until after the defendant testifies, in order to develop facts that assist in the decision, does not impermissibly chill the defendant's right to make a free election to testify or remain silent. The decision whether to defer ruling on a defense motion *in limine* to exclude proposed prior conviction impeachment evidence until the defendant testifies is within the trial court's discretion and, in this case, the trial court did not abuse its discretion.

\*\*\*

*State of Maryland v. Terris Terrell Lockett*, No. 122, September Term 2009, filed April 14, 2010, opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/122a09.pdf>

CONSTITUTIONAL LAW - CRIMINAL PROCEDURE - FIFTH AMENDMENT -  
MIRANDA WARNINGS:

Facts: Terris Terrell Lockett stands charged by indictment with two counts each of first-degree murder and use of a handgun in the commission of a crime of violence. He filed a motion to suppress three statements he had made to the police. The Circuit Court granted the motion to suppress the third statement, on the ground that it was taken after improper *Miranda* warnings. The State filed an interlocutory appeal, pursuant to Maryland Code (2006 Repl. Vol.), § 12-302(c) of the Courts and Judicial Proceedings Article.

Respondent made the particular statement in question under the following circumstances. The interrogating officer, when advising Respondent that he had "the right to talk to a lawyer before you are asked any questions [and] to have a lawyer present with you while you're being questioned," the officer added, "that's about this case, specifically." The officer followed that statement with an example of the type of exchange that would *not* be considered interrogation accorded protection under *Miranda*: "Like I said, if we want to talk about the Redskins, you don't need a lawyer for that because it does not concern - okay." Following that, Respondent asked whether, in discussing "the incident" without a lawyer, he would be "setting [himself] up" in "discuss[ing] the case without my lawyer." In answer to Respondent's concern, the officer repeated the words that not everything that he and Respondent might discuss during the interrogation was covered by the right to counsel: "Okay, if we discuss any matters outside of the case, you don't need a lawyer present at all period. Okay." Respondent sought confirmation that he would not "be hurting" himself, and the officer repeated that Respondent did "have rights" but only "[w]hen we are discussing matters of the case." The officer re-emphasized that not everything Respondent might say during interrogation was covered by the right to counsel: "When or if you tell me something specifically, you have a right to have a lawyer present here." The detective ended these "advisements" with the following: "What you're doing here is that you are giving up a right to having a lawyer present to tell me your side, okay." Shortly thereafter, Respondent purported to waive his *Miranda* rights by signing the form declaring that he "understood" the rights he was waiving.

The four-day hearing on the suppression motion was followed by the Circuit Court for Prince George's County issuance of a written opinion denying the motion as to the first and second statements and granting the motion with respect to the third statement, detailed above. The Court of Special Appeals affirmed the Circuit Court, holding: "[U]nder the totality of the circumstances, the unnecessarily lengthy and rambling discussion about the nature of the *Miranda* rights not only included specifically questionable statements of the law but utterly failed effectively to communicate the message mandated by *Miranda*." *State v. Lockett*, 188 Md. App. 399, 410, 981 A.2d 835, 841 (2009). The Court of Appeals granted the State's petition for writ of certiorari to consider whether the Court of Special Appeals erred in affirming the Circuit Court's grant of the Motion to Suppress the statement.

Held: Affirmed. The Circuit Court's suppression ruling was correct, as was the judgment of the Court of Special Appeals affirming that order. In determining the constitutional adequacy of a suspect's waiver of the *Miranda* rights, the totality of the circumstances must be examined. "Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Florida v. Powell*, 130 S. Ct. 1195, 1205, 175 L. Ed. 2d 1009, 1019-20 (2010). If the warnings, viewed in their totality, in any way misstate the suspect's rights to silence and counsel, or mislead the suspect with respect to those rights, then the warnings are constitutionally infirm, rendering any purported waiver of those rights constitutionally defective and requiring suppression of any subsequent statement.

The Court of Appeals concluded that the above-stated test for determining the constitutional adequacy of *Miranda* warnings had not been met in the case at bar. No police officer advising a suspect of his rights under *Miranda* may intimate, much less declare affirmatively, a limitation upon the suspect's right to counsel. The detective's statements to Respondent that the right to counsel applied only to discussion of the specifics of "the case," were wrong as a matter of law, and rendered the advisements constitutionally infirm. Therefore, the Court of Special Appeals did not err in affirming the Circuit Court's suppression of Respondent's statement because it did not comport with the requirements of *Miranda*.

\*\*\*

*RRC Northeast, LLC v. BAA Maryland, Inc.*, No. 70, September Term 2009, Filed 10 May 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/70a09.pdf>

CONTRACTS - PERCENTAGE LEASES - DUTY OF GOOD FAITH AND FAIR DEALING - IMPLIED COVENANT AGAINST DESTRUCTIVE COMPETITION - A COMPLAINT FOR BREACH OF AN IMPLIED COVENANT AGAINST DESTRUCTIVE COMPETITION, INFERRED ALLEGEDLY FROM THE DUTY OF GOOD FAITH AND FAIR DEALING IN A COMMERCIAL PERCENTAGE LEASE, DOES NOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED WHERE THE COMPLAINT FAILS TO DEMONSTRATE THAT THE PARTIES INTENDED TO LIMIT COMPETITION, AS INDICATED BY THE TERMS OF THE LEASE AND THE CIRCUMSTANCES SURROUNDING THE LEASE'S FORMATION.

Facts: RRC Northeast, LLC ("RRC") operates specialty retail shops selling regionally-themed souvenirs and gift items to travelers. Pursuant to a contract with the Maryland Aviation Administration ("MAA"), who owns and operates Baltimore-Washington International/Thurgood Marshall Airport ("BWI"), RRC opened its first souvenir and gift retail store in a passenger terminal at BWI in 1995. Over the next decade, RRC opened six additional retail stores in such terminals at BWI.

In 2003, as part of a change in its concessions leasing business model, MAA issued a Request for Proposals ("RFP") to obtain a contractor to lease, develop, and manage all of the retail food, service, and merchandise concessions at BWI. The RFP set forth a proposed concessions plan that included RRC's souvenir and gift store locations, as well as space for, among other things, four addition, competing souvenir and gift stores designated under the category of "News/Gifts."

BAA Maryland, Inc. ("BAA"), submitted a development proposal in response to the RFP, and MAA selected BAA as the new master concessions operator at BWI. In March 2004, MAA and BAA executed a Master Lease (the "Master Lease") and concessions contract. The Master Lease specifically incorporated the terms of the RFP and proposed concessions plan, as well as BAA's development proposal prepared in response to the RFP.

After BAA entered into the Master Lease with MAA, BAA and RRC began negotiations regarding sublease agreements for RRC's existing and future locations at BWI. According to RRC, during these negotiations, RRC relied on the terms of the RFP, including the proposed concessions plan, which contemplated only four additional stores that would compete with RRC in the market for souvenir and gift sales.

In April 2004, BAA and RRC entered into a temporary sublease (the "temporary sublease"), which permitted RRC to continue operating seven existing stores at BWI. The temporary sublease incorporated by reference the terms of the Master Lease between MAA and BAA, which, in turn, incorporated the RFP and the proposed concessions plan. In addition, the temporary sublease provided that RRC's rent would be based on a percentage of its gross revenues from sales at BWI, and limited RRC to using its locations only for "retail concession of gift items focused on the Baltimore region and for no other purpose."

BAA and RRC entered into a new and separate sublease agreement in August 2005 (the "2005 sublease") regarding RRC's anticipated new stores at BWI. The 2005 sublease provided RRC with eight future locations at which to operate concession facilities. The 2005 sublease similarly required RRC to pay BAA a percentage rent based on its gross receipts and dictated the specific operations of RRC's stores at BWI. The 2005 sublease also contained an express "Good Faith and Fair Dealing" clause, which required BAA and RRC "to perform their obligations under [the] Sublease, and to exercise their rights and remedies under [the] Sublease, in good faith, and consistent with customary standards of commercial reasonableness and fair dealing."

In 2004, BAA began subleasing numerous locations at BWI to Hudson Group ("Hudson"), for the operation of news and gift locations in the same terminals at BWI as stores operated by RRC. By 2007, BAA had permitted Hudson to establish 18 locations at BWI, where it sold gifts and souvenirs in direct competition with RRC. After Hudson opened its competing stores, RRC experienced an immediate and severe decline in its sales.

In response to the additional competition from Hudson, RRC requested changes in the terms of its subleases with BAA. BAA refused to make any changes or to take any action to halt Hudson's sales of regionally-themed souvenirs and gifts. According to RRC, when RRC complained to BAA about the number of Hudson stores that were selling regionally-themed gifts and souvenirs and about RRC's loss of sales, representatives of BAA responded by stating that RRC was "afraid" of competition. RRC eventually closed all of its stores at BWI in 2007.

RRC filed suit in the Circuit Court for Anne Arundel County, alleging, among other things, that BAA breached its sublease contracts with RRC. Count I of the original complaint (the "Original Complaint") alleged that BAA breached the 2005 sublease's and temporary sublease's express and implied covenants of good faith and fair dealing by allowing Hudson to sell

regionally-themed gifts and souvenirs and other competing merchandise at BWI to an extent exceeding the specifications of the RFP's proposed concessions plan, actions which RRC characterized as destructive competition. Count II alleged that BAA breached the temporary sublease by authorizing a number of "News/Gifts" retail locations that far exceeded the four additional locations contemplated by the RFP's proposed concessions plan. RRC did not attach the RFP, Master Lease, or sublease agreements to its Original Complaint because, according to RRC, its counsel did not believe the voluminous agreements were either useful or necessary at the initial pleading stage of the litigation.

BAA moved to dismiss the entirety of RRC's Original Complaint, contending that RRC failed to state any viable claims. As to Counts I and II, BAA argued, among other things, that RRC failed to identify actual contract terms that BAA breached. RRC opposed BAA's motion to dismiss. Following a hearing, the Circuit Court granted BAA's motion, but gave RRC leave to amend the Original Complaint, stating that "there needs to be a more explicit recitation of what particular contractual terms are allegedly being breached," and that the court was "left with a bit of a blank on which particular paragraph of the sublease or what portion of the contractual relationship has been breached."

RRC filed an amended complaint (the "Amended Complaint"), essentially reasserting the facts alleged in the Original Complaint and restating Counts I and II, in nearly identical form. The most significant changes from the Original Complaint were a new allegation by RRC that the temporary sublease incorporated the RFP by virtue of incorporating the Master Lease between BAA and MAA, and the addition to Count I of the specific contractual language of the 2005 sublease's "Good Faith and Fair Dealing" clause. Again, RRC did not attach the RFP, Master Lease, or sublease agreements to the Amended Complaint.

In response, BAA moved to dismiss RRC's Amended Complaint, with prejudice and without leave to amend, on essentially the same grounds as it had moved to dismiss RRC's Original Complaint. Specifically, BAA contended that RRC's Amended Complaint failed to state claims upon which relief could be granted, and that Counts I and II were unchanged essentially from the Original Complaint and should be dismissed for RRC's failure to identify the contract terms allegedly violated by BAA.

On 28 January 2008, a different judge of the Circuit Court than the one who dismissed the Original Complaint issued a written opinion and order dismissing, with prejudice, RRC's



Amended Complaint. In the discussion section of the court's opinion, the court explained its reasons for dismissal, noting that RRC "again has failed to incorporate or even quote at length[] any provisions either of the sublease, the master lease or the RFP," such that the court was "unable to consider, interpret and apply the specific terms of the alleged lease."

RRC filed a motion to alter or amend the judgment of dismissal and for reconsideration, seeking to have the Circuit Court clarify that its dismissal of the Amended Complaint was without prejudice and with leave to amend further. In the motion, RRC alleged, for the first time, that the 2005 sublease incorporated the Master Lease and, therefore, the RFP and proposed concessions plan. In addition, RRC attached to the motion several documents, including copies of the Master Lease, the RFP, and both sublease agreements. Nevertheless, the Circuit Court denied summarily RRC's motion, and RRC noted timely an appeal to the Court of Special Appeals.

In an unreported opinion, the intermediate appellate court affirmed the Circuit Court's dismissal, with prejudice, of RRC's Amended Complaint. In its opinion, the court held that the Circuit Court did not err in dismissing Count I, RRC's claim for breach of the implied covenant against destructive competition, because, at the time it signed the sublease agreements, "RRC had reason to expect greater competition in the sale of souvenirs and gifts than that contemplated by the RFP." In addition, the court found that the Circuit Court did not err in dismissing Count II, the express breach of contract claim, because RRC failed to allege the existence of a contractual obligation on the part of BAA to limit the number of competing stores to the four contemplated by the RFP's proposed concessions plan. Finally, the court held that the Circuit Court did not abuse its discretion in denying RRC leave to amend further its Amended Complaint.

RRC filed a petition for writ of certiorari with this Court, which we granted, to consider whether the Court of Special Appeals erred in affirming the Circuit Court's dismissal, with prejudice, of Counts I and II of RRC's Amended Complaint and refusing to grant leave to amend further the complaint.

Held: Affirmed. The Court held that, based on RRC's continued failure to present to the Circuit Court sufficient facts from which the court could infer either an express contractual obligation by BAA to limit the number of competing "News/Gifts" stores to four or an implied duty obligating BAA to refrain from engaging in destructive competition by permitting Hudson to operate stores in excess of the number contemplated by

the RFP's proposed concessions plan, the Court of Special Appeals did not err in affirming the Circuit Court's dismissal, with prejudice, of Counts I and II of RRC's Amended Complaint.

Addressing first the Circuit Court's dismissal of Count II of RRC's Amended Complaint, which asserted that BAA breached the terms of the temporary sublease when it allowed Hudson to operate more than the four competing "News/Gifts" stores contemplated by the RFP and proposed concessions plan, the Court found that the allegations and facts alleged by RRC failed to state a claim for breach of contract. The Court noted that, although Count II stated in conclusory fashion that "BAA was bound to a configuration of concession sales locations for news/gifts of four locations," nowhere in the Amended Complaint did RRC allege an explicit or implicit promise by BAA to be so bound. Rather, the Amended Complaint alleged merely that the RFP, which contained a "proposed" concessions plan that "contemplated" four additional "possible" locations for future "News/Gifts" stores, was incorporated into the temporary sublease, that RRC based its negotiations in reliance upon the RFP's proposed concessions plan, and that, by allowing Hudson to open more than four new "News/Gifts" stores, BAA violated the RFP's proposed concessions plan. In addition, the Court noted that: (1) the fact that the 2005 sublease permitted RRC to open eight additional "News/Gifts" stores demonstrated clearly that the RFP did not serve to bind BAA to permit only four additional "News/Gifts" stores, and (2) the Master Lease incorporated BAA's response to MAA's RFP and proposed concessions plan, suggesting further that BAA never bound itself to the proposed concessions plan contained in the RFP. As such, the Court found that the Court of Special Appeals did not err in affirming the Circuit Court's dismissal of Count I of the Amended Complaint.

Turning to the viability of Count I of RRC's Amended Complaint, which charged BAA with breaching its implied obligations under the sublease agreements to refrain from engaging in destructive competition by allowing Hudson to sell regionally-themed gifts and souvenirs in more locations than the four stores contemplated by the RFP's proposed concessions plan, the Court examined prior case law regarding the sometimes implied covenant against destructive competition. Specifically, the Court observed that, when read together, the cases establish that an implied covenant to refrain from destructive competition may be inferred from a percentage lease, based on the duty of good faith and fair dealing, where the intentions of the parties, as indicated by the terms of the lease and the circumstances surrounding the formation of the lease, suggest that such an inference is appropriate, namely, by limiting competition to a

particular level with, or granting exclusivity to, the plaintiff, either in the contract or an incorporated pre-lease document.

Following its explanation of the applicable precedents, the Court analyzed whether the terms of the sublease agreements, as alleged in RRC's Amended Complaint, and the circumstances surrounding their creation, plead a triable issue of whether the parties intended for competition to be limited to some definable amount, such that the Circuit Court or other trier of fact could infer reasonably the existence of an implied covenant to refrain from destructive competition. In doing so, the Court noted that RRC's Amended Complaint asserted that the RFP's proposed concessions plan contemplated the addition of four "News/Gifts" locations in competition with RRC's stores, that the RFP's proposed concessions plan was incorporated generally into RRC's subleases, and that RRC based in part its negotiations with BAA in reliance on the RFP's proposed concessions plan. In the Court's opinion, such allegations, coupled with the fact that the 2005 sublease authorized BAA to open up eight new gift stores, failed to suggest that the parties intended for competition to be limited to the four "News/Gifts" locations contemplated by the RFP's proposed concessions plan, and that, therefore, RRC's Amended Complaint did not state a claim for breach of an implied covenant against destructive competition.

Finally, the Court determined that the Circuit Court did not err in denying RRC leave to amend further Counts I and II of the Amended Complaint. The Court noted that, in dismissing Counts I and II of RRC's Original Complaint, the Circuit Court, in essence, directed RRC to identify specific contract terms in the 2005 sublease and/or the temporary sublease from which the court could infer, respective, an implied covenant on BAA's part to refrain from engaging in destructive competition or an express contractual obligation by BAA to limit the number of competing "News/Gifts" stores to four. In the Court's opinion, the Circuit Court did not abuse its discretion when, faced with RRC's failure to address its concerns in either the Amended Complaint or the motion to alter or amend, it determined that RRC could not plead sufficiently the existence of contractual terms that would make viable Counts I and II and that granting further leave to amend would result merely in undue delay.

\*\*\*

*Kelroy Williamson v. State of Maryland*, No. 61, September Term 2009. Opinion filed April 22, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/61a09.pdf>

FOURTH AMENDMENT - MARYLAND DNA COLLECTION ACT - ABANDONMENT.

Facts: Kelroy Williamson was convicted by a jury in the Circuit Court for Anne Arundel County in 2007 on charges of rape and related offenses. Williamson asserted that his arrest warrant for the 2002 rape was based upon a statement of probable cause predicated upon the illegal testing of his DNA, as well as the uploading of his DNA profile into a local database and search of that database from a profile match. Williamson also challenged the admission of a statement he made to police. Williamson's challenges were premised upon the Maryland DNA Collection Act and the Fourth Amendment of the U.S. Constitution.

In 1994, in an unrelated case, an acquaintance of Williamson alleged that Williamson had raped her. She underwent a forensic medical examination and vaginal swabs were collected, but not tested for the assailant's DNA. Williamson ultimately entered an *Alford* plea to battery in that case. In 2002, a different complainant alleged that she was raped by an unknown assailant. Vaginal swabs containing a DNA sample were recovered during her forensic medical examination, and the sample, as tested by the Anne Arundel County Police Crime Lab, yielded a DNA profile of the assailant. The DNA profile was uploaded to the statewide DNA database system, creating a DNA record and was also uploaded to the Federal Bureau of Investigation's national DNA database, known as "CODIS." After a search of CODIS revealed no match, the complainant's assailant remained unknown.

Later, in 2004, Anne Arundel County obtained funding through a private grant to conduct DNA testing in "cold cases" and submitted the 1994 vaginal swab for testing, yielding a DNA profile of that assailant. The DNA profile of the 1994 assailant was uploaded into CODIS, and the Anne Arundel County Police determined that the 1994 DNA record matched the DNA record of the rape victim's assailant in 2002.

An investigator, Detective Morgan, determined that Williamson may have been involved in both the 1994 and 2002 incidents. Williamson had an open arrest warrant on unrelated charges, was arrested, and while awaiting booking at the Eastern District Police Station, was provided a meal from McDonald's. After he finished eating, Williamson discarded the wrappers and cup on the floor of the cell, and Detective Morgan retrieved the

McDonald's cup and took it to the crime lab to have it tested for DNA. The test yielded a DNA record matching the DNA record of the 2002 assailant. An arrest warrant issued for the 2002 rape, predicated upon the matches between the DNA records for the 1994 and 2002 forensic medical examinations and the match between the DNA records for the 2002 forensic medical examination and the McDonald's cup. Williamson was arrested in connection with the 2002 rape and was interviewed, at which time he confirmed his home address in 2000 and 2001 at a location not far from the 2002 rape scene.

Williamson's motion to suppress the DNA retrieved from the McDonald's cup, premised upon the Maryland DNA Collection Act as well as the Fourth Amendment, was denied by the trial judge. Williamson also moved to suppress his statement regarding the location of his home in 2000 and 2001, as the fruit of an illegal arrest, which was also denied. The Court of Special Appeals affirmed.

Held: The Court of Appeals affirmed, reviewed analogous cases from sister jurisdictions, and determined that Williamson had no reasonable expectation of privacy in the discarded McDonald's cup, or the saliva thereon, pursuant to the Fourth Amendment, because he had abandoned the cup. The Court also reasoned that the testing of the DNA sample obtained from the cup was not in violation of the Maryland DNA Collection Act, because Williamson was not compelled to give a DNA sample by the police. The Court rejected Williamson's argument that a warrant was required to test his genetic material obtained from the cup, reasoning that "[i]t would be anomalous, indeed, for us to hold that a warrant would be necessary to analyze the contents of lawfully acquired abandoned property—property in which the previous owner did not retain a reasonable expectation of privacy, because the resulting information was inculpatory of Williamson's identity, while encouraging testing without a warrant to determine exculpatory information." Finally, the Court determined that Williamson's statement to police, which was pursuant to a lawful arrest and free of any Fifth Amendment violations, was admissible.

\*\*\*

*Garner v. State*, No. 26, September Term 2009, filed May 18, 2010.  
Opinion by Murphy, J.

<http://mdcourts.gov/opinions/coa/2010/26a09.pdf>

CRIMINAL LAW - EVIDENCE - THE RULE AGAINST HEARSAY - NON-HEARSAY  
"VERBAL ACTS" - ADMISSIBILITY OF EVIDENCE THAT THE DEFENDANT WAS  
IN POSSESSION OF A CELL PHONE CALLED BY AN UNKNOWN PERSON WHO  
REQUESTED TO PURCHASE COCAINE

CRIMINAL PROCEDURE - MARYLAND RULE 4-215 - TRIAL COURT'S  
OBLIGATION TO DETERMINE WHETHER DEFENSE COUNSEL HAS BEEN  
DISCHARGED

Facts: In the Circuit Court for Queen Anne's County, a jury convicted Alphonso Garner, Petitioner, of possession of cocaine with intent to distribute and related offenses. At trial, the State called a trooper who testified over objection that after Petitioner was stripped of his personal items following arrest, his cell phone continued to ring. The trooper further testified that he answered the phone, "hello," to which a male caller replied, "can I get a 40?," then hung up when asked for his name. During opening statements, the prosecutor characterized this reference as "slang for a \$40 piece of cocaine" .

The Court of Special Appeals affirmed, rejecting Petitioner's arguments that he was entitled to a new trial on the grounds that (1) the Circuit Court erroneously admitted hearsay evidence of what was said by the unknown person who had placed a call to Petitioner's cell phone, and (2) the Circuit Court failed to comply with the requirements of Md. Rule 4-215 when ruling on Petitioner's pre-trial request to discharge counsel, notwithstanding that his attorney continued to act as counsel for the duration of the trial.

The Court of Appeals then issued a writ of certiorari to address four questions: (I) Did the Court of Special Appeals, purporting to rein in the "expansionist tide that produced" this Court's decisions in *Stoddard v. State*, 389 Md. 681 (2005) and *Bernadyn v. State*, 390 Md. 1 (2005), err in holding that an out-of-court statement by a non-testifying, unnamed caller to Petitioner's cell phone in which the called said, "can I get a 40," was not hearsay?; (II) Where Petitioner unequivocally expressed a desire to discharge counsel, the trial court ruled that he could do so, and the docket entry reads: "[c]ourt finds defendant has a right to proceed without counsel today and [attorney] may advise," did the Court of Special Appeals err in holding that counsel was not "discharged" for purposes of Rule 4-

215, because Petitioner responded affirmatively when the court asked him, "[w]ould you like me to have him [the attorney] stay to be - sit next to you at the trial table to be on call if you need his help during trial," and the attorney participated in all stages of trial?; (III) Is the State precluded from arguing that counsel was not "discharged" by the prosecutor's concession at the motion for a new trial that "the court allowed [the attorney] to stay to assist?" and (IV) Did the trial court fail to comply with the requirements of Maryland Rule 4-215?

Held: The Court of Appeals affirmed, a majority holding that the rule against hearsay was not violated because the trooper's testimony referred a verbal act and was therefore admissible. The Court analogized the use of a telephone, an instrumentality of the crime, to receive orders called in by persons who wish to purchase controlled dangerous substances to cases in which a telephone is used to receive illegal wagers, citing to the proposition that "[t]he telephoned words of the would-be bettor or would-be purchaser are frequently categorized, therefore, as verbal parts of the acts. They are not considered to be assertions and do not fall under the scrutiny of the Rules Against Hearsay[,] " even when the witness does not know the identity of the caller. The Court also referenced similar holdings in other jurisdictions in which questions posed by anonymous callers were also held to be admissible.

On the issue of whether the Circuit Court failed to comply with the requirements of Md. Rule 4-215(a)(3), a majority of the Court held that Petitioner's attorney was never actually discharged, and therefore the provisions of the rule never came into play. The Court noted that the purpose of Rule 4-215 is to protect the fundamental right of assistance of counsel, and despite the fact that an ambiguous colloquy took place in the waning moments before trial, "no such watered down relationship ever asserted itself." It was Petitioner's attorney and not Petitioner who "called the shots" from start to finish, and therefore his right to counsel was protected. When Petitioner's counsel made the statement, "I'm still in this case," the court was entitled to rely on that without further inquiry.

\*\*\*

*Abdel Khader Diallo v. State of Maryland*, No. 91, September Term 2009, filed 10 May 2010. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/91a09.pdf>

CRIMINAL LAW - IMMUNITY - DIPLOMATIC IMMUNITY - PETITIONER WAS NOT ENTITLED TO DERIVATIVE DIPLOMATIC IMMUNITY BASED ON HIS FATHER'S STATUS AS A NON-RESIDENT ASSISTANT SECRETARY-GENERAL OF THE UNITED NATIONS BECAUSE PETITIONER FAILED TO ESTABLISH THAT HIS FATHER WAS PRESENT IN THE UNITED STATES AT THE TIME OF PETITIONER'S ARREST AND OF THE OFFENSE

CRIMINAL LAW & PROCEDURE - DUE PROCESS - BRADY VIOLATION - THE STATE DID NOT SUPPRESS EVIDENCE OF THE DIPLOMATIC STATUS OF PETITIONER'S FATHER, IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS, BECAUSE PETITIONER KNEW OF THE PARTICULAR EVIDENCE PRIOR TO TRIAL AND THE STATE DID NOT HAVE ACTUAL KNOWLEDGE OF THE EVIDENCE ARGUABLY IN POSSESSION OF THE U.S. DEPT. OF STATE

Facts: Petitioner was convicted in December 2007 in the Circuit Court for Baltimore County of first degree assault and use of a handgun in the commission of a crime of violence. Prior to trial and post-judgment, Abdel Khader Diallo (Petitioner) asserted in the Circuit Court that its exercise of jurisdiction over him was improper because he enjoyed derivative diplomatic immunity by virtue of the fact that his father was an Assistant Secretary-General of the United Nations (the "UN") at the time of the offense and his arrest.

Petitioner's father (the "elder Diallo"), served apparently as Executive Secretary of the United Nations Convention to Combat Desertification (the "UNCCD") and was stationed formally in Bonn, Germany. Petitioner grounded his claim of diplomatic immunity on the Vienna Convention on Diplomatic Relations of 1961, 18 Apr. 1961, 23 U.S.T. 3227 (the "Vienna Convention") and the Convention on Privileges and Immunities of the United Nations of 1946, 13 Feb. 1946, 21 U.S.T. 1418 (the "UN Convention"). Diallo tendered in support of this claim an "attestation" from Frank M. Meek, Chief of Administration and Finance of the UNCCD. The "attestation" indicated that the elder Diallo served as the Executive Secretary of the UNCCD from 1999 to June 2007 and was entitled to full diplomatic status. It also stated that because UNCCD's headquarters is situated in Germany, the UN and the secretariat of the UNCCD were not required to notify the U.S. Department of State of the elder Diallo's diplomatic status. Petitioner's motion alleged also that Petitioner was a citizen of Burkina Faso, a country in West Africa, and that he held a diplomatic passport from that country. Additionally, he claimed



that he held an expired diplomatic identification card from the Federal Republic of Germany and current diplomatic identification papers from the UN.

The State opposed Petitioner's motion to dismiss. Attached to the written opposition was a certification, dated 20 September 2007, from Holly S.G. Coffey, Deputy Assistant Chief of Protocol of the United States Department of State. The certification stated that the State Department had a record of the elder Diallo serving as a diplomat, but that his assignment expired on 22 June 1993. At the time of the elder Diallo's appointment, Petitioner was disclosed to the Department as a member of his family forming part of his household. The trial court denied Diallo's motion on 25 September 2007.

Petitioner moved the court to reconsider the denial of the motion to dismiss. He specifically argued that he enjoyed diplomatic immunity, notwithstanding the Coffey certification, because, as his father was a non-resident UN official, the UN was not required to notify the United States Department of State of the elder Diallo's change in status in 1993, which continued until 19 June 2007. At a 13 November 2007 hearing, Petitioner presented a copy of his father's diplomatic passport from Burkina Faso and a G-4 Visa issued by the State Department. Additionally, he presented his own German diplomatic identification card. He again pressed to the court the Meek "attestation" as a conclusive document. The court denied the motion to reconsider, finding that Petitioner had not presented sufficient evidence to show that he was entitled to diplomatic immunity through his father.

Persisting, the defense moved again on 27 November 2007 to alter and amend, or, alternatively, to reconsider and vacate the order denying the motion to dismiss. Petitioner attached to his motion a list of the "Senior Officials of the United Nations and Officers of Equivalent Rank Whose Duty Station is New York." The list included the elder Diallo's name and listed his position as the Executive Secretary of the UNCCD. The list reflected further that he was working "Away from Headquarters" in Bonn, Germany.

The court granted a defense request for a postponement of a hearing on the latest motion until 14 December 2007. On that date, the defense requested another continuance on the basis that it was in contact with the United States mission to the UN and was awaiting a response. The trial court denied the request and the motion. The parties proceeded to trial. The court found defendant guilty of first degree assault and use of a handgun in the commission of a crime of violence.

Ten days later after the convictions were returned, defense counsel filed a motion for new trial contending that he "recently discovered evidence" which required the court to exercise its revisory power under Maryland Rule 4-331 to set aside the verdict. The "recently discovered evidence," however, was not available yet.

The court held a hearing on the new trial motion on 8 February 2008, approximately six weeks after Petitioner filed it, at which time defense counsel requested another postponement. The only "new" evidence that defense counsel was able to muster at that time was a letter from Congressman Donald Payne of New Jersey's 10th Congressional District, which, defense counsel asserted, stated that it was the Congressman's "personal knowledge that Ambassador Diallo does enjoy diplomatic status . . . ." The court denied the defense request for more time to develop additional evidence and denied the motion for a new trial.

The Court of Special Appeals dismissed Diallo's appeal in part and affirmed the convictions otherwise. Before the intermediate appellate court, Petitioner advanced two primary contentions: (1) he enjoyed diplomatic immunity at the time of his arrest and (2) the failure of the United States Department of State to disclose that the elder Diallo enjoyed full diplomatic immunity and privileges when traveling in this country should be imputed to the State prosecutor and, thus, the suppressed evidence was a violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The intermediate appellate court dismissed Diallo's appeal of the trial court's denial of his motion to dismiss because it determined that his brief did not comply with the requirements of Maryland Rule 8-504(a)(4)-(5), by which a brief must include a clear and concise statement of facts material to the determination of the questions presented and an argument in support of the party's position. The court rejected Petitioner's *Brady* claim, concluding that the State did not suppress any evidence. *Diallo v. State*, 186 Md. App. 22, 972 A.2d 917 (2009).

The Court of Appeals granted Diallo's petition for a writ of certiorari. 410 Md. 559, 979 A.2d 707 (2009). Additionally, the Court granted the State's conditional cross-petition to consider whether Petitioner failed to preserve his claim that the prosecutor failed to comply with discovery obligations.

HELD: The Court of Appeals vacated the judgment of the Court of Special Appeals dismissing Diallo's appeal in part. The Court

affirmed the judgment of that court otherwise and remanded the case to the intermediate appellate court with instructions to affirm the judgment of the Circuit Court for Baltimore County.

The Court of Appeals addressed first the intermediate appellate court's partial dismissal of Diallo's appeal. Arguments not presented in a brief or not presented with particularity will not be considered on appeal. The intermediate appellate court found Diallo's argument lacking particularity because it made only one internal cross-reference to diplomatic immunity in a separate portion of the argument section in which he made his *Brady* claims. The two arguments were based on the same assertion, that he was entitled to diplomatic immunity and that the trial court erred in finding to the contrary. The Court of Appeals concluded that the brief below was sufficient to identify facts and legal authority upon which Diallo based his argument in his brief in that court. The Court thus held that he did not waive his diplomatic immunity argument.

Next, the Court addressed Diallo's argument that he was entitled to derivative diplomatic immunity. It is a well-established general principle of law that a diplomatic envoy is immune from the legal process of the Receiving State. Diplomats enjoy immunity under various international treaties, including the UN Convention and the Vienna Convention. Generally, the spouses and other members of the household and the diplomat's staff also enjoy the same diplomatic immunities and privileges as the diplomat.

The Diplomatic Relations Act of 1978, 22 U.S.C. § 254d (2006) provides that any action or proceeding brought against an individual who is entitled to immunity under the Vienna Convention shall be dismissed. Thus, if an individual is entitled to immunity, a court must dismiss the matter because it lacks subject matter jurisdiction over the defendant. The individual claiming immunity from prosecution bears the burden of showing that he or she is entitled to immunity.

Generally, an individual must be accredited by the State as a diplomatic official in order to be entitled to full diplomatic immunity. Typically, in the more common situation of a diplomat to a mission of a traditional foreign State (as opposed to an international organization such as the UN), when a person asserts diplomatic immunity from prosecution or suit, the law enforcement officer should verify the party's diplomatic status with the State Department. In that situation, courts generally give the State Department's certification substantial deference in its consideration of diplomatic status.

Ascertaining the diplomatic status of an individual claiming diplomatic immunity based on his or her involvement with the UN, rather than a traditional foreign State, requires a different and more complex analysis. In the case of a UN official, the United Nations is essentially the Receiving State and, as such, the United States has no say or veto power with respect to such representative of any member state. Thus, in the context of the present case, the Coffey certification would be inconclusive with regard to the elder Diallo's diplomatic status in 2006 and the Court did not consider the certification further in its analysis.

As a then UN Assistant Secretary-General, the principal source of the elder Diallo's immunity was the UN Convention. The UN Convention grants to the Secretary-General and all Assistant Secretaries-General (and their spouses and minor children) the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. The scope of that immunity under "international law" is the immunity described in the Vienna Convention. The Vienna Convention provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the Receiving State from the moment he or she enters the Receiving State to take up his or her post. When that person's diplomatic functions come to an end, such privileges and immunities shall cease at the moment he leaves the country. With respect to acts performed in the exercise of his or her functions as a member of the mission, however, immunity shall continue to exist. The members of the family of a diplomatic agent forming part of his household shall enjoy the privileges and immunities.

Thus, Petitioner may have been entitled to immunity if his father was present in the United States at the time the offense occurred or perhaps when Petitioner was arrested. The Court held that Petitioner did not present sufficient evidence to show that the elder Diallo was present at those times. If the elder Diallo was absent, he would only be entitled to immunity for acts performed in the exercise of his official functions. Petitioner would not be entitled to greater immunity than his father. The Court thus held that the trial court did not err in denying the motion to dismiss on the ground that Petitioner had not proven that he enjoyed immunity under the Vienna Convention because he did not present sufficient evidence that he enjoyed immunity under the UN Convention.

The Court addressed next Petitioner's claim that the U.S. State Department violated its obligation under *Brady v. Maryland* to exercise due diligence and produce exculpatory materials

related to his father's diplomatic status. The State argued that Petitioner did not preserve properly his *Brady* argument. Petitioner never argued explicitly, before conviction by the trial court, that the State Department's failure to recognize the elder Diallo as a diplomat was a violation of his due process rights under *Brady*. He did assert, however, in a motion for a new trial, that he had "recently discovered evidence" which required the court to exercise its revisory power under Maryland Rule 4-331 and set aside the verdict. He stated that he would "present evidence from the United States Department of State that will directly controvert" the Coffey certification. The Court held that his *Brady* argument was preserved sufficiently.

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To establish a *Brady* violation, Petitioner must establish three necessary components: (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense - either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness - and (3) that the suppressed evidence is material.

The Court concluded that all of the category of evidence that Petitioner claimed the State suppressed was known to him or he was in a unique position to obtain. The parties agreed that if the elder Diallo was in the United States at the time Petitioner committed the crimes and/or at his arrest, Diallo would have a viable claim of derivative diplomatic immunity. He never presented any actual evidence, however, that his father was in the United States at the time of the crime or his arrest. Surely, his father's whereabouts and current job title were facts known to Petitioner, or at least was information more accessible to his inquiry than the prosecution. The Court held that because there was no suppression of evidence, there was no *Brady* violation.

The Court next considered whether the State Department's putative knowledge with respect to the elder Diallo's diplomatic status, other than as revealed in the Coffey certification, may be imputed fairly to the prosecutor in this case. Where two jurisdictions engage in joint investigations, courts generally hold that the prosecutor has constructive possession of any evidence possessed by the other party to the investigation. The Court discussed *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006), where the federal Court of Appeals for the Third Circuit

identified three factors to consider when determining questions of cross-jurisdiction constructive knowledge: (1) whether the party with knowledge of the information is acting on the government's behalf or is under its control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation or are sharing resources; and (3) whether the entity charged with constructive possession has ready access to the evidence.

As to the first factor, the Court concluded that the U.S. State Department was not under the control of the Baltimore County State's Attorney's office. The Court also concluded that the State Department was not acting on behalf of the State of Maryland. The Court declined to hold, as a general proposition, that because a prosecutor asks a federal agency or official for information, all of the latent or attributable knowledge of that federal department, agency, or official may be imputed to the State.

The Court also determined that the second *Risha* factor does not support Diallo's argument. The Court concluded that this was not a joint investigation. Furthermore, there was no allegation that the State Department and the State of Maryland pooled labor or resources in any way during the State's investigation of Petitioner.

Finally, the Court concluded that Petitioner did not satisfy the third *Risha* factor because the prosecutor did not have "ready access" to the evidence. The record in the case did not suggest that the State had the ability to inspect or access easily the State Department's records. Ultimately, the Court concluded that Petitioner's right to due process was not violated under *Brady* and its progeny because there was no suppression of evidence by the State.

\*\*\*

Herbert Roosevelt Sidbury v. State of Maryland, No. 86, September Term 2009.

Opinion filed May 12, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/86a09.pdf>

CRIMINAL LAW - RULE 4-325 - SUPPLEMENTAL JURY INSTRUCTIONS - CONSEQUENCES OF A "HUNG" JURY

Facts: Herbert Roosevelt Sidbury was charged with murder and use of a handgun in the commission of a felony in connection with the shooting death of Kevin Hardy and was tried in the Circuit Court for Prince George's County. At the close of all of the evidence, the judge instructed the jury on its task, stating "[i]t is your duty to decide the facts and apply the law to those facts," and also described the elements of first degree murder, second degree murder, and use of a handgun in the commission of a felony. During its deliberations, the jury sent the judge a note asking, "Judge: If the jury is hung on the degree of murder (first or second), will the defendant go free?" The judge read the note to counsel, asked for comment, and instructed the jury, "That's not an issue for you to concern yourselves with." The judge also gave an *Allen* charge. Thirty-nine minutes later, the jury found Sidbury guilty of first degree murder and use of a handgun in the commission of a felony. Sidbury appealed to the Court of Special Appeals, which affirmed in an unreported opinion, holding that "the trial court did not abuse its discretion in declining to discuss with the jury the possible consequences of their failure to agree on a verdict," citing *Mitchell v. State*, 338 Md. 536, 659 A.2d 1282 (1995).

Held: The Court of Appeals affirmed, reasoning that the consequences of a hung jury were not a proper consideration of the jury, as the jury's only task was determining Sidbury's guilt or innocence. The Court rejected Sidbury's argument that the trial judge abused his discretion in refusing to answer "no" to the question presented by the jury, because he was being held without bail and was awaiting trial on a charge of attempted murder, had a prior conviction for first degree assault, and was on probation at the time of the shooting in this case, such that, "[t]here was no way any judge was going to release [me]." The Court determined that whether Sidbury was held without bail awaiting trial in an unrelated matter was not at issue in the case and did not inform the jury's task of reaching a guilty or not guilty verdict. The Court also rejected Sidbury's argument that the question indicated that the jury was convinced that he had committed second degree murder, but was concerned that he would "go free" if a unanimous verdict on first degree murder

could not be reached. Sidbury's interpretation of the jury's question was simply not plausible, reasoned the Court, as evidenced by the verdict sheet, which expressly required that the jury determine whether Sidbury was guilty of first degree murder, and if not, then consider whether he was guilty of second degree murder. The more plausible interpretation of the question was that the jury was divided on whether to convict of first degree or second degree murder. The trial judge could not have known what would happen in that instance, because the decision of whether to retry a defendant after a mistrial is within the sole discretion of the State's Attorney, such that any definitive answer would "necessarily have been speculative," as the Court enunciated in *Mitchell v. State*.

\*\*\*



*Briggs v. State of Maryland*, No. 56, Sept. Term, 2009. Opinion filed on April 12, 2010 by Greene, J.

<http://mdcourts.gov/opinions/coa/2010/56a09.pdf>

CRIMINAL LAW – SENTENCING – ENHANCED SENTENCE

Facts: Petitioner's conviction in the present case is not his first. On June 25, 1990, Troy Briggs was arrested for possession with intent to distribute cocaine ("Offense One"). A statement of charges was filed in the District Court for Baltimore City the following day and a criminal information was filed in the Circuit Court for Baltimore City two months later, on August 28, 1990. Briggs was convicted of Offense One in the Circuit Court on May 10, 1991.

Briggs was also arrested for possession with intent to distribute cocaine ("Offense Two") on July 17, 1990. A statement of charges was filed the next day and a criminal information was filed in the Circuit Court for Baltimore City two months later, on September 12, 1990. Briggs was convicted of Offense Two in the Circuit Court on May 10, 1991.

Ten years later, on May 7, 2001, Briggs was convicted of distribution of cocaine, an offense that he committed on March 15, 1999. The trial court held a sentencing hearing and, on April 10, 2002, imposed a sentence of 25 years incarceration without the possibility of parole. This sentence was based on the trial court's determination that Briggs was a third-time offender under § 5-608(c), which provides mandatory penalties for individuals who had previously committed two prior offenses involving controlled dangerous substances.

Six years later, Briggs filed a motion challenging his sentence. He argued that the trial court's decision to impose a mandatory sentence pursuant to § 5-608 was illegal because he had not been previously convicted on "separate occasions," as required by the statute. The Circuit Court denied Briggs's motion and he appealed that judgment to the Court of Special Appeals, which affirmed.

Briggs appealed to the Court of Appeals on the issue of whether the statement of charges filed in the District Court for Offense One was a "charging document" within the meaning of § 5-608(c)(4).

Held: The Court saw no ambiguity in the phrase "charging document" as it is used in § 5-608(c)(4). The Court concluded

that the statement of charges filed was a "charging document" under § 5-608(c)(4). Accordingly, the Court affirmed the judgment of the Court of Special Appeals.

\*\*\*

*Crofton Convalescent Center v. Dep't of Health & Mental Hygiene*, No. 32, September Term 2008, filed April 8, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/32a08.pdf>

HEALTH - DEPARTMENT OF HEALTH & MENTAL HYGIENE - MEDICAID REIMBURSEMENT - MORTGAGE INTEREST - SWAP AGREEMENT

Facts: The petitioner, Crofton Convalescent Center ("Crofton"), is a nursing facility certified to provide medical care through the Maryland Medical Assistance Program ("Medicaid"). In 1998, Crofton refinanced a mortgage using a financing agreement that, through the use of an interest rate swap agreement, exchanged the variable interest rate on Crofton's new mortgage for a fixed rate.

The Court defined a "plain-vanilla swap agreement" as:

'a contract between two parties, . . . to exchange or 'swap' cash flows at specified intervals, calculated by reference to a particular rate or index.' See S. Lawrence Polk & Bryan M. Ward, *A Guide to the "Regulatory No Man's Land" of Over-The-Counter Interest Rate Swaps*, 124 *Banking L.J.* 397, 399 (2007). The '[m]ost commonly employed [interest rate swaps] are fixed/floating rate swaps in which the first counterparty pays the second at designated intervals, a specific amount of interest based on a fixed interest rate multiplied' by an agreed principal amount called the 'notional' amount. Stuart Somer, *A Survey of Legal & Regulatory Issues Relevant to Interest Rate Swaps*, 4 *DePaul Bus. L.J.* 385, 387 (1992). Concurrently, the second counterparty pays the first counterparty based on a floating interest rate, such as LIBOR, applied to the notional amount. *Id.* The notional amount is used solely to calculate the interest payments and is not exchanged between the parties.

Crofton submitted the interest payments made according to the swap agreement ("swap payments") as mortgage interest payments for reimbursement from the respondent Department of Health and Mental Hygiene ("DHMH"). Providers' mortgage interest payments are reimbursable costs under COMAR 10.09.10.10.C. DHMH, however, disallowed Crofton's claim that interest paid under its swap agreement was a reimbursable expense under COMAR.

Crofton appealed DHMH's decision to the Nursing Home Appeal Board ("the Board"), which affirmed DHMH's decision. Crofton

petitioned for judicial review in the Circuit Court for Baltimore City, which reversed the Board's decision. DHMH appealed to the Court of Special Appeals, which held that the swap payments were not reimbursable.

The Court of Appeals granted certiorari to consider the following questions:

1. Should interest paid by a nursing care facility pursuant to an integrated mortgage financing transaction securing commercial real property that includes a swap agreement be treated without regard to the integrated nature of the transaction?
2. Does *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 310 F.3d 1188 (9th Cir. 2002) establish Maryland law governing whether interest paid by a nursing care facility pursuant to a swap agreement that secures the facility's real property is mortgage interest under the Maryland Medicaid regulation making mortgage interest an allowable, reimbursed cost?

Because the Court of Appeals held that Crofton's swap payments were not reimbursable under COMAR, the Court did not address the second question presented.

Held: A health care provider's swap payments are not reimbursable as mortgage interest payments under COMAR 10.09.10.10, regardless of a nursing care facility's intent to integrate a swap agreement and a mortgage refinancing agreement into a single transaction.

The Court first noted that an agency's interpretation of a regulation is a conclusion of law, which, taking into consideration the deference owed to an agency's interpretation of its own regulation, appellate courts review to determine whether the interpretation is "plainly erroneous or inconsistent with the regulation." The Court then examined COMAR regulations 10.09.10.10A and 10.09.10.10C, which both refer to mortgage interest. The provisions, however, do not define "mortgage interest." Accordingly, the Court looked to COMAR 10.09.10.29, which provides that, in the absence of express evidence of the DHMH's intent to reimburse costs "without regard to the availability of federal financial participation," COMAR regulations should be interpreted "in conformity with applicable federal statutes and regulations." Thus, the Court turned to the Medicare Provider Reimbursement Manual ("PRM") and the C.F.R. for guidance and concluded that swap payments are not reimbursable mortgage interest under the PRM.

Noting that the PRM and the C.F.R. define interest as "the cost incurred for the use of borrowed funds," the Court emphasized that only "necessary" interest is reimbursable. The Court then cited the PRM and C.F.R.'s definition of necessary interest as interest "incurred on a loan that is made to satisfy a financial need, [f]or a purpose related to patient care, and [i]ncurred on a loan that is reduced by investment income." In addition to these definitions, the Court referred to § 202.2A of the PRM, which expressly provides that "[i]nterest expense incurred under an interest rate swap agreement is not recognized for Medicare payment purposes because the interest expense incurred under such agreement does not result from a loan made to satisfy a financial need of the provider." Moreover, the Court emphasized that the § 202.2A of the PRM addresses swap agreements directly in an example:

Hospital A has \$10 million in bonds at a variable interest rate of prime plus 2%. The bonds were issued for a patient care related purpose and the interest is an allowable expense under Medicare. The hospital prefers a fixed rate and enters into a swap interest rate agreement with a bank. The amount of the note is \$10 million. The agreement stipulates that the hospital will pay the bank a fixed rate of 12% and the bank will pay the hospital a variable rate of prime plus 2%.

For the first year, prime remains at 10% and there is no exchange of funds between the bank and the hospital. For the second year, the prime drops to 8%. The hospital pays the bank \$200,000 in interest. This interest is NOT reimbursable under Medicare. For the third year, the prime rate increases to 12%. The bank pays the hospital \$200,000. This is NOT considered investment income for Medicare reimbursement. The transaction has no impact on the allowability of the interest expense associated with the bonds.

Citing the PRM example, the Court concluded that "Crofton's intent to integrate the swap and mortgage agreements" did not except Crofton's swap payments from "the PRM's clear directive that swap payments, even when incurred in place of allowable interest expenses, are not reimbursable interest payments." Because the PRM example expressly provides that the hypothetical swap payments replacing otherwise allowable payments were not reimbursable even though the payments were incurred in an attempt to obtain a fixed interest rate, the Court declined to consider as determinative the provider's intent to integrate the mortgage and swap agreements or the swap agreement's effect, which was essentially to fix Crofton's interest rate. Accordingly, the Court held that, because COMAR

does not expressly address swap payments and swap payments are not reimbursable mortgage interest under the PRM, swap payments are not reimbursable as mortgage interest under COMAR.

\*\*\*

*Washington Suburban Sanitary Commission v. Shaaron Phillips, et al.*, No. 85, September Term 2009; *James K. Sillers v. Washington Suburban Sanitary Commission and Allen W. Cartwright, Jr. v. Washington Suburban Sanitary Commission*, No. 154, September Term 2008, Filed 10 May 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/154a08.pdf>

DISCRIMINATION - EMPLOYMENT - MD. CODE, ART. 49B, § 42(A), AUTHORIZING PRIVATE CIVIL ACTIONS FOR RELIEF UNDER ANTI-DISCRIMINATION ORDINANCES OF HOWARD, MONTGOMERY, AND PRINCE GEORGE'S COUNTIES - WHETHER THE WASHINGTON SUBURBAN SANITARY COMMISSION ("WSSC") IS AMENABLE TO SUIT AS A "PERSON" UNDER THE STATE STATUTE - WSSC POSSESSES UNIQUE "HYBRID" CHARACTERISTICS, NAMELY, ITS CONSIDERABLE AUTONOMY FROM STATE OVERSIGHT AND ITS NEARLY EXCLUSIVE LEVEL OF CONTROL EXERCISED BY THE COMMISSION'S INTERNAL MANAGEMENT OVER PERSONNEL MATTERS, AND IS CONSIDERED PROPERLY THEREFORE A "PERSON" FOR PURPOSES OF ACTIONS BROUGHT PURSUANT TO MARYLAND CODE, ARTICLE 49B, § 42(A).

Facts: Three former employees of the Washington Suburban Sanitary Commission ("WSSC"), a bi-county governmental entity charged with administering the public water and sanitation services of Montgomery and Prince George's Counties, brought, in the Circuit Court for Prince George's County, independent, but similar, lawsuits against WSSC, pursuant to Maryland Code, Article 49B, § 42(a) (hereinafter, "§ 42(a)"), alleging that WSSC engaged in race-based employment discrimination in violation of Prince George's County Code §§ 2-186 and 2-222, the County's anti-discrimination ordinances. In each case, WSSC moved to dismiss the employees' complaints on the grounds that § 42(a), which creates a civil, private cause of action for persons subjected to acts of discrimination prohibited by the County Codes of Montgomery, Prince George's, and Howard Counties against the "person" committing the alleged discriminatory act, does not apply to WSSC because, as a State agency or instrumentality, it is not considered properly a "person" for purposes of § 42(a) actions.

In the Phillips case, the Circuit Court denied WSSC's motion, finding that, although WSSC was a State agency, it nevertheless qualified as a "person" for purposes of employment discrimination actions brought pursuant to § 42(a). Upon WSSC's cross-appeal from a jury verdict in Phillips's favor, the Court of Special Appeals affirmed the ruling of the trial court with regard to § 42(a), holding that, based on its view of the statutory scheme of Article 49B as a whole and WSSC's nature as a "unique," albeit a State, agency, the General Assembly intended

for § 42(a) to apply to WSSC as a "person." WSSC filed with this Court a petition for writ of certiorari, which we granted to consider whether WSSC is considered properly a "person" for purposes of employment discrimination actions brought pursuant § 42(a) for violations of anti-discrimination ordinances enacted by Prince George's County.

Unlike Phillips, in the Sillers and Cartwright cases, a different judge of the Circuit Court granted WSSC's respective motions, finding that WSSC is not a "person" for purposes of actions brought pursuant to § 42(a). Each of the plaintiffs noted timely appeals to the Court of Special Appeals. While those appeals were pending in the intermediate appellate court, we issued writs of certiorari, on our initiative, to consider the identical issue as presented by the Phillips case.

Held: Affirmed the judgment of the Court of Special Appeals in Phillips; reversed the judgments of the Circuit Court in Sillers and Cartwright and remanded for further proceedings. The Court held that, for purposes of employment discrimination actions brought pursuant to § 42(a), WSSC is considered properly a "person," and, therefore, may be sued for employment discrimination under § 42(a) for violations of the anti-discrimination provisions of the Prince George's County Code.

At the outset, the Court determined that the term "person" in § 42(a) is ambiguous. In reaching this finding, the Court noted that the canons of sound statutory interpretation provide that, in general, the term "person" in a statute does not include the State and its agencies and instrumentalities, although it may where such an intention is manifest. Examining statutory definitions contained elsewhere in Article 49B, the Court found that, although the express definition of "person" seemed to suggest that it did not include government agencies, such as WSSC, other relevant definitions, such as those of the terms "employer" and "employee," cast considerable doubt upon that conclusion and reflected that government entities may be considered "persons" under Article 49B. Confronted with both seemingly reasonable interpretations, the Court observed that it was ambiguous whether the General Assembly intended for the State and its agencies and instrumentalities to be included in the term "person."

Upon finding the term "person" in § 42(a) to be ambiguous, the Court examined the legislative history and purpose of the section. Specifically, the Court described a "Fiscal Note" contained in the legislative history of the legislation creating § 42(a), which suggested that State expenditures would be



unaffected by the passage of § 42(a), but that county expenditures might be impacted to the degree that those counties are held liable as defendants in employment discrimination actions brought pursuant to § 42(a). This history, the Court concluded, demonstrated that the General Assembly intended that causes of action brought pursuant to § 42(a) alleging violations of county anti-discrimination ordinances could not be filed against the State, but that § 42(a) would apply against county and local governmental entities. Thus, the Court interpreted the term "person," as used in § 42(a), to exclude generally the State and its agencies or instrumentalities, but to include county and local government entities.

With this background established, the Court turned to consider whether WSSC is considered properly a State agency or instrumentality for purposes of actions brought pursuant to § 42(a), and, therefore, whether it was subject to the actions underlying the appeals. The Court began by noting that WSSC is a "hybrid" entity which defies simple and definitive categorization as either a "State" or "local" agency or instrumentality for any and all purposes. Specifically, the Court observed that WSSC possesses certain characteristics indicative of State agency status, such as the power of eminent domain, the ability to enter into contracts that have the full effect of a contract between the District of Columbia and the State of Maryland, and the creation of WSSC by a public general law, rather than a public local law. Furthermore, the Court noted that prior opinions of the Court described WSSC as a State agency for purposes of determining the applicability of the doctrine of state sovereign immunity, the State Administrative Procedures Act, and the running of statutes of limitations.

The Court also opined, however, that an entity may qualify as a State agency for some purposes, while being classified as a local agency for other purposes. In this vein, the Court noted that, despite possessing certain characteristics common to State agencies, WSSC is a unique entity, autonomous in many ways from the constraints and characteristics of most other State agencies. For example, the Court observed that WSSC's scope is entirely local in nature, and that its members are appointed and removed by the County Executives and County Councils of Montgomery and Prince George's Counties without any requirement of State approval. In addition, the Court noted that, among other things, WSSC may impose taxes on residents within its jurisdiction to raise funds sufficient to satisfy judgments levied against it, is designated as a "local government" for purposes of the Local Government Tort Claims Act, and controls independently and without State input nearly all of its internal personnel

management decisions.

After detailing the above characteristics, the Court determined that, in order to further the General Assembly's clearly-stated goals of eliminating discrimination in employment and allowing certain counties to have the anti-discrimination provisions of their County Codes enforced through private civil actions against employers operating within their boundaries, and to uphold the Court's duty to construe remedial statutes, such as § 42(a), broadly in favor of claimants, the term "person," as it is used in § 42(a), should be interpreted to include WSSC as a local entity, based on WSSC's unique nature as a "hybrid" entity largely autonomous from State oversight and the nearly exclusive level of control over WSSC and its employment actions exercised by WSSC's internal management and the local governments of Montgomery and Prince George's Counties. As such, the Court found that WSSC is subject to suits brought pursuant to § 42(a) for violations of the anti-discrimination ordinances of the Montgomery and Prince George's County Codes.

\*\*\*

*W.M. Schlosser Co., et al. v. Uninsured Employers' Fund, et al.*, No. 112, September Term, 2009. Opinion filed May 12, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/112a09.pdf>

LABOR AND EMPLOYMENT – WORKERS' COMPENSATION ACT – STATUTORY  
EMPLOYER LIABILITY – DEFERENCE TO WORKERS' COMPENSATION  
COMMISSION

Facts: Jehue Q. Johnson was an employee of Rose Industrial Services, a hazardous waste removal company, when he suffered an accidental injury while acting as a hazardous waste removal technician, at the Blue Plains Wastewater Treatment Plant located in the District of Columbia. Rose's work at Blue Plains was being performed pursuant to a subcontract with W.M. Schlosser Co., a Maryland based corporation, which had contracted with Rose to do work solely at the Blue Plains site. Mr. Johnson filed for workers' compensation benefits in Maryland, where he resided, for his accidental injury that occurred solely in the District of Columbia, where Rose only had workers' compensation coverage; Schlosser had workers' compensation coverage in Maryland. The Workers' Compensation Commission determined that Schlosser was a "statutory employer" within the meaning of the Workers' Compensation Act, Sections 9-101 to 9-1201 of the Labor and Employment Article, Maryland Code (1991, 1999 Repl. Vol.), but not liable to Mr. Johnson, because there would not have been workers' compensation jurisdiction over a claim in Maryland against Schlosser if it had been the direct employer of Mr. Johnson. The Circuit Court affirmed the Commission, and the Court of Special Appeals reversed, basing its decision on public policy concerns, rather than on a situs determination, without deference to the determination by the Workers' Compensation Commission.

Held: The Court of Appeals reversed and held that the Uninsured Employers' Fund, not Schlosser, was liable for workers' compensation benefits payable to Mr. Johnson, because Mr. Johnson's direct employer, Rose, was uninsured in Maryland. The Court deferred to the Workers' Compensation Commission's interpretation of Section 9-508 of the Workers' Compensation Act and reasoned that Mr. Johnson, who was injured while working wholly outside of this State in the District of Columbia, would not have been a "covered employee" under the workers' compensation statute, had he been directly employed by Schlosser, rather than through a subcontractor. It was not disputed that Mr. Johnson was a covered employee of Rose. Rather, whether Mr. Johnson was a covered employee of Schlosser was the disputed

issue. Schlosser argued that Mr. Johnson could not have been its "covered employee," because he was employed wholly outside of the State in the District of Columbia and thus, did not meet the requirement of Section 9-203. The Fund asserted that once Mr. Johnson was determined to be a covered employee of Rose, he was always a covered employee, and thus, Schlosser, as a statutory employer, was liable to the same extent as Rose, pursuant to Section 9-508 of the Act. The Fund contended that Section 9-508 defined the extent of a statutory employer's liability, rather than including a "condition precedent to the very existence of the statutory employer's liability." In holding for Schlosser, the Court explained that the determination of a "covered employee" precedes that of a "statutory employer." The Court held that situs of employment is the dispositive element when determining whether an employee is a "covered employee" who is eligible to bring, and maintain, a worker's compensation claim in this State.

\*\*\*

120 West Fayette Street, LLLP v. Mayor & City Council of Baltimore, et al., No. 96, September Term, 2009, Filed April 13, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/96a09.pdf>

MUNICIPAL CORPORATIONS-BALTIMORE CITY BOARD OF ESTIMATES-SALE OF PROPERTY-LAND DISPOSITION AGREEMENT-COMPETITIVE BIDDING REQUIREMENTS-PUBLIC WORK

BALTIMORE CITY CHARTER-COMPETITIVE BIDDING REQUIREMENTS-PUBLIC WORKS-DEFINITION

PUBLIC WORKS PROJECTS-PUBLIC USE

PUBLIC WORKS PROJECTS-PUBLIC FUNDING

MUNICIPAL CORPORATIONS-BALTIMORE CITY BOARD OF ESTIMATES-SALE OF PROPERTY-LAND DISPOSITION AGREEMENT-ULTRA VIRES

MUNICIPAL CORPORATIONS-URBAN RENEWAL-DELEGATION OF ADMINISTRATIVE AND MINISTERIAL FUNCTIONS-BALTIMORE CITY CHARTER-SUITABLE BOARD

CIVIL PROCEDURE-JUSTICIABILITY-DECLARATORY JUDGMENT ACTIONS-RIPENESS

Facts: 120 West Fayette Street, LLLP ("120 West Fayette") brought suit against the Mayor and City Council for Baltimore City ("the City"), alleging that the City illegally entered into a Land Disposition Agreement ("LDA") to sell to Lexington Square Partners, LLC ("Lexington Square") property in Baltimore's westside known as the "Superblock." 120 West Fayette alleged that the LDA violated the Baltimore City Charter's competitive bidding requirements because the contract was awarded without competitive bidding. Moreover, 120 West Fayette alleged that, when the Baltimore Board of Estimates ("the BOE") engaged the Baltimore Development Corporation, Inc. ("the BDC") to issue a Request for Proposals ("RFP") to develop the "Superblock," the BOE impermissibly delegated discretionary authority to the BDC and, therefore, the LDA was *ultra vires*. Specifically, 120 West Fayette alleged that when the BDC amended the LDA to include a former Greyhound terminal in the development site and recommended that Lexington Square include additional partners in its development team, the BDC improperly exercised discretionary authority. 120 West Fayette also alleged that the BDC usurped the City's discretionary authority because the process through which the BDC considered proposals and recommended a developer to the BOE rendered the BDC the decision maker.

The BDC is a not-for-profit corporation focused on the development and revitalization of Baltimore. The BDC is governed by a board of directors, some of which are nominated by the Mayor, who also has the authority to remove directors and fill board vacancies. On October 27, 2003, the BDC issued an RFP soliciting proposals from experienced real estate developers to develop the "Superblock." The BDC received four viable proposals. Among the prospective development teams was the group that would later become Lexington Square, to which the BDC ultimately offered the LDA. The LDA provided that at closing Lexington Square would receive a fee simple interest in all property conveyed under the agreement.

On February 27, 2007, 120 West Fayette filed a declaratory judgment action against the City. On January 18, 2008, the Circuit Court granted the City's motion to dismiss. 120 West Fayette appealed to the Court of Special Appeals, but the Court of Appeals granted certiorari on its own motion before the intermediate appellate court considered the case. The Court of Appeals reversed the judgment of the trial court and remanded the case for further proceedings. On remand, the City filed a motion for summary judgment, and 120 West Fayette filed an amended complaint requesting a declaratory judgment establishing that the plans for the "Superblock" must conform to certain historical preservation standards. The City filed a motion to dismiss that count of the complaint. The trial court granted both of the City's motions.

120 West Fayette appealed to the Court of Special Appeals and filed a petition for writ of certiorari seeking bypass review from the Court of Appeals. The City filed a cross-petition for certiorari. The Court of Appeals granted both petitions, which presented five questions. The Court, however, distilled these questions into three issues:

- (1) whether the Circuit Court properly found that the LDA was not subject to competitive bidding requirements,
- (2) whether the Circuit Court properly determined that the City's delegation of authority to the BDC was lawful and therefore that the LDA was not an *ultra vires* act, and
- (3) whether the Circuit Court correctly concluded that it could not issue a declaratory judgment that the proposed plans for the "Superblock" are subject to the MOA and the Renewal Plan development standards because the controversy was not ripe for judicial consideration.

Held: The Baltimore Charter's competitive bidding requirements were inapplicable to the LDA because the LDA was not a public work contract. The Court defined public works as "structures (such as roads or dams) built by the government for public use and paid for by public funds." Additionally, the Court held that the LDA was not *ultra vires* because the City delegated to the BDC only ministerial and administrative responsibilities and the BOE was the ultimate decision maker in the RFP process. Finally, the Court held that 120 West Fayette's request for a declaratory judgment establishing the applicability of the historical preservation standards to the LDA was not ripe for adjudication because the "Superblock" plans had not been finalized or adopted and thus no justiciable controversy existed.

The Court first examined whether the Baltimore Charter's competitive bidding requirements apply to all urban renewal projects regardless of whether the projects are public works. Looking to the language of the competitive bidding requirements, the Court held that the requirements do not apply to projects involving solely the disposition of land because the purpose of the requirements—to obtain the lowest possible bid—is inconsistent with the City's objective as a seller, which is, among other things, to obtain the highest price.

Next, the Court examined whether the LDA constituted a public work contract rather than a contract for the mere sale of land. The Court began by defining public works as "structures (such as roads or dams) built by the government for public use and paid for by public funds."

To determine whether the work contemplated under the LDA would be for public use, the Court considered whether the project's primary function was to benefit the public. Because the project's primary objective was private economic benefit and any public benefits were secondary, the Court concluded that the LDA's primary purpose was not to confer a public benefit. Additionally, the Court's public use analysis weighed whether the completed project would be government owned and operated and accessible to the general public. Noting that Lexington Square and any other private investors would own the completed project and those investors could limit public access to the property, the Court held that the project would not be for public use.

The Court then examined whether the work completed pursuant to the LDA would be government funded. In reaching the conclusion that the project would not be government funded, the Court relied on the following factors: the LDA did not obligate the government directly to fund any construction, the City had

acquired through separate transactions the land upon which the work would be completed, and the financial incentives offered to Lexington Square discounted the purchase price of the property but did not fund any construction. Moreover, the Court reasoned that any ambiguity regarding whether the project would be government funded could be eliminated by considering whether the City would own the completed project, whether the completed project would be publicly maintained, and whether the City would bear the financial risks associated with the project. Because none of these factors implicated the City, the Court held that the "Superblock" development would not be government funded and thus the LDA was not a public work contract.

Third, the Court addressed whether the RFP process constituted an unlawful delegation of City authority rendering the LDA *ultra vires*. After establishing that the Baltimore Charter authorizes the City to delegate its renewal authority to a "suitable board" and noting that the BDC constitutes a public body for the purpose of Maryland's Open Meetings Act, the Court held that the BDC qualified as a "suitable board" under the Baltimore Charter and therefore the City could properly delegate ministerial and administrative urban renewal responsibilities to the BDC. The Court noted that the contract with the BDC was further validated by Baltimore Code provisions authorizing the Department of Housing and Community Development to contract for professional services to assist with the agency's redevelopment work.

Additionally, the Court rejected 120 West Fayette's challenge to the process through which the City selected Lexington Square to develop the "Superblock." After explaining that the standards governing agency conduct cannot anticipate every eventuality an agency might face, the Court concluded that the BDC did not exceed the scope of its mandate when it amended the LDA to include the former Greyhound terminal property because the City had previously charged the BDC with the task of developing that property. The Court further concluded that the BDC did not exceed the scope of its responsibility by recommending that Lexington Square include additional partners in the development team because the recommendation did not obligate the City. Moreover, because the BOE, not the BDC, retained the ultimate authority to award the LDA, the Court held that the process through which the BDC solicited and considered proposals and submitted a recommendation to the BOE was not an unlawful exercise of discretionary authority and therefore the LDA was not *ultra vires*.

Finally, the Court considered whether the Circuit Court



properly dismissed 120 West Fayette's request for a declaratory judgment establishing the applicability of various historical preservation standards to the "Superblock" project. The Court reviewed the record and determined that because the City had not adopted or approved any development plans and had not otherwise indicated that it intended to violate the standards at issue, no actual dispute existed between the parties and thus 120 West Fayette's request for relief was not ripe for adjudication. Accordingly, the Court affirmed the judgment of the Circuit Court on the ground that 120 West Fayette had failed to allege facts rising to the level of a justiciable controversy.

\*\*\*

*Susan Eynon Lark v. Montgomery Hospice, Inc.*, No. 140, September Term 2007, Filed May 13, 2010. Opinion by Murphy, J.

<http://mdcourts.gov/opinions/coa/2010/140a07.pdf>

STATUTORY INTERPRETATION; WRONGFUL DISCHARGE UNDER THE HEALTH CARE WORKER WHISTLEBLOWER PROTECTION ACT (HEALTH OCC. §§ 1-501 TO 1-506)

Facts: Susan Eynon Lark, a registered nurse, brought a wrongful discharge action under the Health Care Worker Whistleblower Protection Act against Montgomery Hospice Inc., her former employer. Lark claimed that the reason given for her discharge was pretextual and was in fact the result of her complaints to management that hospice patients were being endangered by incompetent, unethical, or illegal practices of other employees. Montgomery Hospice filed a motion to dismiss Lark's complaint, arguing that Lark was not protected by the Act because (1) the wrongdoing she complained of was committed by her fellow employees, not the employer, and (2) Lark never reported the alleged wrongdoing to an external authority. During a pre-trial motions hearing, the Circuit Court elected to treat the hospice's motion to dismiss as a motion for summary judgment, and ruled in favor of the hospice.

After Lark noted a timely appeal to the Court of Special Appeals, the Court of Appeals issued a writ of certiorari on its own initiative to address two questions of statutory interpretation: whether a former employee is entitled to assert a wrongful discharge action under the Health Care Worker Whistleblower Protection Act (1) even if she never reported to an external board an activity, policy, or practice of the former employer that is in violation of a law, rule, or regulation; and/or (2) the unlawful acts that she threatened to report were errors committed by fellow employees who did not have the authority to establish the former employer's policy or practice?

Held: The Court of Appeals vacated the summary judgment and remanded the case to the Circuit Court for Montgomery County for further proceedings, holding that (1) the report of unlawful acts to an external board is not a condition precedent to a civil action under the Health Care Worker Whistleblower Protection Act, and (2) when a fellow employee's repeated violation of a law, rule, or regulation is reported to a supervisor, the failure or refusal to correct the violation constitutes a prohibited act of the employer. The Court found that the Act, while designed to protect employers against frivolous Whistleblower actions asserted by disgruntled former employees, does not protect an

employer against a legitimate Whistleblower action asserted by a former employee who was fired before she made an external report, provided that the former employee reported the activity, policy, or practice that posed a substantial and specific danger to the public health or safety to a supervisor or administrator of the employer in writing. A contrary interpretation of the Act would be illogical and would thwart the public policy of encouraging employee's to report their employers' violations of law. The Court held that because a fact-intensive inquiry is necessary to resolve the issue of whether any of the violations that Lark reported actually pose a substantial and specific danger to the public, Montgomery Hospice was not entitled to summary judgment.

\*\*\*

# COURT OF SPECIAL APPEALS

*Chesapeake Bay Foundation, Inc., et al. v. David Clickner, et ux.*, No. 01525, September Term, 2008, filed April 30, 2010, Opinion by Kehoe, J.

<http://mdcourts.gov/opinions/cosa/2010/1525s08.pdf>

## AGENCY LAW - ADMINISTRATIVE STANDING

Facts: The Chesapeake Bay Foundation, Inc. and the Magothy River Association, Inc. opposed two zoning variance applications filed by David and Diana Clickner for property located in Anne Arundel County. The variance applications were initially considered by a County administrative hearing officer, who granted them. Appellants appealed that decision to the Anne Arundel County Board of Appeals. The Clickners moved to have the case dismissed due to lack of standing. In order to have standing to appeal the decision of an administrative hearing officer to the Anne Arundel County Board of Appeals, §§ 3-1-104(a) and 18-16-402 of the Anne Arundel County Code require one to be both "aggrieved" by the administrative hearing officer's decision as well as a party to the proceeding before the administrative hearing officer. The Board dismissed appellants' appeal on the ground that appellants lacked standing to appeal, interpreting *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 144-145 (1967), as holding that a would-be appellant must have a property interest affected by the administrative hearing officer's decision in order to qualify as aggrieved. The Circuit Court for Anne Arundel County affirmed the decision of the Board of Appeals.

Held: The Court of Special Appeals reversed and remanded the decision of the circuit court. The Court of Special Appeals held that *Bryniarksi* does not require a property interest to be affected by an administrative hearing officer's decision in order to be "aggrieved" under §§ 3-1-104(a) and 18-16-402 of the Anne Arundel County Code.

\*\*\*

*Joseph F. Andrulonis v. Mary I. Andrulonis*, No. 2431, September Term 2008, filed May 5, 2010. Opinion by Wright, J.

<http://mdcourts.gov/opinions/cosa/2010/2431s08.pdf>

CIVIL PROCEDURE - JUDGMENTS - PRECLUSION & EFFECT OF JUDGMENTS

LAW OF THE CASE - COLLATERAL ESTOPPEL -; RES JUDICATA

Facts: Joseph F. Andrulonis ("Husband") and Mary I. Andrulonis ("Wife") divorced in 1995. In accordance with their separation agreement, the Circuit Court for Baltimore County ordered Husband to pay alimony in the amount of four thousand dollars (\$4,000.00) per month. "Each party waive[d] his or her right to have any court assume jurisdiction for the purpose of modifying th[at] provision." On July 27, 1998, pursuant to Wife's remarriage, Husband filed a complaint for modification and/or termination of spousal support provisions, which the court dismissed on December 3, 1998. On appeal, we held that the circuit court correctly "concluded that the alimony provision contained in the parties' divorce decree is not modifiable." *Andrulonis v. (Andrulonis) Reilly*, No. 5526, Sept. Term, 1998, Slip Op. at 3 (Ct. of Spec. App. Sept. 20, 1999). Thereafter, on July 30, 1999, the circuit court issued an immediate earnings withholding order, directing Husband to pay alimony by way of a wage lien.

On February 21, 2003, the Court of Appeals decided *Moore v. Jacobsen*, 373 Md. 185, 187 (2003), and held that, "unless an agreement states explicitly that alimony survives a party's remarriage, alimony terminates on the marriage of the recipient spouse." As a result, on May 6, 2008, Husband filed a second complaint, asking the court to strike and/or withdraw its immediate earnings withholding order and seeking judgment against Wife "for three (3) years of wrongful and unlawful taking of monies thereunder." Wife filed a motion to dismiss, which the court granted, after finding that "there is no equitable doctrine that allows the controlling case of *Moore v. Jacobs[e]n*, to trump and foreclose the issue that is the law of this case." This appeal followed.

Held: The Court of Special Appeals reversed and remanded, holding that Husband's second complaint was not barred by the doctrines of law of the case, collateral estoppel, and res judicata. According to the Court, the holding announced in *Jacobsen* dictates that the alimony in this case should be terminated, due to Wife's remarriage. The Court concluded that precluding Husband's claim in this case would not only undermine

public policy, but would foster a continuing wrong.

\*\*\*

*Janay Barksdale v. Leon Wilkowsky et al.*, No. 48, September Term, 2009, filed May 7, 2010. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2010/48s09.pdf>

CIVIL - JURY INSTRUCTIONS - LEAD PAINT POISONING - HARMLESS ERROR - RELEVANCE.

Facts: Janay Barksdale, appellant, lived with her grandmother at 2440 West Baltimore Street in Baltimore, Maryland, (the "Property") from her birth in 1988 until her grandmother vacated the Property in 1999. G&S Real Estate owned the Property, and neither G&S Real Estate nor its partners inspected the Property during the time that Ms. Barksdale resided there. G&S Real Estate subsequently sold the Property and the new purchaser performed a "[t]otal gut rehab" on the Property. Following these renovations, lead-based paint was detected in one location on the interior of the Property.

On November 21, 2006, Ms. Barksdale filed a complaint against G&S Real Estate and its two partners, appellees, in the Circuit Court for Baltimore City. Count I alleged that, as a result of appellees' negligence in failing to maintain and inspect the Property and abate any lead paint hazard, Ms. Barksdale "suffered severe and permanent brain damage" as a result of exposure to lead-based paint. Count II alleged that appellees violated the Maryland Consumer Protection Act by marketing and leasing the Property when appellees "knew that the dwelling . . . contained flaking, loose or peeling paint or plaster or lead[-]based paint accessible to children." Ms. Barksdale requested two million dollars in damages on each count. Following a five-day trial, the jury returned a verdict in appellees' favor on all counts.

Held: Judgment affirmed. Where a tenant of a rented property alleged that she suffered injuries as a result of exposure to lead-based paint during her occupancy, the circuit court erred in instructing the jury that the Baltimore City Housing Code imposed a duty on the tenant to maintain the property in a clean and sanitary condition. Although the instruction was a correct statement of the statutory obligation of the tenant, it was not relevant to the issues before the jury, *i.e.*, whether the landlord was negligent or engaged in deceptive trade practices in renting the property. The error, however, was harmless error that did not require a new trial. The court's instructions made clear that the relevant issue for the jury was the conduct of the landlord, and there was no suggestion during closing argument that the landlord was relieved in any way of its statutory obligations to keep the premises free of chipped or flaking paint.

The circuit court did not abuse its discretion in admitting evidence that the average blood lead level in the United States in 1976 was 14.6 where the tenant argued that her blood lead levels, ranging from 15-18, caused her mental impairments. Evidence that the average blood lead level in the United States was 14.6 was relevant to the landlord's defense that the tenant failed to prove that her blood lead levels caused her impairments.

Appellant is not entitled to reversal based on the court's admission of evidence that her mother smoked cigarettes and drank alcohol during her pregnancy. Although appellant argues that the evidence was improperly admitted, in the absence of expert testimony regarding the causal link between this activity and appellant's brain damage, she cites no authority in support of her position. Under these circumstances we will not consider this argument. Moreover, even if we considered the issue and found error in the admission of this evidence, any error was harmless. The landlord did not mention alcohol and cigarette use in closing argument, and the verdict sheet indicates that the jury did not reach the issue of causation.

\*\*\*



*Alfred Jerome Reeves v. State* - No. 1723, September Term, 2008, filed May 3, 2010. Opinion by Zarnoch, J.

<http://mdcourts.gov/opinions/cosa/2010/1723s08.pdf>

CRIMINAL LAW - CONDUCT OF TRIAL - ABSENCE OF DEFENDANT FROM TRIAL

Facts: Appellant was tried before a jury on charges of armed carjacking and related offenses. Appellant was present during the entire one-day evidentiary, argument, and jury instruction portions of the trial. That evening, the judge instructed the jurors that they were excused until 9 a.m. the following morning, at which time they would resume deliberations. The judge then indicated to counsel and appellant that they were not required to reassemble at 9 a.m. the next morning, but said that deliberations would take at least two hours, "so just make certain we know where you're at." The next morning, at 11:20 a.m., appellant was not in court. The judge asked defense counsel where appellant was, to which counsel answered, "All I can represent is he's on his way," and that he talked to appellant's family members and appellant, who said that appellant was on his way. The judge responded, "We're going to take the verdict in his absence. It's now 11:20. He was here yesterday when we told everyone that the jury would return at 9:00 today." The jury returned guilty verdicts on most of the charges. The jury was polled, and all of the jurors confirmed that they agreed with the verdict. The judge then issued a bench warrant for appellant's arrest.

Appellant turned himself in almost one month later. At his sentencing hearing, appellant admitted that he was on the run from November 5, 2007, the day the verdict was rendered, until he turned himself in on December 3, 2007, at which time "[he] got sick and tired of running, and [he] had to surrender." He appealed and contended that (1) the court violated his right to be present at every stage of his trial when it accepted the verdict in his absence; (2) the evidence was insufficient to prove that he committed a carjacking and robbery; and (3) the evidence was insufficient to prove that he was the individual who committed the crimes.

Held: The Court of Special Appeals affirmed the appellant's convictions. It is well established in Maryland that a criminal defendant is entitled to be present at every stage of his trial. Under Maryland Rule 4-231(c)(1), however, the right to be present is waived by a defendant who is voluntarily absent from the proceedings. In *Pinkney v. State*, 350 Md. 201 (1998), the Court of Appeals described the inquiries a trial court must make to determine whether a defendant's absence is voluntary. In this

case, although the trial judge did not conduct an extensive inquiry on the record into appellant's whereabouts and any reason for his absence, since the judge had told the appellant the previous evening to ensure that the court knew his whereabouts, the appellant was out on bail before and during the trial, and the evidence of appellant's guilt was overwhelming, the circumstances provided the judge a sufficient basis to conclude that appellant voluntarily failed to appear that day.

The Court of Special Appeals held, moreover, that evidence that a defendant's absence was voluntary that comes to light after a trial court proceeded in the defendant's absence may be considered in determining whether the trial court's decision was erroneous. Since it was undisputed that appellant chose to flee, rather than appear in court to hear the verdict and face likely incarceration, it is clear that appellant voluntarily absented himself from the proceeding. Therefore, apart from the indicia upon which the trial judge apparently relied when proceeding with the rendering of the verdict, the evidence produced subsequently demonstrated that the court's decision to proceed was not erroneous.

Lastly, the Court held that even if the trial court's failure to conduct a more extensive investigation into the voluntariness of appellant's absence and its decision to allow the verdict to be rendered in his absence were abuses of discretion, any error was harmless. Since the jury was not told during their deliberations that appellant would not be present for the rendering of the verdict, there is no way that his absence could have tainted the deliberative process. Appellant's attorney was present during the whole trial and the rendering of the verdict and polled the jury. Lastly, any error in the court's process of determining whether appellant's absence was voluntary was harmless because appellant was in fact voluntarily absent.

The Court then addressed the appellant's sufficiency arguments. The act of carjacking is the taking of "unauthorized possession or control of a motor vehicle from another individual who actually possesses the motor vehicle, by force or violence, or by putting that individual in fear through intimidation or threat of force or violence." Md. Code (2002), Criminal Law Article, § 3-405(b)(1). The words "actual possession" in the statute means that a carjacking occurs when a vehicle is forcibly taken from the care, custody, control, management or possession of one having a right superior to that of the carjacker. The victim need only be entering, alighting from, or otherwise in the immediate vicinity of the vehicle when an individual obtains unauthorized possession or control of the vehicle. Robbery is the felonious taking and

carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear. The words "from his person or in his presence," as used in the common-law definition of robbery, make plain that the property taken need not be in the victim's physical possession; rather, it need only be taken in his presence, *i.e.*, within the victim's immediate control or custody. In this case, the victim was in the immediate vicinity of and walking to his vehicle when appellant approached, intimidated the victim with threats of violence, grabbed the car keys from his hand and then took off with the car. The evidence was therefore sufficient to prove carjacking and robbery.

Last, the Court rejected the appellant's contention that the evidence was insufficient to prove that he committed the crimes. First, the issue was not preserved because defense counsel at trial did not advance this argument when he moved for judgment of acquittal at the close of the State's case or at any other time during the trial. Moreover, even if preserved, the victim's testimony that appellant committed the crimes coupled with two police officers' testimony that the appellant was involved in a high-speed chase driving the stolen vehicle shortly after the crimes occurred provided the jury with sufficient evidence to conclude that appellant committed the crimes.

\*\*\*

*Jacquon Lakeem Collins v. State of Maryland*, No. 1938, September Term, 2008, filed May 5, 2010, Opinion by Kehoe, J.

<http://mdcourts.gov/opinions/cosa/2010/1938s08.pdf>

CRIMINAL PROCEDURE - EFFECT OF GOOD FAITH NOL PROS OF CHARGES WHICH DOES NOT HAVE THE PURPOSE OR NECESSARY EFFECT OF CIRCUMVENTING THE 180 DAY RULE

Facts: Jacquon Lakeem Collins, appellant, was charged with crimes relating to the attempted murder of Juan Figueroa. The initial charges were nol prossed because of the State's concerns over the degree of appellant's involvement in the victim's attempted murder. After further investigation of leads provided by the victim's family suggesting the involvement of others, the State reindicted appellant. Appellant moved for dismissal of the charges on the basis that his trial was outside the 180 day limit, established by MD. CODE ANN. CRIM. PRO. § 6-103 (2002) and Maryland Rule 4-271(a), from the initial appearance of his counsel in the first criminal proceeding. The circuit court denied Collins' motion to dismiss, finding that the State nol prossed the charges in good faith. Collins was convicted of attempted second degree murder, first degree burglary, assault in the first and second degree, wearing or carrying a dangerous weapon with intent to injure and reckless endangerment.

Held: The Court of Special Appeals affirmed the convictions. Applying the reasoning of the Court of Appeals in *Huntley v. State*, 411 Md. 288, 302 (2009), the Court of Special Appeals held that the nol crossing of charges, in good faith, does not trigger the severe dismissal sanctions expounded in *Hicks v. State*, 285 Md. 310, 369-70, *on motion for reconsideration*, 285 Md. 334 (1979), and its progeny, where the nol pros does not have the purpose or necessary effect of circumventing the 180 day rule established by MD. CODE ANN. CRIM. PRO. § 6-103 and Maryland Rule 4-271(a).

\*\*\*

*Andre Marlin A/K/A Kendrick Martin v. State of Maryland, No. 1032, September Term, 2008.* Opinion by Hollander, filed April 30, 2010.

<http://mdcourts.gov/opinions/cosa/2010/1032s08.pdf>

CRIMINAL LAW - RECKLESS ENDANGERMENT - FIRST DEGREE ASSAULT - FIREARM - C.L. § 3-202(a)(2); C.L. § 3-204(a) - MERGER; REQUIRED EVIDENCE TEST - RULE OF LENITY - PRINCIPLES OF FUNDAMENTAL FAIRNESS - UNSWORN PRETRIAL STATEMENTS - INCONSISTENT STATEMENTS - RULE 5-802.1 - NANCE V. STATE, 331 MD. 549 (1993) - SUFFICIENCY OF THE EVIDENCE.

Facts: Following a bench trial in the Circuit Court for Baltimore City, the court found appellant guilty of first degree assault; use of a handgun in the commission of a crime of violence; reckless endangerment, and related offenses. The court sentenced appellant to 10 years' incarceration for first degree assault; a concurrent sentence of 5 years in prison, without the possibility of parole, for the handgun conviction; and a concurrent term of 5 years for reckless endangerment.

Before trial, the victim, Mr. Williams provided police with oral and recorded statements, in which he identified appellant as the shooter. But, Williams also stated: "If I go to court, if you all was to arrest Mr. Martin, I'm going to say that he ain't do it and I don't know nothing." At trial, Williams testified that at about 7:45 p.m. on January 4, 2006, while he was trying to buy drugs, he was shot in the back. But, he claimed that he did not "remember" who shot him. He also testified that he did not "know" appellant, although he might have seen him in "passing." Williams identified his signature and handwriting on the back of the photo array, in which he had identified appellant before trial, but claimed that he had no recollection of making any statements to the police. Williams explained that, at the time he was shot and when he spoke to the detectives, he was "strung out, real strung out" on cocaine, heroin, and alcohol, and was "out of it."

Two police officers testified as to Williams's pretrial statements. Those statements were the only evidence against the appellant as to criminal agency. In addition, Williams's medical records were admitted by stipulation. They established that he suffered a gunshot wound on the date in question.

Held: Affirmed: At trial, the victim's testimony was inconsistent with his pretrial statements implicating the defendant as the shooter. One of those pretrial statements was a verbatim audio recording. Although the victim's pretrial

statements were unsworn, they were properly admitted as substantive evidence at trial. That evidence, which was corroborated by police detectives, was sufficient to establish criminal agency.

The Court of Special Appeals also held that the defendant's convictions for reckless endangerment and first degree assault by use of a firearm did not merge under the required evidence test, because each involved different elements. But, his sentences merged under the rule of lenity or principles of fundamental fairness, because the same conduct, the single act of shooting a single victim, formed the basis for both convictions. This warranted only one sentence.

\*\*\*

*Deon Arnell Turner v. State of Maryland, No. 2934, September Term, 2007.* Opinion by Hollander, filed April 29, 2010.

<http://mdcourts.gov/opinions/cosa/2010/2934s07.pdf>

CRIMINAL LAW - WAIVER OF COUNSEL - MARYLAND RULE 4-215 - MARYLAND RULE 4-245

Facts: After a jury trial, at which appellant appeared without counsel, appellant was convicted of driving a motor vehicle with a revoked license, driving without a license, and speeding. Because appellant was a subsequent offender, the court imposed an enhanced sentence for driving on a revoked license. However, in regard to appellant's waiver of counsel under Rule 4-215, appellant was never advised by the court about the potential subsequent offender penalty that he faced. Instead, prior to trial, the State sent appellant a "Notice of Intent to Seek Enhanced Penalty," as required by Md. Rule 4-245. That notice did not specify the particular enhanced penalties that appellant faced.

Held: Reversed. Appellant's waiver of counsel was not valid under Rule 4-215, because the court was required to advise appellant about the enhanced penalty that he faced. Moreover, the State's notice under Rule 4-245 did not cure the improper advisement.

\*\*\*

*Fire and Police Employees' Retirement System of Baltimore City V. Amy Middleton*, No. 02503, September Term, 2008, filed May 6, 2010. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2010/2583s08.pdf>

LABOR AND EMPLOYMENT - LINE-OF-DUTY DISABILITY BENEFITS: TOTAL AND PERMANENT INCAPACITATION: §§ 34(E-1)(1) OF THE BALTIMORE CITY CODE: INJURY ARISING OUT OF AND IN THE COURSE OF THE ACTUAL PERFORMANCE OF DUTY: CONGENITAL ABNORMALITIES AND CAUSATION

Facts: On July 4, 2006, the appellee, a Baltimore City police officer, was working crowd control at the Inner Harbor Park in Baltimore when she received a "Signal 13" call, indicating that a fellow officer needed immediate assistance. She then ran to where the officer was located, going down a set of stairs and over some walls at Harborplace. After returning to her post, the appellee started to feel pain in her lower back. The appellee had severe pain the following morning and informed her sergeant that she needed to visit the clinic at Mercy Hospital. The doctor examined her and recommended that she be placed on light duty with "no suspect apprehension, no prisoner contact . . . [she should] be able to change positions at will if needed." The appellee remained on light duty and under the care of the doctors at Mercy until September 11, 2006, when she was released to full duty. The appellee remained on full duty until March 15, 2007, when she reported to Mercy complaining of lower back pain that she had noticed two days earlier after she had been baking cookies at home. On June 13, 2007, Dr. Mohammed H. Zamani conducted an independent medical evaluation and concluded that the appellee was capable of working without restrictions. In the aftermath of the March 2007 hospital visit, the appellee was seen by three other doctors between August 2007 and March 2008, all of whom opined that her medical condition was chronic in nature and prevented her from performing the essential functions of a police officer. On April 28, 2008, a hearing examiner from the Fire and Police Employees' Retirement System held a hearing to determine whether the appellee was eligible for line-of-duty disability. On May 8, 2008, the hearing examiner issued a written decision in which the examiner denied line-of-duty disability retirement but awarded non-line-of-duty disability retirement to the appellee. On November 20, 2008, the Baltimore City Circuit Court held a judicial review hearing and reversed the decision of the hearing examiner. The court remanded the case with instructions to grant the appellee's application for line-of-duty retirement.

Held: The Court of Special Appeals reversed the decision of



the Baltimore City Circuit Court. A reasonable mind could conclude from this report, as the hearing examiner did, that congenital abnormalities caused the appellee's disability. Although a claimant is not required to show that the line-of-duty injury is hermetically sealed from any pre-existing condition or prior injury, *Hersl v. Fire & Police Employees Retirement System*, 188 Md. App. 249, 268-9 (2009), the hearing examiner has discretion to accept any explanation for a disability which is supported by substantial evidence. There was relevant and substantial evidence from which a reasonable mind could conclude that the appellee's disability was not the result of the injuries sustained in the course of duty. The inferences drawn by the hearing examiner are supported by a fair reading of the record. The decision of the hearing examiner was not arbitrary, capricious, illegal or discriminatory. Therefore, we reverse the decision of the circuit court and remand the case to that court for the entry of judgment in favor of the appellant.

\*\*\*

*MBC Realty, LLC et al. v. Mayor and City Council of Baltimore*, No. 2601, September Term, 2008, filed May 5, 2010. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2010/2601s08.pdf>

REAL PROPERTY - ZONING -- CREATION BY TEXT AMENDMENT OF NEW CONDITIONAL USE IN A PARTICULAR ZONE -- PRESUMPTION OF VALIDITY OF LEGISLATIVE ACTION -- GRANT OF CONDITIONAL USE BY ORDINANCE SUBJECT TO JUDICIAL REVIEW FOR SUBSTANTIAL EVIDENCE ON FACTS AND CORRECTNESS ON LAW.

Facts: In 2000, the Mayor and City Council of Baltimore enacted an ordinance prohibiting the erection of new billboards in all zoning districts in Baltimore City. In 2003, the City Council enacted by text amendment an ordinance that allowed new billboards to be erected on any publicly owned stadium or arena as a conditional use in the B-5 zoning district. Within a few weeks, it granted by ordinance an application by the City and Edwin Hale, the owner and major tenant of the Baltimore Arena, for a conditional use to erect 14 new billboards on the exterior of three walls of the Arena. The grant of the conditional use was conditioned upon the removal of an equal number of existing billboards in specified areas of the City.

Owners and individuals with interests in property near the Arena challenged the City Council's enactment of the ordinances in question. In *MBC Realty, LLC v. Mayor & City Council of Baltimore*, 403 Md. 216 (2008), the Court of Appeals ruled that the proper procedural means to challenge the ordinances was a declaratory judgment action to challenge the conditional use exception to the billboard moratorium and an administrative appeal to challenge the ordinance granting the Arena a conditional use to erect the billboards. On remand, the circuit court declared that the ordinance creating the conditional use exception was valid and upheld the City Council's grant of a conditional use to the Arena. The appellants appealed both judgments.

Held: The ordinances were validly enacted. The creation by text amendment ordinance of a new conditional use in a particular zoning district was in the nature of a legislative act. It is therefore entitled to a presumption of validity. Creation of a new conditional use in a particular zoning district did not need to be carried out by comprehensive rezoning. Enactment of the ordinance was not illegal piecemeal zoning, spot zoning, or contract zoning.

The grant of the conditional use to the Arena was a quasi-judicial zoning action by the City Council acting in its agency capacity. It is subject to judicial review for substantial evidence in the record and for legal correctness. The City Council's zoning action satisfied both prongs of that standard.

\*\*\*

# ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals of Maryland dated May 12, 2010, the following attorney has been disbarred from the further practice of law in this State:

LORIN HENRY BLEECKER

\*