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Facts: The Attorney Grievance Commission of Maryland, acting through Bar Counsel and pursuant to Maryland Rule 16-751(a), filed an amended Petition For Disciplinary or Remedial Action against Respondent Barbara Osborn Kreamer on June 8, 2007. The petition alleged Respondent violated Maryland Rules of Professional Conduct ("MRPC"), 1.1 (Competence), 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15 (Declining or Terminating Representation), 8.1 (Bar Admission and Disciplinary Matters), 3.3 (Candor Toward the Tribunal), and 8.4 (Misconduct) in her representation of six clients.

The Circuit Court for Harford County conducted an evidentiary hearing and issued proposed findings of fact and conclusions of law, which culminated in a determination that Respondent violated Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 8.4(a),(c), and (d). Respondent filed many exceptions to the hearing judge's findings of fact and conclusions of law. Bar Counsel filed no exceptions. The Court of Appeals overruled each of Kreamer's exceptions. Of particular interest, the Court of Appeals held that Respondent's practice of billing clients separately for time spent completing her time sheets ("accounting services") violated Rule 1.5. The Court stated that while Rule 1.5 allows attorneys to charge for work performed during the representation and to seek reimbursement for costs of services or expenses undertaken during the representation, it was not reasonable, under the circumstances presented, for Respondent to separately charge her clients for "accounting services." The Court viewed "accounting services" as an overhead expense that should usually be subsumed in the professional fee that is charged for the legal services rendered. The Court then noted: "Should a lawyer wish to charge clients for overhead costs and expenses, such a charge - including its method of calculation - ought to be explained to the client prior to the start of representation, and expressly stated in the written retainer agreement. Most importantly, the client must consent in advance to the additional fees and their method of calculation."

Held: Disbarment. The Court concluded that Respondent, in each of the six complaints, accepted fees and then failed to represent her clients competently. In addition, Respondent billed several clients for accounting services that are customarily a part of the operating costs of a law practice. The Court then took notice of Respondent's violation of Rule 8.4(c)(Misconduct). The Court concluded that Respondent's intentional disregard for her clients' legal matters as well as her intentional misrepresentations to her clients regarding the status of their cases reflects her disregard for client matters and the rules of professional responsibility. In addressing the appropriate sanction for Respondent's misconduct, the Court stated that Respondent's intentionally dishonest conduct, coupled with her prior disciplinary record, including three prior sanctions imposed by the Court, demonstrated a continuing pattern of misconduct and threatened the public's confidence and trust in the legal profession, thereby warranting the sanction of disbarment.

*Attorney Grievance Commission v. Barbara Osborn Kreamer* - Misc. Docket AG No. 18, September Term 2006. Opinion filed April 17, 2008 by Greene, J.

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CIVIL PROCEDURE - MISJOINDER OF PARTIES - SEVERANCE OF CLAIMS INTO SEPARATE ACTIONS - WHEN APPROPRIATE

FINAL JUDGMENT DOCTRINE - RELATIONSHIP TO MISJOINDER - SEVERANCE OF PARTIES UNDER MARYLAND RULE 2-213 IS INAPPROPRIATE WHEN SOLE PURPOSE IS CIRCUMVENTION OF THE FINAL JUDGMENT RULE

Facts: Nearly ten years ago, seven minor plaintiffs (Reginald Smith, Jr., Shatara Smith, Shatavia Smith, Christian Brantley, Brandon Hamilton, Gerald Shorter, and Octavia Shorter) from four families (the Smiths, the Brantleys, the Hamiltons, and the Shorters) filed a complaint in the Circuit Court for Baltimore City. Based on exposure to the element, lead, these four families sought to recover damages from twenty-one defendant companies on

varied products liability-related claims. The fifteen-count complaint, filed 20 September 1999, alleges that the defendant companies are liable to the plaintiffs because they either 1) produced tetraethyl lead (TeL) used in motor vehicle gasoline; 2) produced lead pigment used in manufacturing paint; 3) produced paint that contained the lead pigment; 4) produced lead-free paint without warning consumers on the containers how to remove safely previously applied lead paint in the surface preparation instructions; or 5), in the case of two trade organization defendants, allegedly promoted the use and unsafe removal of lead paint.

Early in the proceeding, the plaintiffs moved to sever the action into four separate cases, one for each family, or, in the alternative, to allow them to dismiss the action without prejudice in order that separate actions could be brought. The court denied that relief. Instead, it treated the motion as one for separate trials pursuant to Maryland Rule 2-503(b) and granted that relief. In a subsequent pre-trial scheduling order, the court set four separate trial dates – one for the Smith children, one for the Brantley child, one for the Hamilton child, and one for the Shorter children – and established different discovery schedules with respect to the quadrifurcated claims. Although that scheduling order was amended from time to time, the question of severance was never revisited, and the case proceeded in accordance with the ruling denying the motion for severance but granting separate trials on a per family basis. The effect of the court's ruling was to maintain the action as a unitary one, involving all plaintiffs against all defendants.

The case then proceeded with many motions to dismiss and for summary judgment, which ultimately were granted, in whole or in part. On December 10, 2002, all of the plaintiffs filed an appeal "from all appealable Orders, including but not limited to the final judgments entered on November 15, 2002." The Court of Special Appeals, in an unreported opinion, recognized that there was no final judgment in the case in that many of the counts against many of the defendants were still unresolved with respect to the Brantley, Hamilton, and Shorter plaintiffs. It assumed, however, that all claims against all defendants had been finally resolved with respect to the Smith children, and concluded, as a result, that to condition the Smith appeal upon the entry of final judgment in the claims brought by the other plaintiffs would be inefficient. That was so, it said, because the facts for each family of plaintiffs were different and because a decision in the Smith appeal might clarify issues that remain in the other cases. On that ground, the intermediate appellate court, invoking Maryland Rule 8-602(e)(1)(C), purported to enter final judgment on the Smith

claims and proceeded to address the substantive issues presented in the appeal.

The Court of Special Appeals affirmed the trial court's grant of summary judgment with respect to fraud, negligent misrepresentation, and intentional concealment claims on the ground that the plaintiffs failed to produce sufficient evidence of reliance on their part, which the appellate court held was necessary to establish liability. The court also agreed that the manufacturers of non-lead-based paint had no duty to warn the plaintiffs of the hazards associated with the removal of lead paint, not made by them, when preparing the surface for repainting. The court found no duty owing to the plaintiffs by the two trade associations. The one area in which the appellate court disagreed with the trial court concerned the liability of the defendants that produced lead pigment and lead paint – claims of alternative liability, negligent product design, supplier negligence, strict liability for defective design, and liability of commercial sellers for harm caused by products into which harmful components are integrated. Judgments with respect to those claims against those defendants were reversed and the case was remanded for further proceedings.

The Court of Appeals granted certiorari and determined that the Court of Special Appeals erroneously invoked Maryland Rule 8-602(e)(1)(C), on its initiative, to render a final judgment as to less than all claims by all of the parties because the Circuit Court had no authority to do so under Maryland Rule 2-602. *Smith v. Lead Indus. Ass'n, Inc.*, 386 Md. 12, 871 A.2d 545 (2005) (*Smith I*). The Court of Appeals discussed Maryland Rule 2-602. As a policy underpinning, the rule is intended to prevent piecemeal appeals, which the Court noted are inefficient and costly and may create significant delays, hardship, and procedural problems, although "the infrequent harsh case" may justify departing from the usual rule. With regard to Maryland Rule 8-602(e), the Court noted that an appellate court could render a final judgment as to less than all claims by all parties in even more limited situations. The Court concluded that the decision of the Court of Special Appeals to enter judgment under Rule 8-602(e) delayed resolution of the claims of the other plaintiffs, increased the uncertainty of unresolved claims, and enabled additional appeals. The Court vacated the judgment of the Court of Special Appeals and remanded the case to that court with instructions to dismiss the appeal.

Returning to the Circuit Court, the plaintiffs, on 2 September 2005, filed a "Motion for Entry of Final Judgment Consistent with the Maryland Court of Appeals' Opinion and Mandate." In the motion, they submitted that the Court of Appeals in *Smith I* stated

that the Smith plaintiffs are unable to appeal final judgments relating to them unless, and until, the other plaintiffs' cases have been severed or dismissed. To that end, plaintiffs filed a Motion to Sever and to Stay, which, in part, sought to sever the cases of Brandon Hamilton, Christian Brantley, and Gerald and Octavia Shorter from the cases of Reginald, Shatara, and Shatavia Smith. The plaintiffs, noting that many, if not all, of the issues to be raised in the appeal in connection with the Smith plaintiffs are directly relevant and pertinent to the other four cases, further requested that the Circuit Court stay the cases of Brandon Hamilton, Christian Brantley, and Gerald and Octavia Shorter pending the resolution of the Smith cases' appellate process.

Concurrently with the motion for final judgment, the plaintiffs filed a "Motion to Sever and to Stay." The Motion posited that the facts associated with each family are unique, distinguishable, and are not in any way related to each other. Plaintiffs then reiterated that they believed the Court of Appeals in *Smith I* instructed that they should seek a severance of the cases of Brandon Hamilton, Christian Brantley, and Gerald and Octavia Shorter from those of Reginald, Shatavia, and Shatara Smith. Plaintiffs also requested that the court stay these cases until the Smith case, because of its relevance and applicability to all plaintiffs' cases, was resolved.

On 6 and 21 February 2006, the trial judge granted plaintiffs' Motion to Sever and Stay and plaintiffs' Motion for Entry of Final Judgment, respectively. Believing that these two orders created a final appealable judgment within the meaning of Maryland Rule 2-602, the Smith plaintiffs again appealed to the Court of Special Appeals. Defendants countered that the extant judgments remained not properly appealable because a number of claims made by the other three families were outstanding. Agreeing with the arguments of the defendant companies, the intermediate appellate court, in an unreported opinion, held that none of the various orders docketed in the Circuit Court in this case, either individually or collectively, resolved all claims against all parties. The court found that the Smith plaintiffs mischaracterized this Court's judgment in *Smith I.*

The Court of Appeals granted certiorari to consider first whether the Circuit Court's two orders created final, appealable judgments as to the Smith plaintiffs (Petitioners), and, if able to answer that in the affirmative, determine whether the trial court committed reversible error by dismissing: 1) Petitioners' fraud and misrepresentation claims against Respondents for failure to allege reliance upon the alleged fraudulent behavior; 2) Petitioners' product design defect, negligence, and strict liability claims

concerning the manufacture, sale, and distribution of lead-based pigments; and 3) Petitioners' claims against various companies because their surface preparation instructions did not address the safe removal of lead-based paint.

Held: Affirmed. The Court of Appeals concluded that, based on the record before it, severance of the plaintiffs' claims along family lines under Maryland Rule 2-213 was inappropriate and that Petitioners (the Smith plaintiffs), were attempting to circumvent the final judgment rule. The Court declined, therefore, to consider the other issues before it.

The Court looked to the merits of Petitioners' assertion that the trial court could sever claims under Maryland Rule 2-213 in this case. The Court noted that the trial court could sever claims in some circumstances because the Maryland Rule is styled after Federal Rule of Civil Procedure 21, which allows the severance of a single action into separately appealable actions where considerations of convenience, fairness, and separability in law and logic are met.

The Court found that these considerations are similar to ones that prevent circumvention of the final judgment rule (Rule 2-602) in Maryland. The Court noted that a party normally must await the entry of a final judgment, disposing of all claims against all parties before seeking appellate review, unless one of three narrow exceptions applies. The purpose of this requirement is to prevent piecemeal appeals, which are inefficient and costly, may create significant confusion, delays, hardship, and procedural problems, and may cause the appellate court to be faced with having the same issues presented to it multiple times.

Applying these principles to the record, the Court determined that the Circuit Court improperly severed the families' claims in this case and that Petitioners sought to circumvent the final judgment rule by seeking the severance. The Court noted that all of the plaintiffs joined in filing a single complaint alleging fifteen counts on behalf of all the plaintiffs against the defendants. The Court noted that allowing each family's claims to proceed in piecemeal fashion may lead to delayed resolution of the plaintiffs' claims, greater uncertainty as to the status of parties, and set the stage for multiple additional appeals. The Court observed that Petitioners and the other plaintiffs, in their Motion to Sever and Stay and their Motion for Final Judgment, admitted that common issues affect the outcome of all the claims and that severance of the claims would pose a significant danger of inconsistent judgments in the separate actions.

The Court addressed Petitioners' argument that severance was justified because the facts necessary to show liability in each family's claims may vary. The Court held that such a finding is justification for separate trials under Maryland Rule 2-503(b) (as the trial court initially granted), but not for severance under Rule 2-213. The Court held that severance is improper when the issues in the litigation arise out of the same transaction, occurrence, or series of transactions, and there is a common question of law or fact with respect to all or part of the action. Similarities of the claims of plaintiffs need not be total, and the results on all claims need not be the same.

*Renee Kennedy, Next Friend, et al. v. Lasting Paints, Inc., et al.* - Case No. 88, Sept. Term 2007. Opinion filed 7 May 2007 by Harrell, J.

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CRIMINAL LAW - APPEALS - VICTIMS' RIGHTS - MARYLAND RULE 8-111 - A CRIME VICTIM MAY PARTICIPATE IN A CRIMINAL APPEAL, UNDER MARYLAND RULE 8-111(c), IN THE SAME MANNER AS A PARTY REGARDING ISSUES THAT DIRECTLY AND SUBSTANTIALLY AFFECT THE VICTIM'S ENUMERATED RIGHTS.

CRIMINAL LAW - SENTENCING - MOTION FOR RECONSIDERATION - MARYLAND RULE 4-345 - AN INDIVIDUAL TRIAL COURT MAY NOT INCREASE A DEFENDANT'S SENTENCE AFTER A SENTENCE HAS BEEN IMPOSED EVEN WHERE THE SENTENCE WAS TAINTED BY AN IRREGULARITY, BUT THE DEFENDANT WAS NOT RESPONSIBLE FOR THE IRREGULARITY.

CRIMINAL LAW - SENTENCING - MARYLAND RULE 4-345 - ILLEGAL SENTENCE - A SENTENCE IS NOT ILLEGAL WHERE THE VICTIM NOTIFICATION PROVISIONS OF MARYLAND RULE 4-345(e) AND (f) WERE NOT COMPLIED WITH PRIOR TO IMPOSITION OF SENTENCE.

Facts: On 10 April 1998, Sharden Busie Hoile, the Petitioner/Cross-Respondent, pled guilty in the Circuit Court for Prince George's County to a charge of first degree assault of Ms. Tracy L. Palmer, a former romantic partner. Hoile was sentenced to

15 years in prison, which was suspended in favor of five years of probation. On 18 May 2001, Hoile was found to have violated that probation and therefore was ordered by the trial judge to serve the balance of the original 15 year sentence concurrently with a sentence Hoile then was serving for a separate conviction in the Circuit Court for Calvert County for a crime also committed against Palmer. Hoile filed a motion for reconsideration of sentence in the Prince George's County case.

On 10 December 2004, the Circuit Court for Prince George's County held a hearing on Hoile's motion. The motion was granted. As a result, Hoile ostensibly was to be committed to the Department of Health and Mental Hygiene for substance abuse treatment. The Circuit Court for Prince George's County forwarded a copy of the order imposing the altered sentence to the Circuit Court for Calvert County. The Circuit Court for Calvert County declined, however, to reconsider Hoile's sentence in its case. This result occasioned the Circuit Court for Prince George's County to hold another hearing on 8 April 2005, at Hoile's request, to consider the effect on its 10 December 2004 ruling of the refusal by the Calvert County court to alter its sentence of imprisonment. The Circuit Court for Prince George's County, upon reflection, again modified the sentence in its case, the present one, to time served and placed Hoile on five years of supervised probation.

On 8 December 2005, Ms. Palmer wrote a letter to the trial judge in Hoile's case in Prince George's County stating that she had not been notified of the 10 December 2004 or 8 April 2005 hearings, although she previously requested such notification in writing in a letter dated 2 July 1998 to the Assistant State's Attorney who prosecuted the case. The court held a hearing on 10 February 2006, where Palmer was represented by counsel, and found as a fact that the victim had not been notified properly, as required by Maryland Code (2001, 2007 Cum. Supp.), Criminal Procedure Article, §§ 11-104, 11-503, and Maryland Rule 4-345(e)(2) and (f). On Palmer's motion, the trial court vacated the altered sentence imposed on 8 April 2005.

In effect, the vacation of Hoile's reconsidered sentence reinstated the immediate prior sentence (the one imposed upon finding a violation of probation), at least until the trial judge were to act anew on the now resurrected motion to reconsider sentence. Before the judge could move on to revisit the merits of Hoile's Motion to Reconsider Sentence at the 10 February 2005 hearing, Hoile asked for a continuance. One was granted. On 13 February 2006, a new commitment order was filed by the Clerk of the Circuit Court, committing Hoile to the Department of Corrections for the remainder of the 15 year sentence.

Hoile filed an immediate appeal to the Court of Special Appeals. In addition, Hoile filed a motion to exclude Palmer's participation, individually or through counsel, as a party to the proceedings in the Court of Special Appeals. The intermediate appellate court originally denied the motion, without prejudice, permitting Hoile to seek the same relief in his reply brief or at oral argument. Counsel for Palmer filed a brief (accepted by the intermediate appellate court) and participated in oral argument in the Court of Special Appeals as if a party. Although Hoile, in his reply brief, renewed his request to strike the appearance of Palmer's counsel, the Court of Special Appeals dismissed the appeal without acting on the motion. The intermediate appellate court, in an unreported opinion, dismissed the appeal as premature because the trial judge in the Circuit Court for Prince George's County had not acted yet on the revived motion to reconsider sentence. The Court of Appeals granted Hoile's Petition for Certiorari and the State's Cross-Petition on 5 December 2007.

On 3 January 2008, Hoile filed a Motion to Strike the Appearance of Counsel for Palmer in the proceedings before the Court of Appeals. Palmer opposed the motion.

Held: Motion Denied. Judgment of the Court of Special Appeals Reversed.

With regard to Hoile's Motion, Maryland Rule 8-111(c) currently states that "[a]lthough not a party to a criminal or juvenile proceeding, a victim of a crime or a delinquent act or a victim's representative may: (1) file an application for leave to appeal to the Court of Special Appeals from an interlocutory or a final order under Code, Criminal Procedure Article, § 11-103 and Rule 8-204; or (2) participate in the same manner as a party regarding the rights of the victim or victim's representative."

Section (c) was added to Rule 8-111 by a Rules Order of the Court of Appeals signed on 4 December 2007. The two subsections, (c)(1) and (c)(2), address different contexts: if a victim is aggrieved by an adverse trial court action affecting one or more of the twelve statutory rights referred to in § 11-103(b), subsection (c)(1) applies, and the victim may seek leave to appeal under § 11-103(b); if a victim is content with the implicated trial court action, but a party appeals, the victim may "participate in the same manner as a party" in that appeal, but only with regard to the victim's rights. Victims' rights under subsection (c)(2) extend only as far as, and are subject to, the same limitations as victims' rights under subsection (c)(1) and § 11-103(b). The Court of Appeals held that the recent amendments to Maryland Rule 8-111 serve as a distinguishing feature between the present case and

Maryland precedent where Maryland's appellate courts have restricted more narrowly victims' roles in criminal appeals. Accordingly, Palmer was permitted to participate in a manner similar to a party, including participating in oral argument and filing a brief.

With regard to the merits of the appeal, the Court of Appeals first concluded that Hoile's reimposed sentence constituted an appealable final order. The Court of Appeals cited prior caselaw which held that a sentence was deemed imposed, and thus appealable, when an original sentence was altered because of a violation of probation or motion for reconsideration. The Court also noted that finality attached to a sentence before a new commitment order was filed. The new commitment order filed in the present case provided even greater evidence of finality.

The Court also concluded that Hoile's new sentence of the remainder of fifteen years in prison represented an increase over his previous sentence of five years probation. Palmer contended that such an increase was permissible because the sentence imposed at the April 2005 hearing was "illegal" and may be corrected by the Circuit Court pursuant to Maryland Rule 4-345(a). The Court of Appeals stated that procedural errors at sentencing are not sufficient for a sentence, valid on its face, to be deemed "illegal."

The State contended that the increase in sentence was permissible because the April 2005 proceeding was marred by an "irregularity." The Court assumed, for the sake of argument, that the failure of the State to notify Palmer (as found by the trial judge) and the failure of the trial court to inquire into notification in the first instance constitutes an "irregularity" within the meaning of Rule 4-345(b). The Court analyzed the legislative history of Rule 4-345(b) and concluded that the drafters of the new Rule did not intend to eliminate the prohibition on increasing a sentence because of fraud, mistake, or irregularity. Accordingly, the trial court improperly increased Hoile's sentence at the April 2005 hearing.

*Sharden Busie Hoile v. State of Maryland* - Case No. 87, September Term 2007. Opinion filed on 07 May 2008 by Harrell, J.

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# COURT OF SPECIAL APPEALS

APPEAL AND ERROR - PLANNING AND ZONING - JUDICIAL REVIEW - STANDING FOR PERSONS IN PRINCE GEORGE'S COUNTY. Md. Code (1957, 2003 Repl. Vol.), Art. 28, § 8-106(e) provides, in pertinent part, that in Prince George's County, "any person or taxpayer in Prince George's County, . . . may have judicial review of any final decision of the district council." The Circuit Court for Prince George's County correctly dismissed the petition for judicial review because (1) neither of the petitioners was a domiciliary of that county, and therefore, they were not "person[s] . . . in Prince George's County," and (2) although both owned an interest in entities that conducted businesses that may have paid real property taxes in the county, neither petitioner personally paid such taxes in an individual capacity, and therefore, they were not "taxpayer[s] in Prince George's County."

Facts: This case came to the Court of Special Appeals from the Circuit Court for Prince George's County following its dismissal of a petition for judicial review of a zoning ruling. The appellants, Rishi Gosain and Abid Chaudhry, filed the petition for judicial review, asking the court to review a decision of the Prince George's County Council that had approved a site plan application for a proposed commercial complex which included a new gas station. Appellants, through separate companies, operated gas stations in Prince George's County within a few miles of this proposed new development. The applicants for the site plan approval filed a motion to dismiss, contending that neither of the petitioners for judicial review resided in, nor personally paid taxes in, Prince George's County, and therefore, neither had the necessary standing under § 8-106 to pursue judicial review of the zoning ruling. The appellants acknowledged that the gas stations they operated in Prince George's County were owned by companies and not the appellants individually. The circuit court expressed the view that neither of the appellants was a "person" in Prince George's County within the meaning of § 8-106(e) because neither of them was domiciled there. The court further held that neither individual was a "taxpayer" in Prince George's County because, although the business entities they were involved with may have paid taxes to the county, they themselves did not do so. The circuit court granted the motions to dismiss based upon standing. Appellants noted an appeal to the Court of Special Appeals.

Held: Judgment affirmed. The Court of Special Appeals held that the circuit court correctly ruled that neither of the appellants had standing to file this action under Art. 28, § 8-

106(e).

*Rishi Gosain, et al. v. County Council for Prince George's County, Maryland, Sitting as the District Council, et al.* - Case No. 0208 September Term 2007. Opinion filed on February 1, 2008 by Meredith, J.

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CRIMINAL LAW - EVIDENCE - BODILY APPEARANCE OR CONDITION - FORENSIC NURSE'S TESTIMONY REGARDING WHAT SHE OBSERVED AFTER WIPING AWAY DYE FROM VICTIM'S BODY WAS NOT OPINION TESTIMONY

CRIMINAL LAW - JURY INSTRUCTIONS - TRIAL COURT'S ERROR IN ISSUING PRELIMINARY JURY INSTRUCTIONS PROVIDING THAT THE JURORS, INCLUDING THE ALTERNATE JUROR, MAY DISCUSS THE CASE DURING TRIAL IF ALL THIRTEEN WERE ALONE TOGETHER DID NOT WARRANT REVERSAL

CRIMINAL LAW - CLOSING ARGUMENT - PROSECUTOR'S REMARK DURING REBUTTAL STATING THAT THERE WAS NO EVIDENCE THAT DEFENDANT DID NOT COMMIT THE CRIMES FOR WHICH HE WAS CHARGED, ALTHOUGH IMPROPER, AMOUNTED TO HARMLESS ERROR

Facts: In the early morning hours of December 31, 2005, Jessica Manning was forced to perform fellatio and engage in anal intercourse with Charelles Lamar Jones-Harris. After a jury trial in the Circuit Court for Washington County, Jones-Harris was convicted of second-degree sexual offense and other related charges.

The State was allowed to introduce testimony at trial of the forensic nurse who examined Jessica after she reported the assault. Jones-Harris objected to the nurse testifying that after she applied blue dye to Jessica's anal region, she observed "scattered uptake", which allowed her to see the presence of lacerations. Jones-Harris claimed that this constituted "expert opinion testimony" and, because the State failed to qualify the nurse as an expert, such testimony was inadmissible. The trial court

disagreed, reasoning that the nurse was not giving opinion testimony but was simply testifying as to her observations.

During the State's rebuttal argument, the prosecutor said that "there is no evidence, none that [Jones-Harris] didn't do this." Jones-Harris' trial counsel objected and sought permission to approach the bench, but the court denied this request and overruled the objection.

Twice during the trial the court instructed the jury that the twelve regular jurors plus the alternate juror could discuss the case whenever all thirteen of them were alone in the jury room. Jones-Harris' trial counsel did not object to the improper instructions and the thirteen jurors were left alone in the jury room three times prior to the point when the twelve regular jurors were sent back to deliberate and reach a verdict.

Held: Affirmed.

On appeal, Jones-Harris argued that the preliminary jury instructions constituted plain error because: (1) the court authorized the jury to deliberate prematurely; and (2) an alternate juror was allowed to take part in those preliminary deliberations. The Court of Special Appeals, while acknowledging that the instructions were improper, nevertheless held that giving the instructions did not amount to plain error. Although the alternate juror accompanied the regular jurors into the jury room for recesses during the one-day trial, there was no way to determine whether the thirteen deliberated about the case. The Court noted that no such speculation would have been necessary if Jones-Harris had objected at a point when the trial court's error could have been remedied. Prejudice arising from an alternate juror's presence is only presumed when the jury retires to consider its verdict; therefore, because there was no evidence that the alternate discussed the case with the regular jurors, the Court declined to take cognizance of plain error in regard to the preliminary jury instructions.

As to the nurse's testimony, the Court held that the trial court properly admitted such evidence as it did not constitute "opinion testimony" but merely was a statement of what the nurse observed after applying dye to the victim's skin.

The Court also held that the prosecutor's remark during rebuttal that there was no evidence that Jones-Harris did not commit the crimes for which he was charged, although improper, was harmless error. The Court noted that the jury was given an

instruction that the defendant was presumed innocent and was not required to prove his innocence. Moreover, the Court pointed out that, the evidence against Jones-Harris was so overwhelming that it was unlikely that the remark swayed the jury.

*Charelles Lamar Jones-Harris v. State of Maryland*, No. 1855, September Term, 2006, filed March 13, 2008. Opinion by Salmon, J.

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FAMILY LAW - DIVORCE

Rule 2-535(b) providing that "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity."

Maryland Rule 9-210(b) (providing, in pertinent part, that, "When the court has ordered . . . a monetary award, the property of a noncomplying obligor may be seized or sequestered in accordance with the procedures of Rules 2-648 . . . ." and

Maryland Rule 2-648 (providing that "(a) Generally. When a person fails to comply with a judgment prohibiting or mandating action, the court may order the seizure or sequestration of property of the noncomplying person to the extent necessary to compel compliance with the judgment and, in appropriate circumstances, may hold the person in contempt pursuant to Rules 15-206 and 15-207. When a person fails to comply with a judgment mandating action, the court may direct that the act be performed by some other person appointed by the court at the expense of the person failing to comply. When a person fails to comply with a judgment mandating the payment of money, the court may also enter a money judgment to the extent of any amount due.

(b) Against Transferee of Property. If property is transferred in violation of a judgment prohibiting or mandating action with respect to that property, and the property is in the hands of a

transferee, the court may issue a subpoena for the transferee. If the court finds that the transferee had actual notice of the judgment at the time of the transfer, the transferee shall be subject to the sanctions provided for in section (a) of this Rule. If the court finds that the transferee did not have actual notice, the court may enter an order upon such terms and conditions as justice may require.").

*Hart v. Hart*, 169 Md. App. 151, 165 (2006) (holding that, "Although courts [under then existing law] must consider the value of such jointly titled property in determining the amount of marital property, they [could] not transfer title as a means of adjusting the equities upon divorce. *See* F.L. § 8-202(a)(3) . . . Consequently, Maryland courts cannot order one spouse to pay a monetary award to the other from the proceeds of the house.")

Facts: The circuit court's Order in its Judgment of Absolute Divorce commanded that "[appellee] shall be and is hereby granted a monetary award against [appellant] in the amount of $110,000 . . . and said award shall be payable upon settlement of the sale of the [marital home located at 5905 Griffith Road, Laytonsville, Maryland]." The trial judge did not reduce the monetary award to a judgment, explaining on the record that, if the court had entered a judgment, but stayed the judgment's execution until the date of settlement, substantial interest would have accrued and, thus, as a benefit to appellant, the judge did not enter a money judgment.

On October 20, 2006, appellant and appellee entered into a contract to sell their marital home for $1,075,000. Prior to settlement, which was scheduled on January 16, 2007, appellant and appellee received a draft settlement sheet, whereupon appellee learned, for the first time, that the law firm representing appellant - to guarantee payment for a portion of his attorney's fees owed in relation to legal representation in the domestic relations case - had filed a deed of trust on October 5, 2006 in the amount of $145,534.28, excluding interest, thereby encumbering one-half of appellant's net proceeds from the expected sale of the marital home.

On the same day that the Montgomery County Office of Child Support Enforcement filed of a petition for contempt, January 12, 2007, which was four days before settlement, appellant consented to a judgment in the amount of $22,993.98 for child support arrearages, and the law firm filed another deed of trust in the amount of $101,862.30, excluding interest. Thus, at the time of settlement, four liens encumbered appellant's title to the marital home, effectively eliminating appellant's interest therein.

Because appellant would receive no proceeds from the sale of the marital home, and appellee would thereby be deprived of appellant's share of the proceeds to satisfy her monetary award, she objected and settlement did not proceed as scheduled. On February 9, 2007, settlement occurred and the settlement company deposited $110,000 into the court registry pursuant to a consent order. On January 24, 2007, appellant filed an Emergency Motion to Appoint A Trustee to Sell the Former Marital Home and to Enforce the Parties Agreement, requesting that the trustee be authorized to consummate the sale of the marital home and that the law firm be paid all of the net proceeds due and owing to appellant. On February 20, 2007, appellant filed an opposition to appellee's Emergency Motion; appellee thereafter filed a reply to that opposition.

On January 30, 2007, appellee filed an opposition to appellant's motion and, additionally, submitted to the trial court an Emergency Motion, requesting that the court revise the Judgment of Absolute Divorce *nunc pro tunc*, thereby giving appellee's monetary award priority over the Brodsky firm's two liens.

On June 29, 2007, the trial court, in granting appellee's Emergency Motion, issued its Memorandum Opinion and Notice of Judgment, ordering the clerk of the court to enter a money judgment against the law firm in favor of appellee in the amount of $110,000 pursuant to Rule 2-648.

Held: Reversed. Because appellant was a non-complying obligor pursuant to Rule 9-210(b) and the Brodsky firm was not a transferee with knowledge pursuant to Rule 2-648(b), the circuit court, although purporting to grant appellee's Emergency Motion pursuant to Maryland Rule 2-535 (b), erred in entering a money judgment for a monetary award granted to appellee against appellant's law firm, which had placed liens against the marital home to secure its legal fees.

*Raul de Arriz et al. v. Laura Klingler-de Arriz* - Case No. 480, September Term 2007. Opinion decided May 1, 2008 by Davis, J.

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JUVENILE LAW - JUVENILE CAUSES ACT - MOTION TO MODIFY DISPOSITION - FINALITY - APPEALABILITY - TERMS OF DETENTION - SEPARATION OF POWERS - ABUSE OF DISCRETION.

Facts: The Circuit Court for Montgomery County, sitting as a juvenile court, found Julianna B., appellant, delinquent, based on its determination that she committed second-degree murder and related offenses. At an initial disposition hearing on January 11, 2006, the court committed appellant to the Department of Juvenile Services ("DJS" or the "Department"). This Court affirmed. *See In re Julianna B.*, 177 Md. App. 547 (2007) ("*Julianna I*").

In March of 2007, DJS requested a review hearing, which appellant joined in April of 2007. At the review hearing, both DJS and appellant asked the court to permit appellant to have certain privileges, such as home leave and attendance at a community college, as part of her rehabilitation and eventual transition to the community. They offered psychological evaluations and test results; testimony concerning Julianna's exemplary behavior; the absence of any indication that she posed a risk to others; her academic achievements, including completion of high school; her support system; and the lack of any other programming for her in detention. The DJS Secretary was among those who testified in favor of the request. The prosecutorial arm of the State opposed the request, however.

While recognizing that "[a]ll reports have been positive," the court denied the motion. In part, it said:

> Julianna must be accountable. Twenty-one months in detention is woefully inadequate. Missy, her family, and the citizens of this county deserve more accountability than 21 months.
>
> * * *
>
> I therefore deny the Department's and the respondent's motion for Julianna to be released into the community, or to have any furloughs or weekend passes or transitions. Julianna is to be held in a secure facility. . . .

On appeal, the State moved to dismiss the appeal.

Held: Reversed. Motion to dismiss appeal denied. The Court of Special Appeals ruled that the juvenile court's denial of a motion to modify its disposition is a final, appealable order. It also

determined that the juvenile court has statutory authority under the Juvenile Causes Act to direct the terms of a juvenile's detention, including the denial of privileges, such as home leave. That authority does not violate the doctrine of separation of powers. However, the juvenile court abused its discretion in this case when it denied the request of DJS and appellant for certain privileges, because the court's ruling was primarily motivated by the grievous nature of the underlying offense and its desire for punishment, rather than rehabilitation.

*In re Julianna B., No.* - Case No. 1125, September Term 2007. Opinion filed on May 2, 2008 by Hollander, J.

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LABOR AND EMPLOYMENT - LACK OF JURISDICTION - AGE DISCRIMINATION

Eleventh Amendment to United States Constitution; *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (providing that Amend. XI "largely shields [s]tates from suit in federal court without their consent, leaving parties with claims against a state to present them, if the state permits, in the state's own tribunals.").

Factors Determinative of Whether Appellee May Be Considered a State Agency: (1) the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys; (2) the scope of the entity's concerns-whether local or statewide-with which the entity is involved; and (3) the manner in which State law treats the entity. *Lewis v. Bd. Educ. of Talbot County*, 262 F. Supp. 2d 608, 612 (D. Md. 2003) (citing *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001)).

Age Discrimination; Maryland Code Ann., Section 4-105(d), captioned "Comprehensive Liability Insurance; Defense of Sovereign Immunity of the Education Article," provides that a "county board shall have the immunity from liability described under § 5-518 of the Courts and Judicial Proceedings Article." Section 5-518(b) provides that

"[a] county board of education . . . may raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy or, if self-insured . . . above $100,000." Subsection (c) of § 5-518, however, prohibits a county board of education from "rais[ing] the defense of sovereign immunity to any claim of $100,000 or less." The legislature, in enacting § 4-105(d), in conjunction with § 5-518(c), specifically prohibited a county board of education from raising the defense of *Eleventh Amendment* immunity to any claim of $100,000 or less.

Facts: Job applicant, who was unsuccessful in her quest to secure a teaching position, sued county board of education, alleging age discrimination under the Age Discrimination in Employment Act (ADEA). The Circuit Court for Baltimore County dismissed job applicant's suit. She appealed.

Held: Reversed and remanded for further proceedings. The Circuit Court erred in determining that § 5-518(c) did not constitute a specific waiver of the state's immunity under the Eleventh Amendment to the United States Constitution. For the purposes of Eleventh Amendment immunity, the county board of education was an arm of the State and not a local autonomous entity.

Section 5-518(c) of the Courts and Judicial Proceeding Article specifically prohibits a county board of education from raising the defense of Eleventh Amendment immunity to any claim of $100,000 or less and, thus, the trial court erroneously dismissed job applicant's claim of alleged age discrimination.

*Mireille Zimmer-Rubert v. Board of Education of Baltimore County*, Case No. 838, September Term 2007. Opinion decided May 5, 2008 by Davis, J.

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OFFICERS AND PUBLIC EMPLOYEES - STATE EMPLOYEES - DISCIPLINARY ACTION FOR EMPLOYEE MISCONDUCT - TIME LIMIT. Maryland Code (1993,

2004 Repl. Vol.), State Personnel and Pensions Article (SPP), § 11-106(a) sets forth the actions that must be completed by the appointing authority before taking any disciplinary action related to employee misconduct. All of the specified actions must be completed and the disciplinary action must be imposed within 30 days after the appointing authority acquires knowledge of the misconduct. One of the specified actions that must be completed before imposing the discipline is that the appointing authority must "give the employee a written notice of the disciplinary action to be taken." Because the appointing authority in this case mailed the written notice on the 30th day, and there was no expectation that the employee would receive the notice on that day, the appointing authority did not meet its obligation of completing all steps required by SPP § 11-106(a) before taking any disciplinary action.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Baltimore City, following judicial review of a decision of an Administrative Law Judge (ALJ). The appellee, Leonard Miley, worked for the State as an employee of the appellant, the Department of Juvenile Services (DJS). An incident involving Miley's interaction with a juvenile offender occurred on February 1, 2006, and Miley's superiors alleged that he had responded inappropriately to the juvenile's disruptive behavior. After an investigation of Miley's alleged misconduct, the Secretary of DJS met with Miley, and then signed a notice of termination of Miley's employment on March 2, 2006. The notice stated that Miley's termination of employment would be effective at the close of business on March 3, 2006. The notice of termination was mailed by the DJS on March 3, 2006 (the 30th day after February 1, 2006). The employee did not receive the notice until March 4, 2006 (the 31st day after the incident).

Miley contended that DJS had not complied with SPP § 11-106 because he did not receive his notice of termination within 30 days of the incident. DJS argued that the statute required only that the notice of termination be mailed — not received — within 30 days. Holding that all steps prior to and including termination had to be completed within 30 days of the incident, which meant that Miley should have *received* the notice of termination before 30 days had elapsed, the ALJ found that the termination was invalid because it had not been imposed in a timely manner. The ALJ rescinded the termination and ordered that Miley be reinstated with back pay. DJS sought judicial review in the Circuit Court for Baltimore City, which affirmed the final decision of the ALJ. Both the ALJ and the Circuit Court for Baltimore City interpreted the statute to require that, in order to terminate a State employee for misconduct, the employee must *receive* notice of the termination

within the 30-day time limit imposed by SPP § 11-106(b). DJS noted an appeal to the Court of Special Appeals.

Held: Judgment affirmed. the Court of Special Appeals wrote:

> We recognize that the relatively short time limit imposed by SPP § 11-106 will sometimes place a burden on the appointing authority that may not be met easily or even with great effort. But, as we noted in *White v. Workers' Compensation Com'n*, 161 Md. App. 483, 489-91 (2005) (quoting [*WCI* v.] *Geiger*, 371 Md. [125] at 143-45 [2002]), the Court of Appeals's 2002 decision in *Geiger* required strict adherence to the 30 day limit for completing all actions required by SPP § 11-106. We observed in *White* that "[t]he General Assembly is presumed to be aware of the Court of Appeals' interpretation of its enactments," and because the legislature "has not legislatively overturned the interpretation articulated in *Geiger*, we can only conclude that the General Assembly has acquiesced in that interpretation." 161 Md. App. at 491. Notwithstanding the passage of additional time, the *Geiger* interpretation of SPP § 11-106 as imposing a strict deadline remains unchanged.

Because DJS did not complete the giving of notice within the 30 day limit imposed by SPP § 11-106, it could not impose any discipline against Miley.

*Department of Juvenile Services v. Leonard Miley* - No. 0284, September Term 2007. Opinion filed on February 1, 2008 by Meredith, J.

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PUBLIC SAFETY - LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS (LEOBR)

Md. Code Ann. (2003), Public Safety Article, Title 3, Subtitle 1, Law Enforcement Officers' Bill of Rights (LEOBR); Bi-County Directive 414 (BCD 414) of Prince George's County Park Police Department, effective January 1, 1979, as amended on May 9, 2001 ("fresh pursuit policy for vehicular pursuit of a fleeing suspect"). A "not guilty" finding, pursuant to §3-108(a)(3) of the LEOBR, "terminates the proceeding and, in that regard, constitutes a final decision, leaving nothing further for the agency to do." *Md.-Nat'l Capital Park and Planning Comm'n v. Anderson*, 164 Md. App. 540 (2005), *aff'd*, 395 Md. 172 (2006).

Law of the Case Doctrine; Under the law of the case doctrine, litigants may not raise new claims after an appeal if the new claims arise from the same facts. *See Schisler v. State*, 177 Md. App. 731, 747 (2007). Since no new facts were alleged in appellant's complaint, it is bound by the law of the case doctrine.

Mandamus: Relief is available under some circumstances that "depriv[e] litigants from raising questions involving their fundamental rights;" therefore, mandamus ordinarily lies where there is some constitutional infirmity. *Criminal Injuries Compensation Bd. v. Gould*, 273 Md. 486, 500 (1975). Because there were no constitutional rights of appellant involved in the Board's decision, an action for mandamus is not available to the Commission.

Facts: After the Circuit Court for Prince George's County denied Maryland-National Capital Park and Planning Commission's (Commission) petition for judicial review of the Administrative Hearing Board's "not guilty" finding and we affirmed, the Court of Appeals granted *certiorari* and held that the Law Enforcement Officers' Bill of Rights (LEOBR) is the exclusive remedial scheme governing disciplinary actions against law enforcement officers and, under that body of law, no statutory right to judicial review of "not guilty" findings exists. The Commission's subsequent complaint for alternative relief in the form of declaratory, injunctive and mandamus relief was also denied. The Commission appealed.

Held: Affirmed. The circuit court properly concluded that the law of the case doctrine is controlling and that the Court of Appeals, in iterating that "the [Law Enforcement Officers' Bill of Rights] was enacted for the express purposes to protect the right of police officers," intended to make clear that the LEOBR provides for "no judicial review . . . by the agency . . . [or] anyone, from

[The Administrative Hearing Board's] not guilty finding."

(1) the law of the case doctrine bars the Commission from asserting a common law right to judicial review in an action for mandamus where no new facts were alleged in the subsequent pleadings.

(2) mandamus relief is unavailable to the Commission because no constitutional rights were involved in Board's "not guilty" finding.

(3) the Commission, as a creature of the State, lacks standing to contest an act of the State.

*Maryland-National Capital Park and Planning Commission v. Kathleen Anderson, et al.* - Case No. 955, September Term 2007. Opinion filed on May 5, 2008 by Davis, J.

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REAL PROPERTY - MARYLAND CONSTRUCTION TRUST STATUTE - whether a managing agent of a construction company may be found personally liable under the Maryland Construction Trust Statute for the failure of the corporation to pay subcontractors.

Facts: Appellant David Selby was the owner and managing agency of Selby Construction, Inc., a company engaged primarily in sub-contracting. Selby Construction served as a subcontractor in a project by H.R. General Maintenance Corporation (HRGM), a general construction company. Selby Construction, in turn, contracted with Williams Construction to to provide equipment, materials, and services to Selby.

At the end of the project, Selby Construction was not paid in full by HRGM, and filed suit, claiming it was owed $205,000. Williams sued Selby Construction and David Selby to recover $70,550.60 due on its account. The parties stipulated to judgment against Selby Construction, Williams sought to hold Selby

personally liable.

The circuit court held David Selby personally liable, ruling that he failed to explain why he did not disburse funds to Williams.

Held: Reversed. Md. Code, Real Property §§ 9-201, provides that funds paid to a contractor or subcontractors are to be held in trust for the payment to lower-tier contractors or suppliers. Any person having control over such funds is a trustee and may be personally liable for using such funds for purposes other than paying lower-tier parties.

The mere non-payment of funds to a subcontractor or supplier is not a basis for imposing personal liability. The funds in this case paid by HRGM to Selby Construction were not earmarked or specified to be paid to Williams. Furthermore, there was no evidence of improper diversion of the funds. Absent such earmarks or a showing of improper use of funds, personal liability may not attach to a managing agent.

The Construction Trust Statute creates no exception to the general proposition of corporate law that the acts of a corporate officer or other agent are not personal.

*Selby v. Williams Construction Services* - Case No. 0327, September Term 2007. Opinion filed May 9, 2008 by Sharer, J.

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# JUDICIAL APPOINTMENTS

On May 13, 2008, the Governor announced the appointment of **LEON ROBERT COOPER** to the District Court of Baltimore City. Judge Cooper was sworn in on May 30, 2008 and fills the vacancy created by the retirement of the Hon. Norman E. Johnson, Jr.

# ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated May 6, 2008, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State:

DAVID ALAN ENGLEHART
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