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COURT OF APPEALS

ADMINISTRATIVE LAW - EXHAUSTION OF ADMINISTRATIVE REMEDIES -
AGENCY PALPABLY WITHOUT JURISDICTION OR AUTHORITY TO HEAR CLAIM

Facts: Montgomery County (the "County") filed a claim in the County's administrative dispute resolution process against two contractors, Heery International, Inc. and Hellmuth, Obata & Kassabaum, P.C. (collectively "Heery"), alleging damages arising from their mismanagement of other trade contractors during the construction of a detention center. Heery responded by filing an action in the Circuit Court for Montgomery County seeking, among other things, to enjoin the County administrative process from hearing or deciding the County's claims. Heery claimed that because there was no express statutory language allowing the County to initiate claims in its administrative dispute resolution process, only claims initiated by a contractor against the County must utilize the process. As a result, the process did not have jurisdiction over claims brought by the County. Heery based its argument on an analogy to *University of Maryland v. MFE, Inc.*, 345 Md. 86, 691 A.2d 676 (1997), which held that the administrative dispute resolution process provided for under the State Procurement Statute was without jurisdiction to hear claims brought by the State.

The circuit court in the present case refused to intervene and enjoin the administrative process, declaring instead that the County process was not "palpably without jurisdiction" to hear a claim brought by the County. The trial judge was not convinced that the holding of *MFE* was applicable to the present case, and could not conclude that the question of the administrative process's lack of jurisdiction was so clear as to warrant judicial intervention at this stage in the proceedings. Heery appealed to the Court of Special Appeals, but, before it could decide the case, the Court of Appeals granted a writ of certiorari on its initiative. 381 Md. 324, 849 A.2d 473 (2004).

Held: Affirmed. Heery must exhaust administrative remedies before resorting to a judicial forum. In order to circumvent an administrative remedy, a party must demonstrate that an administrative agency is "palpably without jurisdiction" to hear the claim. An administrative agency is "palpably without jurisdiction" only if it clearly lacks fundamental subject matter jurisdiction or is clearly and unequivocally in violation of statutory or judicial authority. If the "jurisdictional" dispute is in essence an issue of statutory interpretation, or if questions linger about the application of a statute or prior case law, those questions first must be decided in the administrative process. *State Commission on Human Relations v. Freedom*

Express/Domegold, Inc., 375 Md. 2, 18-20, 825 A.2d 354, 364-65 (2003). In this case, the County administrative dispute resolution process was not "palpably without jurisdiction" because the dispute was essentially a matter of statutory interpretation best resolved by the administrative agency charged with interpreting the statute.

The Court also held that premature judicial intervention was not proper because Heery failed to demonstrate that the County administrative process was clearly and unequivocally without statutory or judicial authority. Although the County Code and its regulations did not provide expressly for County-initiated claims, the Court found that there were several differences between the County administrative process and the State administrative process discussed in *MFE*. For example, while in *MFE* there was undeniable legislative history indicating that the Maryland Legislature knowingly excluded claims initiated by the State, *MFE*, 345 Md. at 94-102, 691 A.2d at 680-83, in the present case there was no such legislative history. Furthermore, the language in the respective statutory schemes was not so identical as to warrant the extraordinary relief Heery requested.

Heery International, Inc. v. Montgomery County, No. 15, September Term, 2004, filed 6 December 2004. Opinion by Harrell, J.

ADMINISTRATIVE LAW - JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS - PARTICULAR QUESTIONS, REVIEW OF - LAW QUESTIONS IN GENERAL - ALJ INCORRECTLY APPLIED FORESEEABILITY OF HARM STANDARD IN FINDING "INDICATED CHILD ABUSE" WHERE ALJ SHOULD HAVE EXAMINED WHETHER ACT CAUSING INJURY WAS "ACCIDENTAL OR UNINTENTIONAL AND NOT RECKLESS OR DELIBERATE."

Facts: In November 2002, appellant was napping at home on a couch when his twelve-year-old daughter repeatedly approached him for help with a computer problem. After she approached him a third time, appellant became irritated, got up from his couch and

kicked a footstool to "accent his point" that she would have to wait. Instead of causing the stool to hit the couch as appellant stated he intended, the kick propelled the stool up and over the couch where it struck his daughter's face. Appellant took his daughter to the hospital where she received three stitches on her nose and treatment of a facial abrasion. After the hospital reported the incident to the Harford County Department of Social Services ("HCDSS") as suspected child physical abuse, HCDSS sent a licensed social worker to appellant's home to investigate. The social worker spoke with the daughter, her siblings and their mother, but did not speak with appellant who was away on business at the time, and, upon his return, declined to meet with the social worker based on his attorney's advice. After concluding her investigation, the social worker made a finding of "indicated child abuse." Appellant then requested a contested hearing pursuant to Md. Code (1984, 1999 Rep. Vol., 2004 Supp.), § 5-706.1 (b) of the Family Law Article.

In July 2003, a contested case hearing took place before an ALJ from the Office of Administrative Hearings. The ALJ sided with HCDSS in ruling that "indicated child abuse" had occurred, stating that the regulations of COMAR 07.02.07.12A did not excuse appellant "from responsibility for the unintended but foreseeable consequences of" his intentional act of kicking the stool. As a result of this finding, HCDSS would identify appellant as being responsible for indicated child abuse and place his name in a central registry.

Appellant appealed the final decision to the Circuit Court for Harford County which affirmed the ALJ's decision in February 2004. Appellant noted an appeal to the Court of Special Appeals in March 2004, but prior to consideration by that court, the Court of Appeals issued a Writ of Certiorari in August 2004.

Held: Judgment Vacated. A parent's act of kicking a stool that accidentally and unintentionally struck and injured his daughter did not constitute "indicated child abuse" unless the act was determined to have been reckless conduct. The Administrative Law Judge incorrectly applied a foreseeability of harm standard in ruling that the parent's conduct in intentionally kicking the stool had the foreseeable consequence of injuring the child. In vacating the circuit court's judgment with instructions to vacate the ALJ's decision and remand the case to the Office of Administrative Hearings for further proceedings, the Court of Appeals held that the ALJ had improperly determined that appellant's intent to act amounted to an intent to injure his daughter. The ALJ should have considered the "ruled-out child abuse" provision found in COMAR

07.02.07.12C(2)(a)(i), which calls for a determination whether "the act causing the injury was accidental or unintentional and not reckless or deliberate."

Stephen Taylor v. Harford County Department of Social Services
No. 51, September Term, 2004, filed December 9, 2004. Opinion by Cathell, J.

ATTORNEY DISCIPLINE - Our goal in matters of attorney discipline is to protect the public and the public's confidence in the legal profession rather than to punish the attorney.

ATTORNEY DISCIPLINE - APPROPRIATE SANCTIONS - Appropriate sanction for attorney misconduct including false accounting and misappropriation of client assets is disbarment unless there are compelling extenuating circumstances that justify a lesser sanction.

ATTORNEY DISCIPLINE - APPROPRIATE SANCTIONS - Appropriate sanction for attorney misconduct including false accounting and misappropriation of estate assets was mitigated to indefinite suspension where respondent's mental condition, specifically depression and alcoholism, were the root cause of his false accounting and misappropriation of estate assets.

ATTORNEY DISCIPLINE - APPROPRIATE SANCTIONS - Absent truly compelling extenuating circumstances, alcoholism does not constitute a sufficient mitigator to conduct that would otherwise warrant disbarment as the appropriate sanction.

Facts Nathan H. Christopher, Jr. was admitted to the Maryland Bar in 1981. He has never been disciplined during the twenty years he has practiced law. From 2000 to 2003 he engaged in the private practice of law as a solo practitioner out of his home in Crisfield, Somerset County, Maryland. Mr. Christopher maintained an attorney trust account as part of his private

practice. All monies received on behalf of his clients were maintained in his attorney trust account. He paid business expenses from a personal banking account in his name. He did not maintain a business operating account for his practice.

Mr. Christopher was retained by Susan R. Howard to represent the Estate of Gordon Bryce Revelle, who died on June 16, 2000, leaving a Last Will and Testament. Ms. Howard was the sole beneficiary and personal representative of the Estate until her death on August 15, 2001. Mr. Christopher was appointed Successor Personal Representative of the Estate on May 14, 2002. On May 11, 2001, Mr. Christopher requested \$5,000 from Ms. Howard to cover his anticipated fees and costs in managing the Estate assets. He received and deposited a check from Ms. Howard in the amount of \$5,000 on that same date. This disbursement of Estate funds was neither approved by nor reported to the Orphan's Court. Mr. Christopher also received a \$435 reimbursement for expenses from the Estate on December 7, 2000.

Mr. Christopher failed to report the \$5,000 and \$435 disbursements from the Estate in the First Administrative Account filed on July 11, 2001, the Second Administration Account on May 7, 2002, and the Third Administration Account on November 14, 2002. At the time of the filing of the Third Administration Account, Mr. Christopher admitted that he knew the accounting to be false when he signed it and filed it with the Orphans' Court. He filed the false report to gain more time to determine how to proceed because he did not know how to account for the missing money. In December 2002, Mr. Christopher advised the Register of Wills that he had falsified the last accounting. Meanwhile, on September 10, 2002, Mr. Christopher's trust account balance fell to \$517.74 below the total Estate assets due to a \$1,200 personal use withdrawal. The deficit lasted less than twenty-four hours and the hearing judge found the use was not knowing or intentional. Mr. Christopher was subsequently removed as personal representative of the Estate on December 10, 2002.

During the time when Mr. Christopher was representing the Estate, he experienced serious health problems. He had been drinking heavily since the mid-1980's. After suffering a heart attack in August 2000, he stopped drinking for six to eight months. He was evaluated by a neurologist in November 2000, and was treated for depression with antidepressant medications. He suffered a panic attack in May 2003, began seeing a psychiatrist in June 2003, and was subsequently diagnosed with depression and alcohol dependence. In June 2003, Mr. Christopher also sought help from the Maryland State Bar Association Lawyer Assistance Program. In November 2003, Mr. Christopher was admitted into the

psychiatric unit of the Dorchester General Hospital. He spent one month there and the following two months in the Eastern Shore State Hospital in Cambridge, Maryland. A psychological evaluation was conducted while he was committed and the results were consistent with Major Depression, Severe, Without Psychotic Features, and Alcohol Dependence. Mr. Christopher continues to be monitored under the Maryland State Bar Association Lawyer Assistance Program and has been fully compliant with their short term and long term requirements.

Board certified forensic psychiatrist, Christine Tellefsen, M.D., who was asked by Bar Counsel to evaluate Respondent, testified that within a reasonable degree of medical certainty, Mr. Christopher was suffering from Alcohol Dependence and Severe Major Depression during the years 2000 through 2004. In her expert opinion, these conditions were the "root cause" of Mr. Christopher's inaccurate Estate accounting and misappropriation of Estate assets, although not the cause of his long history of commingling funds.

The Attorney Grievance Commission, acting through Bar Counsel, filed a petition for disciplinary action against Mr. Christopher for violation of the Maryland Rule 16-812, Maryland Rules of Professional Conduct (MRPC). Bar counsel also alleged that Respondent violated Maryland Rules 16-604 (Trust account - Required deposits), 16-607 (Commingling of funds), and Maryland Code (1989, 1995 Repl. Vol.), §10-306 of the Business and Occupation Article. With respect to the MRPC, the petition alleged that Mr. Christopher violated Rules 1.1 (Competence), 1.3 (Diligence), 1.5 (Fees), 1.15 (Safekeeping property), 3.3 (Candor toward the tribunal), and 8.4 (Misconduct). Bar Counsel recommended disbarment. The Circuit Court for Wicomico County (J. Beckstead) found that Mr. Christopher had violated Md. Rules 16-604 and 16-607, Section 10-306 of the Business and Occupation Article, and MRPC Rules 1.1, 1.3, 1.5, 1.15, 3.3, and 8.4.

Held: If an attorney, through treatment, can adequately address a mental or physical problem affecting his or her ability to competently practice law, he or she should be given an opportunity to correct that problem. Mr. Christopher's mental condition and impairment arising from alcoholism and severe depression are compelling extenuating factors that affected his ability to function in his normal day-to-day activities in a sustained fashion, between the years 2000 and 2004. We agree with Judge Beckstead's finding that Mr. Christopher violated Md. Rules 16-604 and 16-607, Section 10-306 of the Business and Occupation Article, and MRPC Rules 1.1, 1.3, 1.5, 1.15, 3.3, and 8.4. The sole issue in this case is the resolution of the

appropriate sanction to impose because of Mr. Christopher's misconduct. Because of the compelling extenuating circumstances of this case, we believe the appropriate sanction is an indefinite suspension, with the right to reapply for reinstatement. Favorable consideration will depend on the following: (1) a certification signed by Dr. Tellefsen or other qualified health care professional that Mr. Christopher is currently mentally and physically competent to practice law and is receiving ongoing treatment; (2) certification from the MSBA Lawyer Assistance Program that Mr. Christopher is currently using sound judgment and is an honest, responsible, and stable member of the community; and (3) verification of monitoring by the MSBA Lawyer Assistance Program from the date of the filing of this opinion until consideration of the motion for reinstatement.

Ever mindful that our goal in attorney disciplinary proceedings is the protection of the public, we hold that the extenuating circumstances of this case compel a less severe sanction than disbarment. In considering offenses relating to honesty, mental impairment, whether arising out of alcoholism or out of other factors, will not warrant a sanction lesser than disbarment unless there is uncontroverted evidence of compelling extenuating circumstances that would support a hearing judge's finding that the mental condition was "the root cause" of the misconduct. Absent truly compelling extenuating circumstances, alcoholism would not constitute a sufficient mitigator to conduct that would otherwise warrant disbarment as the appropriate sanction. Alcoholism is a mental condition that qualifies as one such mitigating factor sufficient to warrant a sanction less severe than disbarment only when the addiction was to a substantial extent responsible for the conduct of the attorney.

We are more sympathetic to attorneys who recognize their need for assistance and seek to rehabilitate themselves before their transgressions are discovered. Mr. Christopher reported his dishonesty to the Register of Wills before any investigation began concerning his transgressions. Mr. Christopher made efforts to address his medical condition and we are impressed that he recognized the need for assistance and sought to rehabilitate himself. His acknowledgment of wrongdoing was, indeed, a first and crucial step in the rehabilitative process. The public and the legal profession are better served by lawyers who admit and correct their errors.

Attorney Grievance Commission of Maryland v. Nathan H. Christopher, Jr., No. AG 36, September Term, 2003, filed November 16, 2004, Opinion by Greene, J.

CONSUMER PROTECTION ACT - AFFIRMATIVE ACTION - The term "affirmative action" may be used to justify a variety of actions taken by the Consumer Protection Division when those actions are corrective measures that address the specific violations that are the subject matter of the Division's Final Order. The term "affirmative action," however, will not justify all actions taken by the Division simply because they are in furtherance of the purpose of the statute. When an interpretation of statutory language is not supported by the statutory language, history, relevant case law, etc., the Court will not uphold that interpretation.

CONSUMER PROTECTION ACT - AFFIRMATIVE ACTION - PERFORMANCE BOND - the authority to order the posting of a performance bond in a consumer protection case is derived from the equitable jurisdiction of the courts and its authority to grant ancillary equitable relief in connection with an injunction. The Consumer Protection Act authorizes the Agency to seek an injunction from the court when a cease and desist order proves to be insufficient in preventing continued violations of the Act. The Agency may apply to the court for an order requiring the posting of a performance bond, however, it does not have the authority on its own to order such a requirement.

CONSUMER PROTECTION - RESTITUTION - FINANCIAL DISCLOSURES - The Consumer Protection Division is expressly authorized to order restitution and assess civil penalties against persons found to have violated the Consumer Protection Act. CL §§ 13-403 and 13-410. It is also authorized to seek from the court an order of judgment necessary to restore to a person any money or real or personal property acquired from him by means of any prohibited practice. CL § 13-406(b)(2). Once an order of judgment has been obtained the Agency is entitled to certain financial disclosures pursuant to the Maryland Rules of Civil Procedure, Md. Rule §§ 2-633(a) and 3-633(a).

Facts: Paris George, ("George"), is the sole proprietor of a company that sells durable medical equipment and other supplies. He operates out of his home under various trade names, including Allied Home Healthcare, Allied Healthcare, Allied Medical Equipment Co., Maryland Home Healthcare Services, Access Professionals, and Access Medical Equipment Co. He advertises in the yellow pages the sale and rental of durable medical equipment, i.e., wheelchairs, scooters, and stairlifts, as well as sickroom equipment, i.e., hospital beds, bed rails,

and bathing equipment. His customers are seriously ill or disabled people or their families. The average consumer paid George more than \$800.00 for equipment while others paid as much as \$6,000.00.

In a hearing before Administrative Law Judge Beverly Sherman Nash ("ALJ"), the ALJ found that George engaged in repeated violations of the Consumer Protection Act, Md. Code (1975, 2000 Repl.Vol), § 13-101 *et seq.* of the Commercial Law II Article, the Door-to-Door Sales Act, Md.Code (1975, 2000 Repl. Vol), § 14-301 *et seq.* of the Commercial Law II Article, and the Merchandise Delivery Law, (1975, 2000 Repl. Vol), § 14-1801 *et seq.* of the Commercial Law II Article, by, among other things, failing to deliver the purchased items, claiming to be an authorized dealer of a certain manufacturer when he was not, failing to refund money after not delivering the product or after delivering nonconforming goods, and charging sales tax on nontaxable items. He also failed to properly notify customers of their rights to cancel orders and to provide written estimated delivery dates as required by law. When customers called to inquire about their ordered products, often George would use an alias, "Pat," claiming that George was unavailable, and would later fail to return their calls.

The Consumer Protection Division issued a Final Order against George on June 24, 2002 based on the above violations. George appealed to the Circuit Court for Baltimore County. The circuit court affirmed the order with regards to ordering George to cease and desist from violating Maryland Law, requiring George to make modifications to his contracts so as to comply with Maryland Law, to provide refunds, requiring George to list his prior customers and their transactions so as to identify them for refund entitlement purposes, to pay restitution, to establish a restitution account for future claims, and imposing a civil penalty against George. The circuit court reversed the provisions of the Division's order that required George to post a surety bond and that required George to list his assets, sources of income, and transfers of assets greater than \$1,000 to anyone in the previous two years.

Held: The language, "to take affirmative action," found in the Consumer Protection Act, MD. Code (1975, 200 Repl. Vol), § 13-101 *et seq.* of the Commercial Law Article ("Act"), may be used to justify a variety of actions taken by the Division when those actions are corrective measures that address the specific violations that are the subject matter of the Division's Final Order. The term "affirmative action," however, will not justify all actions taken by the Division simply because they are in

furtherance of the purpose of the statute. When the interpretation of "affirmative action" sought by the Division is not supported by the "relevant indicia of statutory intent," we will not uphold the Division's interpretation. While we agree with the Division that the requirement of posting a surety bond is an action in furtherance of the purpose of the statute, the express language of the statute provides a means of enforcing future compliance of its orders by instituting other civil proceedings to restrain or to enjoin continuing violations of its orders when a cease and desist order proves to be ineffective in stopping the unfair and deceptive practice. Because the plain language of the statute specifically addresses the steps to take in the case of noncompliance with the Act, we will not strain for a reading of the statute that would permit the same result as one expressly authorized.

The Division may order an alleged violator to pay restitution if, based on a preponderance of the evidence, the Division determines the alleged violator violated the Act. The Division may also assess civil penalties. However, we hold that the Division's authority to assess penalties does not encompass the authority to enforce penalties through the disclosure of financial information as a requirement in a cease and desist order. The General Assembly has expressly authorized the Division to apply to a court for an "order of judgment necessary to restore to a person any money or real personal property acquired from him by means of any prohibited practice." In this case, the order of restitution represents money taken in violation of the Act and clearly it would be unjust for George to continue to profit from his behavior by eluding the restitution order. The proper procedure for preventing this outcome, according to the express language of the statute, however, is for the Division to obtain a judgment. Thus, our narrow holding is that § 13-403(b)(1) does not authorize the Division "to take affirmative action" either to require a violator of the Act to post a bond or to disclose financial information to aid the Division's enforcement of a cease and desist order.

Consumer Protection Division v. Paris G. George, No. 12, September Term, 2004 filed November 9, 2004, Opinion by Greene, J.

COUNTIES - TORTS - ACTS OF OFFICERS OR AGENTS

OFFICERS AND PUBLIC EMPLOYEES - RIGHTS, POWERS, DUTIES, AND LIABILITIES - LIABILITIES FOR NEGLIGENCE OR MISCONDUCT - IN GENERAL

PRISONS - OFFICERS - LIABILITIES IN GENERAL

Facts: Appellant Livesay suffered brain damage after his attempted suicide at the Baltimore County Detention Center. He subsequently brought suit against Appellees Baltimore County, Corrections Officer Ricky Fore, and Classification Supervisor George Jackson. Livesay alleged, *inter alia*, that Fore had failed to perform a ministerial duty when he summoned help instead of providing direct lifesaving assistance upon discovering Livesay hanging. The Circuit Court for Baltimore County granted summary judgment in favor of Fore and Baltimore County on the grounds of public official immunity and governmental immunity, and in favor of Jackson on the grounds that there were no material facts in dispute and he was entitled to judgment as a matter of law. On appeal, Livesay argued that Md. Code (1973, 2002 Repl. Vol., 2004 Cum. Supp.), § 5-303(b) of the Courts and Judicial Proceedings Article eliminates any immunity that appellees might assert. He also contended that county officials, as opposed to municipal officials, are not entitled to statutory public official immunity under § 5-507(b) of the Courts and Judicial Proceedings Article. He further contended that Fore was not a public official, and that, even if Fore were a public official, he was not acting in a discretionary capacity.

Held: Affirmed. Section 5-303(b) merely prevents a local government from asserting immunity to evade its obligation to defend and indemnify employees in tort actions. It does not address the defenses which employees may themselves assert. Rather, employees' defenses and immunities are preserved explicitly in § 5-303(d).

The Court also rejected Livesay's contention that § 5-507(b)(1) applied only to municipal corporations. Its prior cases have held that the purpose of § 5-507(b)(1) was to codify existing public official immunity. Under the common law, county public officials enjoyed immunity; accordingly, despite the seemingly narrower drafting, the Court held that § 5-507(b)(1) applies to county as well as municipal officials.

The Court declined, on *stare decisis* grounds, to overrule its holding in *Carder v. Steiner*, 225 Md. 271, 170 A.2d 220 (1961), that a prison guard is a public official *per se* in the context of public official immunity. It observed that both Fore

and Jackson had accepted employment with every reason to believe, under *Carder*, that they would be immune from suit for their discretionary, non-malicious actions.

Fore's decision to summon additional help rather than directly aid Livesay was held to be discretionary in nature. Although Fore had been trained in a specific protocol for providing direct aid, the Department of Corrections Manual made clear that providing direct aid was only one of several responses among which Fore had the discretion to choose. Since there was no allegation of malice, the Court found that Fore was a public official performing a discretionary act and was entitled to statutory and common law public official immunity.

The Court found that there had been no evidence before the Circuit Court establishing any act or omission on the part of Appellee Jackson - let alone one which would constitute a breach of some duty to Livesay - and that the Circuit Court had correctly entered summary judgment in Jackson's favor.

Finally, the Court reiterated that the Local Government Tort Claims Act, § 5-301 *et seq.* of the Courts and Judicial Proceedings Article, does not waive a county's common law governmental immunity in any extent more broad than its duty to indemnify employees. The Court thus held that the County was immune from Livesay's *respondeat superior* claims, and that the Circuit Court had thus correctly granted summary judgment to the County.

Joseph Kevin Livesay v. Baltimore County, Maryland, et al., No. 7, September Term, 2004, filed November 19, 2004. Opinion by Raker, J.

CRIMINAL LAW - IMPARTIAL JUDGE - DUE PROCESS - RIGHT TO A FAIR TRIAL - IMPARTIAL JUDGE - A criminal defendant has the right to both a fair and impartial judge and a judge who has the appearance of being fair and impartial. Excessive threats or efforts to coerce a witness to testify may result in the loss of the appearance of impartiality required of the bench and amount to a due process violation.

WITNESSES - COMPELLABLE WITNESS - CONTEMPT - A judge should adopt a neutral and judicious manner when informing a recalcitrant witness of his or her obligation to testify and the consequences of his or her continued refusal.

WITNESSES - COMPELLABLE WITNESS - JUDICIAL ADMONITION - REVIEWING COURT - A reviewing court should consider the record as a whole when determining the probability or possibility of a nexus between the judicial conduct complained of and the witness's testimony or refusal to testify.

SUPERVISORY POWER - COURT OF APPEALS - The Court of Appeals, in the interest of justice, may exercise its inherent supervisory authority over the administration of justice in Maryland courts and reverse a criminal conviction resulting from a trial judge's improper use of judicial authority.

Facts: In the early morning hours of September 12, 1997, three men were walking near Lexington Market in Baltimore City when they were approached by Anthony Archer ("Archer"), Lewis Bailey ("Bailey"), and Keith Edmonds ("Edmonds"). A fight ensued and shots were fired by men on both sides. One man was killed and another, Rudolph Lyons ("Lyons"), permanently lost vision in one eye. At Archer's trial Lyons testified that Archer stood over him, looked to his left and right, and then shot him in the face.

Police arrested Bailey and Edmonds after they received treatment for gunshot wounds from the incident. Bailey and Edmonds were tried as co-defendants. Bailey accepted a plea wherein he received a life sentence with all but 15 years suspended in exchange for agreeing to testify against Edmonds and Archer. Initially, Archer was tried on February 15, 2001. That trial ended in a mistrial when Bailey refused to testify. It is the efforts of the trial court to persuade Bailey to testify in Archer's second trial that is the basis of this appeal.

The trial judge presiding over the second trial told Bailey's attorney that if Bailey continued to refuse to testify, then he would be held in contempt and the judge in the contempt

proceeding would give him "the longest possible sentence the law allows," which is "theoretically . . . a life sentence." The trial judge also said that "all [Bailey] has to do is get on the stand and answer the questions. If they are favorable to the defendant, then Ms. Handy will just cross-examine him with anything he said unfavorable in the past." The trial judge then called another judge on the record and in open court, and asked him to try Bailey for contempt immediately so that "maybe he'll change his mind." Following the conversation with the other judge, the trial judge again told Bailey's counsel "[l]et me advise him of one last thing that saves him and you all this trouble. You've read Chief Judge Murphy's pocket part on *Nance-Hardy* and the turn-coat witness. Basically, if he testifies favorably to the defendant, there is nothing anybody can do to punish him for that and the State still can cross-examine him about anything he might have said unfavorably in the past. So, if instead of refusing to testify, he gets on the stand and tries to help the defendant, the defendant benefits and the State benefits. So, he may want to do that rather than run the risk of getting a life sentence from [the contempt court]." Bailey decided to face the contempt charge instead of testifying. The record is unclear as to whether Bailey pled guilty to the contempt charge or if he chose to testify in lieu of the contempt proceedings. Bailey, however, returned to Archer's trial court and agreed to testify because he felt "he had no choice but to testify."

Bailey took the stand and testified inconsistently with his testimony in Edmonds's trial. As a result of Bailey's decision to testify in the present case, and to testify inconsistently, the court admitted portions of Bailey's prior recorded testimony. The jury heard that Bailey previously said that it was Archer's idea to rob people that night, that Edmonds gave his gun to Archer after the shooting, and that Archer approached the victim, Lyons. Through Bailey's testimony, the State established Archer's identity, that Bailey assisted in Archer's apprehension, and the extent of Archer's complicity in the crimes. Archer was convicted of first-degree murder and two counts of use of a handgun in a crime of violence. He was sentenced to life imprisonment for felony-murder and two sentences of twenty years for the handgun convictions.

Held: Judgment of the Court of Special Appeals reversed and case remanded to that court with directions to reverse the judgment of the Circuit Court for Baltimore City and remand the case to the Circuit Court for Baltimore City for a new trial. We hold that the trial court's repeated warnings and conduct directed towards the State's witness were prejudicial to Archer

and denied him a fair trial. A trial court's warning to a reluctant witness concerning contempt sanctions or the penalties of perjury is not, *per se*, a due process violation unless given under circumstances that undermine the impartiality of the judge and the integrity of the criminal justice system. In this case the trial judge improperly advised the witness on how he could testify and orchestrated a hearing on contempt by inviting another member of the bench to try and convict the witness for contempt of court, which likely caused the witness to change his testimony and undermined the impartiality and integrity of the court.

The trial court correctly identified Bailey's options: he could refuse to testify and be subject to contempt proceedings or he could testify and be subject to cross-examination. When the trial judge suggested how a contempt proceeding should be decided and advised Bailey of how to testify, however, he departed from a neutral judicial role and acted as an advocate in expressing an opinion to Bailey about how he could testify. Ultimately the trial judge's efforts to compel Bailey to testify were improper in that they influenced Bailey's decision to testify inconsistently.

Defendants have the right to fair and disinterested judges. They are also entitled to a judge that appears impartial and disinterested. Although the witness had no right or privilege not to testify, we find the judge's overall conduct "unnecessarily strong," "threatening," and prejudicial to the defendant. The trial court's warnings to the witness were prejudicial to Archer and denied him a fair trial by violating Archer's constitutional right to due process.

Anthony Archer v. State of Maryland, No. 119, September Term, 2003, filed October 7, 2004, Opinion by Greene, J.

CRIMINAL LAW - RESTITUTION - RESTITUTION AS PART OF SENTENCE OR AS CONDITION OF PROBATION

Facts: This case involves a limitation on a trial court's power to order restitution as a direct sentence or a condition of probation under § 11-603(a) and § 6-221 of the Criminal Procedure Article, Md. Code (2001), respectively.

On 23 April 2002 Scott Alan Pete entered the Cambridge apartment of Susan Raickle and, during an argument, hit Ms. Raickle on the back of the head. Ms. Raickle called the police after Pete left the apartment and the police responded to the call at 3:59p.m. After a relatively brief investigation, the police broadcast a lookout for Pete.

At 4:45p.m. Patrolman First Class Michael Cheesman, while in his marked police car, heard a radio dispatch to be on the lookout for Pete and that he might be driving a late model, tan Ford pickup truck. Approximately one hour later, Patrolman Cheesman saw a man, resembling the broadcast description, in a comparable truck stopped at a traffic light in Cambridge. After driving past the person in the truck to confirm the apparent identification, Patrolman Cheesman turned his vehicle around and activated his overhead lights in an attempt to effectuate a traffic stop. Pete turned onto a side street after the police vehicle closed to within approximately twenty feet of the truck.

Pete drove away from his police cruiser in a manner that appeared that Pete "was trying to get away from [Patrolman Cheesman]." As Pete entered an intersection, he stopped abruptly, five feet beyond the intersection's stop line. Patrolman Cheesman's police cruiser struck the rear of the truck, resulting in \$6,490.53 in damage to the cruiser.

On 21 August 2002 Pete was convicted, after a bench trial in the Circuit Court for Dorchester County, of second degree assault of Ms. Raickle and reckless driving for causing the collision with Patrolman Cheesman's cruiser, among other charges. He received probation in exchange for a suspended sentence for the second degree assault, pursuant to § 6-221 of the Criminal Procedure Article. He also was fined \$250 for reckless driving under the same case number as the second degree assault. One condition of the probation for the second degree assault conviction included restitution to the Local Government Insurance Trust (LGIT) for damages to the police cruiser damaged as a direct result of the reckless driving incident.

He appealed to the Court of Special Appeals challenging the

restitution order, among other things. The Court of Special Appeals affirmed in an unpublished opinion. As to the restitution order, it explained that restitution as a condition of probation for the second degree assault was proper because the economic losses arose from the related reckless driving conviction that was charged at the same time.

We granted Pete's petition for certiorari.

Held: Reversed as to restitution and remanded to the Court of Special Appeals with directions to remand to the Circuit Court of Dorchester County to vacate the order for restitution to the LGIT.

Restitution under § 11-603 of the Criminal Procedure Article was unavailable as a direct sentencing option for either the second degree assault or the reckless driving conviction. Restitution under § 11-603 was unavailable for the second degree assault conviction because Patrolman Cheesman was not a victim of the assault. Restitution under § 11-603 was also unavailable because the damages incurred to the police cruiser were not a direct result of the assault. As a matter of law, restitution was unavailable for the reckless driving conviction because convictions under the Transportation Article that are not punishable by confinement, like reckless driving, are not crimes for which restitution may be ordered under § 11-603.

Restitution was also an illegal sentence as a condition of probation for the second degree assault conviction, despite the fact that § 6-221 grants a trial court the discretion to order probation and its accompanying conditions as the "court considers proper." When evaluating the propriety of conditions for probation, the resultant conditions must be read consistently with concurrent and similar existing legislation on the same subject matter. In Pete's case, because the General Assembly clearly limited the authority of a trial court to order restitution to cases where the damage was the direct result of the crime for which probation was ordered, the order of restitution to LGIT was an unauthorized condition because the damage to the cruiser was not the direct result of the assault on Ms. Raickle.

Pete v. State, No. 19, September Term 2004, filed December 6, 2004. Opinion by Harrell, J.

CRIMINAL LAW - SEARCHES AND SEIZURE - IN GENERAL - WHAT
CONSTITUTES SEARCH OR SEIZURE - SCENT; USE OF DOGS - A CANINE
SNIFF OF AN APARTMENT DOOR IS NOT A SEARCH UNDER THE FOURTH
AMENDMENT OF THE UNITED STATES CONSTITUTION.

Facts: Petitioner Matthew Thomas Fitzgerald challenged Respondent State's use of a certified drug detecting dog to sniff his apartment door.

Petitioner was arrested after police searched his apartment pursuant to a warrant and seized marijuana and other evidence of marijuana use and distribution. The warrant was issued in part based on an alert by a drug detecting dog whom police had presented at petitioner's apartment door.

In the Circuit Court for Howard County, petitioner moved to suppress the evidence seized pursuant to the warrant. Petitioner challenged the dog sniff as a search of his apartment without a warrant. He claimed that without the sniff, the police would have lacked probable cause for the warrant. The Circuit Court denied petitioner's Motion to Suppress. Following a plea of not guilty, and an agreed statement of facts, the Circuit Court found petitioner guilty of possession with intent to distribute a controlled dangerous substance and sentenced him to two years incarceration, all suspended, and a \$1000 fine, all but \$250 suspended, with two years supervised probation.

The Court of Special Appeals affirmed the Circuit Court's denial of the suppression motion. The Court of Appeals granted the petition for writ of certiorari to determine whether a dog sniff of an apartment constitutes a search under the Fourth Amendment.

Held: Affirmed. A dog sniff of an apartment door is not a search under the Fourth Amendment. The Court adhered to Supreme Court precedent focusing on the minimal intrusion and narrow scope of dog sniffs, which only disclose the presence or absence of narcotics.

Matthew Thomas Fitzgerald v. State of Maryland, No. 8, September Term 2004, filed December 10, 2004. Opinion by Raker, J.

CRIMINAL LAW – SEARCH & SEIZURE – SEARCH INCIDENT TO ARREST

Facts: The Respondent, Nieves backed his truck into a patrol car driven by Officers Ackerman and Dietz of the Hagerstown Police Department. After the officers asked Nieves for a valid driver's license he responded that he did not possess a valid driver's license or any photo identification. The officers reported the accident to police dispatch, and they learned that the truck was registered to a female who had been reported missing by her parents ten days earlier. In response to the officers' question about his identity, Nieves provided two sets of information. When questioned a second time, Nieves gave his complete name to the officers. Thereafter, Nieves was placed under arrest for providing false information to the police and for obstructing a police officer. At the scene, the officers conducted a pat down of Nieves' person and searched the truck that Nieves had been driving without any result. The officers then transported Nieves to the police station where they were met by Lieutenant Richard Johnson, who immediately recognized Nieves as having been arrested twice in the year 2000 for drug offenses. Lieutenant Johnson ordered a strip search of Nieves during the booking procedures based upon "the information regarding the missing person and the prior history of drugs." The search produced two small plastic baggies containing individually wrapped baggies of cocaine that were protruding from Nieves' rectum.

On January 22, 2002, Nieves was charged with possession of cocaine, possession with intent to distribute cocaine, and five minor traffic violations. Nieves was also charged with the common law crime of obstructing and hindering a police officer for providing false information to the officers. Prior to trial, Nieves filed a motion to suppress the cocaine that was seized during the strip search arguing that the arrest was unlawful and that the strip search was unreasonable under the Fourth Amendment.

On June 7, 2002, the Circuit Court denied Nieves' motion to suppress stating that "detaining the defendant under the totality of the circumstances and the subsequent search were reasonable." The case proceeded to a bench trial in which Nieves was found not guilty of obstructing and hindering a police officer. He was fined for the minor traffic violations and was convicted of possession with intent to distribute cocaine and the lesser included offense of possession of cocaine. Subsequently, Nieves was sentenced to ten years imprisonment without the possibility of parole. Nieves appealed the trial court's ruling to the Court of Special Appeals, which held that the officers lacked

reasonable, articulable suspicion to conduct the strip search and reversed the judgment of the trial court.

Held: Affirmed. Strip searches incident to arrest for minor traffic offenses should not occur unless the arresting officer has reasonable, articulable suspicion that the arrestee was in possession of weapons or contraband at the time of the search. Reasonable, articulable suspicion to conduct a strip search must be particularized and objectively based upon the person suspected of carrying weapons or contraband. In this instance, the officers lacked reasonable, articulable suspicion that Nieves was carrying weapons or contraband on his person solely based upon his prior drug arrests and any connection he had to a missing person. Therefore, the strip search of Nieves incident to his arrest for a minor traffic violation was unreasonable and violated the Fourth Amendment.

State of Maryland v. Chris Nieves, No. 10, September Term, 2004, filed November 15, 2004. Opinion by Battaglia, J.

JUDGMENT – FOREIGN JUDGMENTS – EFFECT OF JUDGMENT OF UNITED STATES COURTS IN STATE COURTS – OPERATION AND EFFECT – DETERMINATION OF FEDERAL APPELLATE COURT, IN EMPLOYEE’S WRONGFUL TERMINATION ACTION AGAINST INTERSTATE COMPACT AGENCY, THAT THE FAMILY AND MEDICAL LEAVE ACT’S PERSONAL-LEAVE PROVISION WAS NOT A VALID ABROGATION OF STATE SOVEREIGN IMMUNITY, HAS A RES JUDICATA EFFECT IN EMPLOYEE’S SUBSEQUENT STATE COURT ACTION AGAINST THE INTERSTATE COMPACT AGENCY ALLEGING VIOLATION OF THE FMLA’S PERSONAL-LEAVE PROVISION.

Facts: On August 27, 1999, Christopher T. Lizzi filed a three-count complaint in the Circuit Court for Prince George’s County, alleging that the Washington Metropolitan Area Transit Authority (“WMATA”) and seven individuals employed by WMATA unlawfully terminated Lizzi’s employment with WMATA: (1) in violation of the Family and Medical Leave Act of 1993 (“FMLA”)

(29 U.S.C. §§ 2601 et seq.); (2) in breach of contract; and (3) in violation of the Maryland Constitution.

On January 4, 2002, the circuit court ruled, pursuant to a hearing on a motion to dismiss, that, because of the United States Court of Appeals for the Fourth Circuit's decision concerning Lizzi's substantially identical FMLA claim as to the one he brought before the state court, Counts I (FMLA claim) and II (contract claim) of Lizzi's complaint were barred by *res judicata* and therefore dismissed. On March 29, 2002, the circuit court further ruled that Count III in Lizzi's complaint (the Maryland constitutional claim) was barred both by *res judicata* and sovereign immunity.

On December 22, 2003, the circuit court's ruling was affirmed by the Court of Special Appeals of Maryland. Lizzi thereafter petitioned the Court of Appeals for Writ of Certiorari. On June 11, 2004, the Court of Appeals granted the petition.

Held: Affirmed. The Court of Appeals held that, because the United States Court of Appeals for the Fourth Circuit had previously held that Lizzi's FMLA claim, based solely on the personal-leave provision (29 U.S.C. § 2612 (a)(1)(D)) of the FMLA, was barred due to WMATA's sovereign immunity as a state agency and that immunity as it relates to the personal-leave provision of the FMLA has not been abrogated or waived, Lizzi's practically identical claim brought in the state judicial forum was barred by *res judicata*.

Christopher T. Lizzi v. Washington Metropolitan Area Transit Authority, et al. No. 32, September Term, 2004, filed December 9, 2004. Opinion by Cathell, J.

REAL PROPERTY - RULE AGAINST PERPETUITIES - CREATION OF FUTURE ESTATES - IN GENERAL - WHERE LEGISLATURE CREATED A STATUTORY

EXCEPTION, CONTRACTUAL TERM IN CONTRACT AND IN DEED BETWEEN DECEASED ORIGINAL PURCHASER AND STATE HIGHWAY ADMINISTRATION WAS NOT VIOLATIVE OF THE RULE AGAINST PERPETUITIES FOR LACK OF A DEFINITE TIME PERIOD IN WHICH CERTAIN CONDITIONS PRECEDENT MUST OCCUR.

STATUTES - CONSTRUCTION AND OPERATION - RETROACTIVE OPERATION - STATUTES IMPAIRING VESTED RIGHTS - THE STATUTE THAT HAD BEEN IN EFFECT AT THE TIME OF THE AGREEMENT, AND WHOSE LANGUAGE WAS INCORPORATED INTO THE CONTRACT AND INTO THE DEED, GOVERNED THE DISPOSITION OF THE PROPERTY AND SUBSEQUENT CHANGES TO THE STATUTE WERE INTENDED TO APPLY PROSPECTIVELY.

Facts: In March 2003, Helene Selig, as executrix of the estate of her husband, Milton E. Selig, sought to enforce a right of first refusal clause contained both in a July 1978 contract for the sale of land between the deceased and the State Highway Administration ("SHA") and in the accompanying October 1978 deed of conveyance. The clause's language, which tracked the wording of Md. Code (1977, 1977 Supp.), § 8-309 (b) of the Transportation Article, the statute in effect at the time of the agreement, provided Mr. Selig or his successor with the right to reacquire the parcel from the SHA, for the price paid by the SHA, if that entity abandoned the project for which it had acquired the property and the Maryland Secretary of Transportation determined that the property was no longer needed for any transportation purpose.

The SHA had used a very small portion of the property for a road project and in February 2003 offered the residual land for sale at public auction. Prior to the auction, Mrs. Selig notified the SHA that she intended to exercise the right of first refusal. The SHA refused to honor this right stating that changes to § 8-309 no longer provided for disposition of the land in the manner stated by the clause in the contract and in the deed. Moreover, the SHA maintained that there had been no project abandonment, though Mrs. Selig could reacquire the property according to the provisions contained in the then-current 2003 version of § 8-309. The SHA conducted its auction as scheduled and sold the land to Capitol Buick, Pontiac, GMC, Inc., a party who later intervened in this case.

Mrs. Selig filed a complaint in the Circuit Court for Prince George's County seeking to enforce the terms of the right of first refusal. The SHA filed a motion to dismiss, in which Capitol joined, asserting that the contract's and the deed's pertinent clauses violated the Rule against Perpetuities. The circuit court dismissed Mrs. Selig's complaint for this reason

stating that the contract contained no time limit within which the prerequisite conditions, *i.e.*, abandonment of the project for which the property was acquired and the Secretary's determination, must vest. The Court of Appeals, on its own initiative and before the intermediate appellate court could decide the appeal, ordered the issuance of a writ of certiorari to address whether the provisions in the contract and in the deed violated the Rule against Perpetuities and whether the SHA's use of a portion of the conveyed property for transportation purposes nullified Mrs. Selig's right of reacquisition.

Held: Reversed. Md. Code (1977, 1977 Supp.), § 8-309 (b) of the Transportation Article, created a statutory exception to the Rule against Perpetuities. The language found in the 1977 version of § 8-309 (b), which was contained in both the contract and in the deed, was not rendered void by the lack of a definite time period in which the conditions precedent must occur. The SHA's use of a portion of the conveyed property did not defeat the right of reacquisition. Furthermore, the statutory language, present in the contract and in the deed, created a contractual right of first refusal and governed the disposition of the property. Finally, the Court of Appeals ruled that changes to § 8-309 (b), subsequent to 1977, were intended to apply prospectively.

Helen E. Selig, Executrix of the Estate of Milton E. Selig v. State Highway Administration, et al. No. 23, September Term, 2004, filed November 16, 2004. Opinion by Cathell, J.

COURT OF SPECIAL APPEALS

ESTATES - ATTORNEY'S FEES AND PERSONAL REPRESENTATIVE'S COMMISSIONS - STANDING - APPEALABILITY.

Facts: On August 10, 2001, appellant, William Peterson, Personal Representative of the Estate of Elsie Kinsey, filed a "Petition for Allowance of Attorney Fees" with the Orphans' Court for Queen Anne's County, requesting attorney's fees of \$22,599 for Elise Davis, Esquire, counsel for the Estate. As an exhibit to the petition, appellant attached an itemized list of approximately 150 services rendered by Davis, along with the corresponding time she expended. Numerous entries also appeared on a fee petition submitted on the same date by the personal representative.

On August 10, 2001, appellant also filed a "Petition for Allowance of Personal Representative Commissions," in which he sought commissions of \$15,787.85, representing the hours of service he allegedly expended on behalf of the Estate. In his petition, appellant detailed seventeen services he rendered, for which he claimed to have expended 63.5 hours in time. Significantly, only one service, totaling 1.2 hours, did not appear on the attorney's fee petition filed that same day.

On October 25, 2001, appellant filed a "Supplemental Petition for Allowance of Attorney Fees," in which he requested an additional \$2,376 in legal fees for Ms. Davis, for a total fee award of \$24,975. On March 26, 2002, the Orphans' Court entered an Order awarding Ms. Davis \$24,975 in attorney's fees and authorizing payment of \$15,787.83 in commissions to the Personal Representative.

Meanwhile, appellant, on behalf of the Estate, was embroiled in a legal battle with Roger E. Pleasanton, Kinsey's surviving spouse. On October 2000, Pleasanton brought suit in the Circuit Court for Queen Anne's county against the Estate and Peterson, individually and as personal representative, challenging the value of the probate estate. Following a trial in May 2001, the circuit court granted the defense's motion for judgment. Thereafter, Pleasanton appealed to this Court. We affirmed on the merits, but remanded to the circuit court for the entry of a declaratory judgment. *Pleasanton v. Peterson*, No.920, September Term, 2002 (filed August 7, 2002) (unreported).

The Estate's assets included, *inter alia*, real and leasehold properties, including properties located at 212, 216 and 244 Merganser Drive in Chestertown. On June 29, 2001, appellant conveyed the properties at 212 and 244 Merganser Drive to Pleasanton as the surviving spouse. At that time, Pleasanton

also held title to property at 216 Merganser Drive. By Order entered November 6, 2001, however, the Orphans' Court directed Pleasanton to deed all three properties to the Estate for distribution or sale.

On February 19, 2002, counsel for both Peterson and Pleasanton filed a "Joint Request for Approval of Settlement" with the Orphans' Court, in which they sought court approval of a settlement agreement reached on December 27, 2001, relating to division of the Estate. By its terms, Pleasanton was to receive the deed to the property at 216 Merganser Drive, and half of the net proceeds of the sale of the properties located at 212 and 244 Merganser Drive. The surviving spouse also agreed to withdraw any objections to appellant's request for attorney's fees and commissions. By Order entered February 19, 2002, the court approved the settlement agreement.

Thereafter, appellant pursued efforts to obtain control of assets belonging to the Estate and to dispose of the rental properties at 212 and 244 Merganser Drive. On December 30, 2002, appellant filed with the court a "Petition for Authority to Sell," seeking the court's approval of a sale to appellant of the rental properties at the appraised value, so that appellant could accrue more money for the Estate and "finalize the Estate sooner rather than later." By "Order of Court" entered January 28, 2003, a newly elected Orphans' Court (consisting of only one of the three prior judges) authorized the sale of the properties to appellant.

Through Ms. Davis, appellant also undertook to recover \$5,000 owed to the Estate by a tenant of the properties at 212 and 244 Merganser Drive, and for an accounting for the rental income received by the surviving spouse during the period of time he held titled to the properties. On May 15, 2003, appellant filed a "Petition for Allowance of Additional Attorney Fees and Court Costs," seeking additional attorney's fees of \$4,269.75.

Appellant sought to impute monies to the surviving spouse for his part in continuing litigation with the Estate. In his first petition to impute monies, filed January 8, 2003, appellant sought to impute to the surviving spouse the rental income he allegedly received improperly under the settlement agreement, for a total of either \$10,740.49 or \$5,340.49. By "Order of Court" entered February 4, 2003, the Orphans' Court granted appellant's petition and ordered \$5,340 imputed to the surviving spouse.

In a second petition to impute monies, filed April 25, 2003, appellant contended that Pleasanton's actions contributed to

litigation in Delaware to collect monies owed to the Estate and to evict holdover tenants residing at 212 and 244 Merganser Drive. Appellant sought an order imputing an additional \$4,269.75 to the surviving spouse, representing the cost of the additional litigation. On May 15, 2003, appellant filed yet another petition, in which, on behalf of the Estate, he sought to impute an additional \$1,110.98 to the surviving spouse, representing the cost for personal property allegedly removed from the rental properties by Pleasanton.

By "Order of Court" entered May 27, 2003, the Orphans' Court denied appellant's second and third petitions to impute monies to the surviving spouse. By a separate order entered that same day, the court denied the petition for additional attorney's fees. Moreover, on May 27, 2003, after completing an audit of the various papers filed on behalf of the Estate, and while awaiting closure of the Estate, the court, *sua sponte*, issued a Show Cause Order to appellant and Ms. Davis "to show cause why the personal representative fees paid ... should not be reduced as originally fixed" by the court on March 26, 2002. The court noted "that all of such papers filed were filed by the Attorney for the estate and not by the personal representative."

A show cause hearing was held on June 10, 2003, at which appellant and Davis appeared. At the outset of the hearing, the court noted its concern with the duplication of services in regard to attorneys' fees and the Personal Representative commissions. Ms. Davis explained that she and appellant worked together on the same tasks, assisting one another. She further contended that the court lacked the authority, *sua sponte*, to review its prior order, issued on March 26, 2002, awarding \$24,975 in counsel fees and \$15,787.83 in commissions to the Personal Representative. She argued: "[T]he order of last spring is a final order. I don't think this Court has the authority to go back and undo what an earlier Court did."

The court inquired about the cost effectiveness of expending counsel fees of over \$4200 to recover an outstanding debt of \$5000 in connection with the rental properties. The court was of the view that it retained the authority to review previously approved commissions, so long as the estate remained open, *i.e.*, so long as the court had not approved the final accounting of the estate.

On June 10, 2003, the same date of the show cause hearing, appellant filed a motion to reconsider the court's orders of May 27, 2003, denying his request for additional attorney's fees, as well as his petitions to impute monies to the surviving spouse.

Following the show cause hearing and the court's review of appellant's motions to reconsider, and by orders of June 19, 2003, the court authorized payment of additional attorney's fees of \$1423.25, but reduced appellant's commissions from \$15,787.85 to \$5785.85. In its Order, the court noted that the fees represented "a one-third attorney compensation for litigation necessitated by the Estate for collection of a debt due ... in the amount of \$5,000.00 to remove tenants from 212 and 244 Merganser Drive, for collecting monies due for rent from those individuals and to recover personal property from the surviving spouse."

On July 18, 2003, appellant filed two motions for reconsideration of the court's orders of June 19, 2003. Appellant argued that the court lacked the authority to unilaterally revise the award of commissions, because no interested party had filed an application with the court to reduce the amount of appellant's commissions.

Thereafter, on July 25, 2003, appellant filed a second administration and partial distribution account, including an accounting of the distribution of the proceeds of the sale of the rental properties. The accounting reflected a deduction for a six-percent real estate broker's commission in connection with the sale of the properties. By an Order entered on August 19, 2003, the court withheld approval of the second account and directed that the account be revised to reflect that the six-percent commission "was not actually paid to a real estate broker" in connection with the sale of the rental properties.

By another Order filed August 19, 2003, the court affirmed its earlier Order of June 19, 2003, in which it had reduced appellant's commissions. The court was satisfied that, prior to approval of the Final Administration Account for the Estate, it retained the power, *sua sponte*, to reduce commissions previously fixed.

Held: Judgment affirmed.

Relying on Title 6 of the Maryland Rules and, *inter alia*, on *National Wildlife Fed'n v. Foster*, 83 Md. App. 484 (1990), the Court determined that the orders reducing commissions and denying additional attorneys' fees were appealable, despite the fact that the estate remained open when the appeal was noted. The Court next concluded that the Orphans' Court may, *sua sponte*, review and then reduce its previous award of commissions while an estate remains open. It noted that the Court of Appeals has long recognized that "matter[s] of accounting by executors and

administrators and of the allowance of their commissions" are within the province of the Orphans' Court. Furthermore, the Court was mindful that commissions "are not regarded as earned until the administration account is passed by the court[.]" Additionally, the Court acknowledged: "Even after final ratification, there are circumstances that permit revisions of fee awards."

As to the authority of the Orphans' Court, on its own motion, to reconsider and revise a prior fee award, the Court observed that it was unaware "of any authority restricting the right of the Orphans' Court to revise, *sua sponte*, its previous Order. Second, the Court found it helpful to analogize to the power of a trial court to revisit earlier rulings during the pendency of a case. The court added that it is well settled that, while a case remains open, "a judge presiding at a trial ... is free at any time during the trial to reconsider any prior ruling in the case, whether made by him or by another judge."

The Court was satisfied that appellant lacked standing to challenge the court's denial of his request for additional attorney's fees. Relying on *Frater v. Paris*, 156 Md. App. 716 (2004), the Court concluded that, on the record before the Court, appellant was not aggrieved by the amount of attorney's fees awarded to Ms. Davis. Indeed, the Court noted that appellant appeared below and in the appellate Court only in his capacity as a Personal Representative. Moreover, the Court was cognizant that, when questioned at oral argument, Davis "did not articulate any basis to support appellant's standing to challenge the court's ruling as to attorney's fees." Additionally, the Court was mindful that there was "no indication in the record that appellant will be held personally liable to Davis for whatever amount of attorney's fees were not awarded by the court."

Further, the Court concluded that, even if appellant had standing, appellant's claim regarding the court's award of attorney's fees lacked merit. The Court recognized that the authority of the Orphans' Court to award attorney's fees to counsel for an estate is derived from statute and is governed by Md. Code (2001 Repl. Vol.), § 7-502 of the Estates and Trust Article ("E.T."). In addition, the Court was satisfied "that the award of attorneys' fees by the Orphans' Court 'requires the exercise of discretion and judgment.'" Additionally, the Court was mindful that the award should not be disturbed in the absence of proof of abuse of discretion. The Court concluded that the Orphans' Court acted within its discretion.

In regard to appellant's contentions as to the court's

failure to approve the proposed distribution of proceeds reflected in the Second Administration and partial Distribution Account, the Court determined that appellant was without standing. Furthermore, the Court concluded that appellant's contentions lacked merit, in light of the Orphans' Court's authority to direct the conduct and accounting of estates.

Finally, the Court held that appellant's question regarding the court's failure to impute monies to the surviving spouse violated Md. Rule 8-504(a)(5), requiring a party to include in its brief argument in support of any question raised. Therefore, the Court declined to reach the issue, pursuant to Md. Rule 8-504(c).

William Christopher Peterson, Personal Representative of the Estate of Elsie Virginia Kinsey v. Orphans' Court for Queen Anne's County, Maryland, No. 1552, September Term, 2003. Opinion by Hollander, J.

ELEVENTH AMENDMENT - SOVEREIGN IMMUNITY - STATE INSTRUMENTALITY - ARM OF STATE - WAIVER OF SOVEREIGN IMMUNITY; COURTS AND JUDICIAL PROCEEDINGS ARTICLE, § 5-518(c)

Facts: Appellant, a former employee discharged at age 48 from employment with the Anne Arundel County Board of Education (the "Board"), filed a claim with the EEOC and obtained a right to sue letter. He then initiated an age discrimination case in federal court; that court dismissed the federal claims under the Eleventh Amendment. Thereafter, appellant filed suit against the Board and his former supervisor, appellees, in the Circuit Court for Anne Arundel County. He alleged, *inter alia*, age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (the "ADEA"), as well as the Fair Employment Practices Act, Md. Code (1957, 2003 Repl. Vol.), Art. 49B, § 16(a). In successive rulings over a period of months, the court

dismissed all of appellant's claims prior to trial. It concluded, *inter alia*, that Art. 49B, § 16(a) does not create a private right of action. The trial court also held that "a private plaintiff cannot bring a cause of action based on the ADEA against a County board of education in a Maryland state court," because the Board is a State agency, and is therefore protected by sovereign immunity.

Held: On appeal, the Court agreed with the circuit court "that the Board is an arm of the State for purposes of a suit filed under federal and State law by a former Board employee, challenging his discharge based on claims of age discrimination." Therefore, it is entitled to the protection of sovereign immunity.

Appellant argued that the court erred when it ruled that the Eleventh Amendment barred an ADEA claim against the Board on the basis that the Board was a State agency for purposes of sovereign immunity. The Court noted: "Only the states themselves, or a state agency or instrumentality that functions as an 'arm of the State,' is entitled to invoke sovereign immunity or the immunity afforded by the Eleventh Amendment." Accordingly, "[t]he question of whether the Board is a State or local entity is central because, with regard to the ADEA claim, the doctrine of sovereign immunity does not apply to a county agency; it applies only to the State and its instrumentalities."

The Court was "mindful that, historically, the Court of Appeals has almost always regarded local school boards as agencies of the State." Nevertheless, it examined "the legislative scheme governing public education in Maryland," pursuant to the multi-factor analysis employed in apposite federal cases. Those factors include: "(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.'" *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001). With regard to these factors, the Court observed that Maryland's statutory scheme conferred broad authority upon local school boards as well as certain limitations.

The Court explained that the fourth factor, the "State treasury" requires analysis of "whether an adverse judgment against the entity would be paid from the State's treasury." In its analysis, the Court observed that the Board is statutorily required to procure comprehensive liability insurance.

Therefore, the State would not be required to pay an adverse judgment. The Court said: "Clearly, the statutory scheme obligates the Board, not the State, to pay any adverse judgment."

The Court continued its analysis with an examination of the decision rendered by Court of Appeals in *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129 (2000), which the Court interpreted as a suggestion that, "under very limited circumstances, a county board of education in Maryland is to be treated as a local agency rather than as an arm of the State." The Court observed that the *Chesapeake Charter* decision "left virtually intact the principle that county school boards are ordinarily agencies of the State," and "recognized only a limited exception with respect to budgetary matters and procurement."

Next, the Court considered whether, under the circumstances of this case, the Legislature authorized a limited waiver of sovereign immunity for "any claim" against the Board less than \$100,000, pursuant to Courts and Judicial Proceedings Article § 5-518(c). The Court determined that the Legislature has authorized a limited waiver of sovereign immunity. The Court relied on "the plain language of the statute," which indicates that the Board may not raise the defense of sovereign immunity in regard to "any claim" of \$100,000 or less. Accordingly, the Court remanded appellant's ADEA claim for further proceedings.

Further, the Court was satisfied "that Article 49B does not provide a private right of action under the circumstances attendant here," where appellant pursued his administrative remedies. Moreover, because appellant had an administrative statutory remedy available to him under Article 49B, he was not entitled to pursue a common law claim of wrongful discharge.

David Norville v. Anne Arundel County Board of Education, et al., No. 00761, September Term, 2003, filed December 6, 2004. Opinion by Hollander, J.

FAMILY LAW - CHILD ABUSE OR NEGLECT - ALLEGED CHILD ABUSER MAY DISPUTE FINDINGS OF ABUSE DISCOVERED THROUGH JOINT INVESTIGATION - DEPARTMENT MUST PRODUCE REDACTED INVESTIGATION RECORD NOT LESS THAN 14 DAYS BEFORE DISPUTE HEARING - STATUTORY RATHER THAN DEPARTMENTAL DEFINITION OF RECORD CONTROLS - AUDIO TAPE RECORDING JOINT INTERVIEW OF ALLEGED ABUSER DURING INVESTIGATION IS DOCUMENTARY MATERIAL AND THEREFORE PART OF RECORD TO BE PRODUCED

Facts: The Cecil County Department of Social Services (CCDSS) received information that a 16 year old girl, "D", had been sexually abused by her friend's father on two separate occasions. The CCDSS assigned an assessor and the Sheriff's Department for Cecil County assigned a detective to conduct a joint investigation of the allegations. During the investigation, "D" identified appellee as her abuser. As a result of the joint investigation of appellee by the CCDSS and Cecil County Sheriff's Department, CCDSS found appellee responsible for "indicated child abuse."

On appeal, an Administrative Law Judge for the Office of Administrative Hearings ruled that the CCDSS's finding that appellee was responsible for "indicated child sexual abuse" was supported by credible evidence and was consistent with the law. As a result, the Administrative Law Judge ruled that the CCDSS could identify appellee as an individual responsible for indicated sexual abuse in a central registry and in its other files.

Appellee appealed to the Circuit Court for Cecil County. Noting that an audio tape recording of a statement made by appellee to investigators was absent from the record, the court remanded the case to the Office of Administrative Hearings for development of further evidence. Specifically, the court ruled that the failure to provide the tape, a form of documentary material made during a joint investigation, rendered the record for review incomplete.

Held: Affirmed. The audio tape of appellee's joint interview with the CCDSS and Sheriff's Department investigators should have been provided to both the Office of Administrative Hearings and appellee prior to the administrative hearing. The audio tape was made during a joint interview, in which the CCDSS actively participated. It falls within the definition of "documentary material" as provided in Md. Code. Ann., Fam. L. § 5-701(t) and is, therefore, part of the record that should have been provided to appellee prior to the contested case hearing.

The CCDSS participated in the creation of the audio tape,

even if the tape did not remain in its physical custody. Appellee should have the benefit of challenging CCDSS's determination by use of the most reliable, and least self-serving, evidence available from a joint investigation.

Cecil County Dep't of Soc. Servs. v. Danny Russell, No. 0390, September Term, 2003, filed November 10, 2004. Opinion by Sharer, J.

TORTS - MEDICAL NEGLIGENCE - HEALTH CARE MALPRACTICE ACT - REQUIREMENT OF CERTIFICATE OF QUALIFIED EXPERT - VALIDITY OF CERTIFICATE

MEDICAL NEGLIGENCE - APPARENT AUTHORITY OF HOSPITAL OVER ATTENDING PHYSICIANS

Facts: Decedent visited the Fort Washington Hospital ("Hospital") complaining of weakness and fatigue. Prior to admission, Decedent signed a medical consent form. Soon thereafter, Drs. Michael Sidarous and Elie Debbas examined Decedent and discovered a condition requiring immediate surgical intervention. Approximately eight hours later, the staff of the Hospital began surgery. During surgery, Decedent went into cardiac arrest and died. Representatives alleged that the delay precedent to the surgery was the proximate cause of Decedent's death.

Consequently, Decedent's representatives filed a Statement of Claim with the Health Claims Arbitration Office pursuant to the Maryland Health Care Malpractice Claims Act. Accompanying their Statement of Claim was the requisite Certificate of Qualified Expert, executed by Dr. Ann Gordon. The Certificate attested to the deviations in the standard of care by the Hospital, Dr. Debbas, and Dr. Sidarous. Decedent's representatives waived arbitration and the action proceeded in the Prince George's County Circuit Court.

Dr. Debbas filed a Motion to Dismiss, predicated on the single assertion that Decedent's representatives had failed to file an appropriate Certificate of Qualified Expert. Specifically, Dr. Debbas claimed that the Certificate was defective because Dr. Gordon contradicted its contents in subsequent deposition testimony. The Circuit Court granted Dr. Debbas' Motion to Dismiss.

The Hospital filed a Motion for Summary Judgment, initially on the basis of the allegedly defective Certificate, but later supplemented by the argument that the record did not support a finding of negligence by the Hospital. That later argument raised the issue of apparent authority of the treating physicians, and potential vicarious liability. The Circuit Court granted the Hospital's Motion for Summary Judgment.

Held: Reversed. A Certificate of Qualified Expert satisfies the requirements of the Maryland Health Care Malpractice Claims Act. The Certificate was timely filed, attested specifically to the deviations from the standards of care, and opined that such deviations were the proximate cause of Decedent's death. Dr. Gordon's subsequent deposition testimony indicating that she formed no opinion as to any other physician save Dr. Sidarous did not render her Certificate of Qualified Expert defective. Deposition testimony merely emphasized that Dr. Gordon had expected to testify at trial regarding only Dr. Sidarous' deviation from the standard of care. Dr. Gordon's affidavit subsequent to the deposition testimony clarified this position and re-asserted her opinions as contained in the Certificate.

Moreover, sufficient evidence created a genuine dispute as to material fact on the issues of apparent authority and vicarious liability. A medical consent form did not put Decedent on notice that independent contractor physicians would treat her at the hospital.

Nelson, et al v. Debbas, et al, No. 1881, September Term, 2003, filed December 8, 2004. Opinion by Sharer, J.

UNIFORM POSTCONVICTION PROCEDURE ACT - MOTION TO REOPEN CLOSED POSTCONVICTION PROCEEDING - ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR NOT ASSERTING A DOUBLE JEOPARDY ARGUMENT OF IMPLIED ACQUITTAL BEFORE JURY THAT RETURNED PARTIAL VERDICT OF GUILT ON SECOND-DEGREE MURDER AND HANDGUN CHARGES WAS PERMITTED TO DELIBERATE FURTHER AND RETURN A VERDICT OF GUILT ON FIRST-DEGREE MURDER CHARGE.

Facts: On April 11, 1988, the body of Lyndetta Mickles was discovered in a wooded area in Prince George's County. An autopsy revealed that she had been shot in the head and left shoulder, and a DNA test on semen found inside Lyndetta's body revealed the presence of Percy Stanley Harris's sperm.

On April 14, 1988, Harris was charged in the Circuit Court for Prince George's County with first-degree murder, second-degree murder, and the use of a handgun in the commission of a crime of violence. After his first trial ended in a hung jury, the jury in his second trial began deliberating on November 9, 1990. After a few hours, the jurors sent a note to the court saying that they had reached a verdict on the second-degree murder and handgun charges but were deadlocked on the first-degree murder charge. Defense counsel agreed to bring in the jury to hear their verdicts, which were guilty of both second-degree murder and the handgun charge. The jurors were polled on those counts. The court then gave the jury an *Allen* charge, over defense counsel's objection, and sent the jury back to deliberate further on the first-degree murder charge. The jury later returned a guilty verdict for first-degree murder. Harris was then sentenced to life imprisonment for first-degree murder and twenty years, to run consecutively, for the handgun conviction. Harris appealed to the Court of Special Appeals, claiming that the trial court's *Allen* charge was incorrect and coercive and its flight instruction was not warranted on the evidence presented. The Court of Special Appeals affirmed the judgments in an unreported opinion, *Harris v. State*, No. 362, September Term 1991 (filed January 8, 1992), explaining that the *Allen* charge was not incorrect or coercive, and that there was sufficient circumstantial evidence to support the flight instruction.

In 1997, Harris filed a petition for postconviction relief. He alleged due process violations, including that the trial court used improper procedure to obtain the first-degree murder conviction, because the guilty verdict of the second-degree murder charge amounted to an implied acquittal of first-degree murder. Harris also alleged ineffective assistance of trial counsel, including that trial counsel had performed deficiently by permitting a witness to make an improper in-court

identification of Harris. Finally, Harris alleged ineffective assistance of appellate counsel, citing a failure to make the double jeopardy argument of implied acquittal on direct appeal as grounds. The postconviction court found that Harris had done nothing to rebut the presumption of waiver of the due process violations and that the ineffective assistance of trial and appellate counsel claims were without merit because Harris did not prove that the errors alleged constituted ineffective assistance under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

On September 20, 2002, Harris filed a motion to reopen the postconviction proceeding, making the same arguments as in his 1997 postconviction petition. He added that postconviction counsel was ineffective for not criticizing the trial counsel's failure to object to a flight instruction given at trial and for not sufficiently pleading the "prejudice prong" of the ineffectiveness claim. The court denied Harris's motion to reopen, stating that his claims were without merit. Harris filed a motion for reconsideration, which was denied, and then appealed to the Court of Special Appeals.

Held: Affirmed. The Court of Special Appeals held that Harris was not impliedly acquitted of first-degree murder when the jury returned a partial verdict of guilt on the second-degree murder and handgun charges, on which it was polled. When they returned the partial verdict, the jurors said that they were in disagreement about the first-degree murder charge. Because this statement lacked evidence of unanimity, the Court concluded that an acquittal on that charge could not be implied. Accordingly, when the jury, after further deliberation, returned a verdict of guilt on the first-degree murder charge, the Court reasoned that the defendant was not convicted of a crime he had been acquitted of. Therefore, the polling of the jury on the two counts on which it returned a partial verdict did not preclude further deliberation on the third count, on which the jury was in disagreement. The Court concluded that, because trial counsel could not have been ineffective by failing to assert an implied acquittal and argue double jeopardy, as those grounds were without basis, it was not in the interests of justice to reopen the postconviction proceeding, and the trial court did not abuse its discretion in so ruling.

The Court also held that its opinion in the case on direct appeal answered in the affirmative the question of whether the evidence at trial was sufficient to generate a flight instruction. Therefore, the Court found that postconviction counsel could not have performed deficiently by failing to

criticize appellate counsel for not appealing this issue; and the postconviction court therefore did not abuse its discretion in declining to reopen the proceedings to hear a claim based on an erroneous flight instruction.

The Court also held that the record did not reflect any in-court identification of Harris, much less an improper one, and thus found no due process violation on that ground. The Court further held that postconviction counsel was not ineffective for not criticizing appellate counsel, who did not raise the issue of improper in-court identification on direct appeal. The Court concluded that the postconviction court did not abuse its discretion in refusing to reopen the postconviction proceeding to hear this issue.

The Court held that postconviction counsel did not render ineffective assistance, and postconviction counsel had properly pleaded non-waiver of fundamental rights, as the postconviction petition alleged as much. It also held that postconviction counsel sufficiently proved non-waiver of fundamental rights, as the postconviction court explained that it was "not persuaded" by the evidence Harris put forth. In addition, the Court held that postconviction counsel had properly pleaded the prejudice aspect of an ineffectiveness claim, as the postconviction court found that it was not convinced that the errors postconviction counsel alleged amounted to deficient *performance* under *Strickland v. Washington*.

Finally, the Court held that all of postconviction counsel's alleged errors, considered cumulatively, did not constitute ineffective assistance of counsel.

Percy Stanley Harris v. State of Maryland, No. 1268, September Term, 2004, filed December 6, 2004. Opinion by Eyler, Deborah S., J.

ATTORNEY DISCIPLINE

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective December 3, 2004:

JAMES F. CHILDRESS

*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective December 7, 2004:

MICHELLE JOY HAMILTON
a/k/a MICHELLE JOY HAMILTON DAVY

*

By an Order of the Court of Appeals of Maryland dated December 7, 2004, the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

WALTER D. McQUIE, III

*

By an Opinion and Order of the Court of Appeals of Maryland dated December 10, 2004, the following attorney has been disbarred from the further practice of law in this State:

MARY I. DUVALL

*

By an Opinion and Order of the Court of Appeals of Maryland dated December 13, 2004, the following attorney has been indefinitely suspended from the further practice of law in this State:

FRANCIS MacDOUGALL

*

By an Order of the Court of Appeals of Maryland dated December 23, 2004, the following attorney has been disbarred by consent from the further practice of law in this State:

STUART M. BLUM

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