Amicus Curiarum

VOLUME 30
ISSUE 5 MAY 2013

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

Gregory Hall, et al. v. Prince George's County Central Democratic Committee, et al., No. 100, September Term 2012, filed April 8, 2013. Opinion by Battaglia, J.

Bell, C.J., Harrell and Greene, JJ., dissent.

http://mdcourts.gov/opinions/coa/2013/100a12.pdf

CONSTITUTIONAL INTERPRETATION – MARYLAND CONSTITUTION – ARTICLE XV, SECTION 2 – REMOVAL OF AN ELECTED OFFICIAL FOR MISCONDUCT BY OPERATION OF LAW – ARTICLE III, SECTION 13(a)(1) – APPOINTMENT TO FILL A VACANCY IN AN ELECTED OFFICE

Facts:

The Court of Appeals considered together two appeals revolving around the removal of Tiffany Alston from the House of Delegates. Ms. Alston was convicted of misconduct in office and sentenced, pursuant to a plea agreement, to a year of incarceration (suspended), restitution, community service, and a fine. Under the terms of the plea agreement, Ms. Alston's conviction was to be modified to probation before judgment after she completed her community service, made restitution, and paid her fine, but the judgment and conviction were not stayed; rather, they were entered against her at the time of sentencing. As a result of Ms. Alston's conviction, her seat in the House was declared vacated by operation of law and the Prince George's County Central Democratic Committee (Central Committee) met to nominate her replacement. The Central Committee nominated Gregory Hall, but, shortly after submitting Mr. Hall's name to the Governor, it became known that Mr. Hall had been involved in criminal activity in his youth. As a result of this revelation, the Governor requested that the Central Committee rescind its nomination.

Mr. Hall filed suit to enjoin the Central Committee from rescinding his nomination and to compel the Governor to appoint him as Ms. Alston's successor, arguing that the Central Committee did not have the authority to rescind his nomination. Ms. Alston joined this suit, arguing that she had not been removed by operation of law because the plea agreement she negotiated bound the court to modify her sentence to probation before judgment, such that her conviction never became final, and, thus, she was not removed from office. A Judge in the Circuit Court for Prince George's County ruled that Ms. Alston's seat had become vacant by operation of law when she was sentenced for misconduct, notwithstanding the subsequent

modification to a probation before judgment and that the Central Committee properly withdrew Mr. Hall's nomination.

Held:

The Court of Appeals held that because Ms. Alston had been sentenced, without a stay, for misconduct in office, her conviction was final for purposes of removing her from office. The fact that she was eligible to have her conviction modified to probation before judgment did not alter the finality of her conviction. The Court also held that the Central Committee had the power to rescind its nomination up to the time when the Governor appointed a nominee, and, because the Governor had not yet acted, the Central Committee properly withdrew Mr. Hall's nomination. The Court also held that if the final day upon which the Governor must act to appoint a nominee under Section 13(a)(1) of Article III of the Maryland Constitution is a Saturday, Sunday, or holiday, the Governor has until the end of the next day the State government is open to make his appointment.

Jaron Tyree Grade v. State of Maryland, No. 16, September Term 2007, filed April 3, 2013. Opinion by Bell, C.J.

http://mdcourts.gov/opinions/coa/2013/16a07.pdf

CRIMINAL LAW – PROCEDURE – JURY COMMUNICATION

Facts:

The petitioner, Jaron Tyree Grade, appealed his convictions for two counts of first-degree murder and use of a handgun in the commission of a crime. He did so on the basis of events which took place at his trial in the Circuit Court for Baltimore County. On December 2, 2004, before adjourning for the day, the trial judge addressed counsel with regard to the next day's procedure, as it specifically pertained to the jurors. The judge made no mention, in the course of that discussion, of how the court would proceed in the event that one of the jurors was unable to serve. Defense counsel provided the court with her contact information in case of an emergency. However, upon arriving in court the following morning, counsel was informed that the court had engaged in a communication with a juror who had called to notify the court of an emergency, and that the court had consequently decided to replace that juror with an alternate. The judge did not notify counsel, in advance of their arrival in court, of the communication, or the replacement decision. Defense counsel objected to the communication "for the record." On December 3, 2004, the jury convicted the petitioner of all counts with which he was charged. The petitioner timely appealed to the intermediate appellate court, asserting that the trial court violated Rule 4-326(d) by replacing a juror with an alternate juror without the knowledge or acquiescence of his counsel. The Court of Special Appeals affirmed the Circuit Court's ruling, concluding, in an unreported opinion, that the Circuit Court's decision to replace a juror with an alternate was not prejudicial to the defendant, nor was it an abuse of discretion. Following oral argument, the Court of Appeals issued a per curiam order, with an opinion to follow, reversing the ruling of the intermediate Appellate Court.

Held:

(1) The telephone call from the juror concerning her ability to deliberate was a communication that pertained to the action, thus implicating Rule 4-326 (d), because the subject of the phone call, if acted on, could, or would affect the make-up of the fact finding panel;(2)the trial court's violation of the rule, by failing to notify counsel of its communication with the juror, prejudiced the petitioner, thus warranting a reversal of his convictions.

Constantine Koste v. Town of Oxford, et al., No. 42, September Term 2012, filed March 26, 2013. Opinion by Harrell, J.

Battaglia, J., joins in judgment only.
Bell, C.J., and Adkins, J., dissent.

http://mdcourts.gov/opinions/coa/2013/42a12.pdf

STATUTORY CONSTRUCTION – ELECTION LAW – REFERENDUM – ANNEXATION RESOLUTION – CIRCULATING AND SIGNING PETITIONS BEFORE FINAL ENACTMENT PROHIBITED

Facts:

On 14 July 2009, the Commissioners of the Town of Oxford, Maryland (the "Commissioners") introduced Resolution 1001 (the "Resolution"), which purported to annex 142 acres of submerged lands under public waters adjacent to the then current municipal boundary of the Town of Oxford ("Oxford"). Following publication of a legal notice in a local newspaper of the pendency of the resolution and of the date and time of a public hearing, as mandated by the annexation statute, petition circulators among the voters of Oxford prepared and began circulating immediately a petition for referendum regarding the proposed resolution. Three days before the statutory deadline to submit the referendum petition to the Town Fathers, the circulators submitted the petition containing enough signatures for a referendum. To achieve the required number of signatures, the petition contained a number of signatures that were affixed before the public hearing on the annexation resolution was held and additional signatures affixed between the hearing date and final enactment of the resolution. If the signatures obtained on the petition prior to enactment of the resolution were deemed invalid, the petition would not have sufficient signatures to place the resolution on the ballot. The Commissioners determined that a referendum was not required because the signatures rendered before final enactment of the resolution were deemed invalid.

Petitioner Constantine Koste ("Koste"), a resident and registered voter of Oxford, filed in the Circuit Court for Talbot County a Complaint for Declaratory Judgment and a Writ of Mandamus contending that, under Md. Code, Article 23A, §19, referendum petition signatures may be obtained lawfully before final enactment of an annexation resolution and, thus, the referendum petition was valid. Koste filed a Motion for Summary Judgment. The Circuit Court granted summary judgment in favor of Koste, holding, as a matter of law, that signatures on a referendum petition may be collected before the final enactment of the targeted annexation resolution. The Commissioners appealed to the Court of Special Appeals, which, in a reported opinion, reversed the Circuit Court's decision and held that the referendum petition was insufficient because signatures for a referendum petition may only be obtained after final enactment of the annexation resolution. *Town of Oxford v. Koste*, 204 Md. App. 578, 593, 42 A.3d 637, 646 (2012).

The Court of Appeals granted *certiorari*, *Koste v. Town of Oxford*, 427 Md. 606, 50 A.3d 606 (2012), to determine whether signatures are valid on a petition for referendum, under Article 23A, §19(g), where the signatures were obtained after the publication of notice of the annexation resolution, but before final enactment, the resolution was enacted finally without modification, and the petition was presented to and filed with the chief executive and administrative officers of the town within forty-five (45) days after final enactment?

Held: Affirmed.

The Court of Appeals concluded that the General Assembly intended for the forty-five (45) day period of Article 23A, §19(g) to act as a substantial restriction on when petitions may be circulated (*i.e.* to act as a beginning and ending period for the petition circulation and submission process). Consequently, the Court held that signatures affixed on a referendum petition before final enactment of an annexation resolution are invalid and, as a result, the referendum petition at issue was insufficient to petition the Resolution to referendum.

The Court began its analysis by looking to the plain meaning of the language of Article 23A, §19(g). The Court determined that the statutory language of Article 23A, §19(g) was ambiguous because both Koste and the Commissioners proffered distinct and reasonable interpretations of Article 23A, §19(g). The Court thereafter turned its attention to other indicia probative of legislative intent (*i.e.* legislative history, case law, purpose, structure, overarching statutory scheme, and etc.). Looking to the purpose of Article 23A, §19(g), the Court noted that the General Assembly, concerned that an abundance of referendum elections could stagnate potentially the legislative process, intended for the referendum process to be a rigorous one to complete. Consequently, when the General Assembly intends to impose a substantial restriction on the referendum process, that purpose will not be disturbed by the Judiciary, except upon the clearest justification and grounds

The Court concluded that Article 23A, §19(g) was intended to be a restriction on the referendum process, which does not permit signatures to be gathered before final enactment of the resolution. While noting that it may not be "completely unrealistic" to expect that voters will make use actually of the opportunity to withdraw their signatures if they change their minds for any reason at any time along the process continuum, the Court believed that the combination of the referendum petition not informing signers of this right and the uncertainty that this right is generally understood by the public made it unsafe to presume that a voter will act with sufficient diligence to withdraw his or her name from a referendum petition in the event that his or her decision changes. Mindful that the referendum process is rigorous necessarily to protect the legislative process from being stagnated, the Court held, therefore, that the General Assembly intended for the forty-five (45) day period of Article 23A, §19(g) to bar the circulation of referendum petitions prior to the final enactment of a resolution.

Joan J. Stickley v. State Farm Fire and Casualty Company, No. 48, September Term 2012, filed April 25, 2013. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2013/48a12.pdf

INSURANCE – MOTOR VEHICLE INSURANCE LAW – HOUSEHOLD EXCLUSIONS

Facts:

In 2008, Petitioner, a passenger in a motor vehicle driven by her husband, suffered serious injuries when her husband negligently drove into an intersection and was struck by another vehicle. At the time of the accident, Petitioner and her husband had both a motor vehicle liability policy and a personal liability umbrella policy issued by State Farm. The umbrella policy provided coverage for bodily injury, personal injury, and property damage, and it contained a household exclusion that excluded coverage for bodily injury to members of the insured's family when the insured is at fault. After the accident, Petitioner filed a claim under both the automobile liability policy and under the umbrella policy. State Farm offered Petitioner the full amount of liability coverage under the motor vehicle policy, but denied Petitioner's claim under the umbrella policy due to its household exclusion.

Petitioner filed a complaint in the Circuit Court for Montgomery County seeking to have the household exclusion in the umbrella policy declared void. Petitioner cited Md. Code (1997, 2002 Repl. Vol., 2005 Cum. Supp.), § 19-504.1 of the Insurance Article, requiring an insurer to offer its insured, under a policy or binder of "private passenger motor vehicle liability insurance," liability coverage for claims made by a family member in the same amount as liability coverage for claims made by a nonfamily member. The statute applies when the liability coverage in the "private passenger motor vehicle liability insurance" policy exceeds the State-mandated minimum amount of coverage. Petitioner argued that their umbrella policy is private passenger motor vehicle liability insurance, and that the exclusion, included in the policy prior to 2004 and never signed off on by the insureds, is void in light of the statute. The trial court held that, under the plain meaning of the statute, a policy of "private passenger motor vehicle liability insurance," does not include an umbrella policy. The Court of Special Appeals affirmed.

Held: Affirmed.

Under the plain meaning of the statute, a private passenger motor vehicle liability insurance policy does not include an umbrella policy. A private passenger motor vehicle liability insurance policy refers to a specific type of motor vehicle liability insurance policy, which attaches to the motor vehicle and protects against injuries and/or damages resulting from the operation of the motor vehicle. By contrast, a personal liability umbrella policy includes coverage for a myriad of personal losses suffered by the insured and attaches generally to the

insured. Moreover, a motor vehicle liability policy is a type of primary policy that is required in Maryland and attaches immediately upon the happening of the occurrence giving rise to liability, whereas an umbrella policy is a supplemental and optional form of insurance coverage that protects against catastrophic losses only after the primary policy has been exhausted. Looking at the plain meaning of the statute in light of the context in which it appears adds further support that an umbrella policy is different in kind from a private passenger motor vehicle liability insurance policy. Other provisions falling under "Subtitle 5. Motor Vehicle Insurance-Primary Coverage" refer generally to motor vehicle insurance policies providing primary coverage.

Property & Casualty Insurance Guaranty Corp. v. Belinda Beebe-Lee, No.64, September Term 2012, filed April 25, 2013. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2013/64a12.pdf

INSURANCE – PCIGC – ABILITY TO REVIEW AND CONTEST SETTLEMENTS

INSURANCE – PCIGC – FINANCIAL OBLIGATION ON MULTIPLE POLICIES

Facts:

On June 30, 2003, nine-year-old Ashley Beebe-Lee was seriously injured while riding a go-cart at her grandparents' home. Ashley's mother, Belinda Beebe-Lee, on behalf of her daughter (Respondents), filed a claim with the grandparents' insurer, Shelby Casualty Insurance Company. The grandparents had a homeowner's personal liability policy with Shelby that offered protection up to $500,000, as well as an umbrella policy that offered an additional $1 million in coverage. In May 2006, after exchanging letters and e-mails with Respondents, Shelby agreed to settle the claim for $1 million. A month later, a Texas court declared that Shelby was insolvent, placed the company in receivership, and eventually approved liquidating the insurer.

Respondents filed a notice of the settlement with the Property & Casualty Insurance Guaranty Corporation (PCIGC, Petitioner), which exists to compensate state residents who have covered claims or policies with insolvent insurers. PCIGC concluded that the grandparents did not breach any duty to their granddaughter and declined to pay the claim. Respondents filed a complaint in the Circuit Court for Baltimore County seeking a declaration that their claim was settled with Shelby for $1 million and that PCIGC must pay the statutory maximum on two claims made under the homeowner's and umbrella policies. The Circuit Court granted Respondents' motion for summary judgment, ruling that PCIGC had only a limited right to contest the underlying liability of a settled claim. The Circuit Court also concluded that PCIGC must pay the statutory maximum on the homeowner's and umbrella insurance policies because there can be multiple claims arising out of a single incident when more than one policy is involved. In an unreported opinion, the Court of Special Appeals affirmed the judgment of the Circuit Court.

Held: Affirmed.

The Court of Appeals observed that PCIGC has the power under Maryland Code (1995, 2011 Repl. Vol.), § 9-306(e)(1)(ii) of the Insurance Article to investigate claims and may review settlements "to determine the extent to which the settlements . . . may be properly contested." The Court noted that there was no legislative history or case law clarifying the meaning of the phrase "properly contested." The Court concluded, however, that there are limits to PCIGC's

ability to challenge a settlement because of the use of the modifier "properly" before the word "contested." The Court noted that the law holds settlement agreements in high regard and courts are reluctant to undo them absent a legitimate rationale. The Court observed that, under § 9-306(c) of the Insurance Article, PCIGC steps into the shoes of the insolvent insurer. The Court held that PCIGC did so here after a settlement had already been reached, thereby limiting the grounds on which it could challenge a claim to fraud, duress, and other similar defenses. The Court concluded that PCIGC also may challenge a claim on limited additional grounds not available to the insurer, such as collusion. The Court held that PCIGC bears the burden of proving one of these rationales for challenging a claim and did not meet that burden here. The Court observed that PCIGC is obligated to pay up to a statutory maximum of $300,000 per covered claim. The Court concluded that PCIGC is required to compensate claimants on a per claim basis, not per occurrence. Therefore, a single incident that triggers coverage from two different policies, as here, can qualify as two covered claims.

Thomas C. Lindsay, Sr., et al. v. Annapolis Roads Property Owners Association, et al., No. 63, September Term 2012, filed April 24, 2013. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2013/63a12.pdf

REAL PROPERTY – IMPLIED EASEMENT – CREATION BY PLAT REFERENCE IN DEED

Facts:

Barbara and Stanley Samorajcyzk ("the Samorajcyzks") believed they had the right to use a ten-foot wide strip of land ("the Strip"), which served as a paved driveway to a property owned by the Thomas C. Lindsay Revocable Trust ("the Lindsay Trust") adjacent to the Samorajcyzks' property. The Strip binds four lots – Lots 18, 19, 20, and 21 – as depicted on a 1928 Plat creating the Annapolis Roads Subdivision filed in the Land Records of Anne Arundel County. The Strip begins at Carrollton Road, runs approximately one hundred-fifteen feet between Lots 18 and 19 on one side and Lots 20 and 21 on the other, and ends in a triangular tip at the lot line between Lots 18 and 21. The Strip is a part of the lots binding it, and, thus, whenever a lot was conveyed, the portion of the Strip binding each lot to the mid-point of the Strip was conveyed also.

The Samorajcyzks, along with the Annapolis Roads Property Owners Association ("ARPOA") (the community homeowners association) and six residents of the subdivision, filed suit in the Circuit Court for Anne Arundel County seeking, in relevant part, a declaratory judgment that ARPOA holds fee simple title to the Strip and that the Samorajcyzk property enjoys an easement over the Strip. Petitioners, Thomas C. Lindsay, Sr. and the Lindsay Trust, filed an amended counterclaim seeking a declaration that the Lindsay Trust owns fee simple title to the Strip and that no easement exists over the Strip, reasoning that no easement by adequate plat reference was created by the initial relevant transfers of the lots.

Lot 18, the lot owned by the Samorajcyzks (for purposes of the dispute at issue), was conveyed originally on 10 December 1928 from Annapolis Roads Company ("ARC") to F.K. Mohler by deed referring expressly to the 1928 Plat; re-conveyed by Mohler to ARC in 1929; and then conveyed again from ARC to Mohler on 20 February 1931. The 1931 deed did not refer expressly to the 1928 Plat, but instead identified the lot as "Lot eighteen (18) in Section 'D'" of the "development known as Annapolis Roads." A portion of Lot 18, including the portion of the Strip abutting Lot 18, was later sold to the owners of Lot 19 (presently the Lindsay Trust) subject to an easement, reserved expressly, over a portion of the property connecting to the Strip, and purportedly over the Strip itself. Lot 18 was later consolidated by Lot Merger Agreement (pursuant to an Anne Arundel County Code provision regulating lot mergers) with portions of three other lots in the subdivision.

Lot 19 was sold initially to the Homes Improvement Company on 8 October 1928. Lots 20 and 21 were sold to Helen Sagrario in 1932. The owners of Lot 20 and 21 later conveyed, in 1976, any and all interest they held in the Strip to the owners of Lot 19.

In its relevant declaratory judgment, the Circuit Court determined that the Lindsay Trust owned fee simple title to the Strip subject to an easement appurtenant, implied by plat reference, in favor of the Samorajcyzks as the owners of Lot 18. The Court of Special Appeals affirmed, noting that the reference to the Plat in the 1928 deed created a strong presumption that ARC intended to convey also an easement to use the Strip, and nothing in the 1931 conveyance intimated an intent to extinguish the easement. The Court of Appeals issued a writ of *certiorari* to consider whether an implied easement by plat reference existed over the Strip in favor of the Samorajcyzks as the owners of Lot 18.

Holding: Affirmed in part, reversed in part.

The Court of Appeals first considered which deed conveying Lot 18 to Mohler - the 1928 deed or the 1931 deed - was relevant to the creation of the asserted easement. The Court determined as an initial matter that, because Lot 18 had been re-conveyed to ARC by Mohler, whatever easement as had been created by the 1928 deed was extinguished at that time because the dominant and servient estates were in common ownership. The Court noted, however, that any easement rights created over Lot 19 by the 1928 conveyance of Lot 18 to Mohler remained intact, as Lot 19 was conveyed previously to a third party. Thus, to determine whether an easement over the Strip existed, the 1928 deed was relevant with respect to the portion abutting Lot 19, while the 1931 deed was relevant for the remainder of the Strip.

The Court looked at each deed to determine whether the plat reference contained therein was sufficient to demonstrate the grantor's intention to incorporate the Plat. Because the 1928 deed referenced explicitly the Plat, the Court determined that it incorporated unquestionably the Plat. In interpreting the 1931 deed, however, the Court noted that, unlike ARC's other conveyances of properties in the subdivision, the 1931 deed contained no specific reference to the 1928 Plat. Instead, it used three terms defined originally in the Plat to describe the property. Noting that assertions of the existence of easements by implication are construed strictly, the Court declined to ignore or even minimize the notable absence of such a specific reference with respect to the 1931 deed. The free-floating references to the terms defined in the Plat, without more, were not sufficient to imply an intention on the part of the grantor to convey an easement.

The Court then considered whether the Plat itself contained a right of way sufficient to establish an easement. Noting that the Court had looked previously beyond the facial markings on the Plat itself, the Court determined that the Strip could not be regarded reasonably as anything other than a shared way or street, and thus depicted a right of way. Thus, because the 1928 deed alone was sufficient to convey easement rights, the Court determined that an easement existed over the one-half of the Strip abutting Lot 19, to be used for the benefit of Lot 18 only.

TransCare Maryland, Inc., et al. v. Bryson Murray, et al., No. 24, September Term 2012, filed April 22, 2013. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2013/24a12.pdf

TORTS – IMMUNITY – GOOD SAMARITAN ACT
TORTS – IMMUNITY – FIRE AND RESCUE ACT

Facts:

Bryson Murray, a child, and his mother sued TransCare, a commercial ground ambulance transport company, alleging negligence by a company employee during the child's transportation by helicopter between two hospitals. The transportation was effected by a separate air medical services provider; TransCare's employee was invited to observe the transportation merely for orientation purposes. The Circuit Court for Talbot County granted summary judgment in favor of TransCare on the ground that it had immunity under two sections of the Courts and Judicial Proceedings Article in the Maryland Code: the Good Samaritan Act, §5-603, and the Fire and Rescue Act, §5-604.

The Court of Special Appeals reversed, holding that neither statute protected commercial entities. TransCare appealed, reasoning that, because its employee was licensed to provide medical care and did so without fee or compensation in transit to a medical facility, the employee was immune under the Good Samaritan Act; based on that immunity, TransCare argued, it too was immune as a "volunteer fire department or ambulance and rescue squad" pursuant to §5-603(b)(3) or general principles of vicarious liability. TransCare also asserted that it was a "rescue company" entitled to broad immunity under the Fire and Rescue Act.

Held:

The Court found that, as indicated by the Good Samaritan Act's history, an ambulance and rescue squad that has immunity under §5-603(b)(3) whenever its members are immune must be a "volunteer" organization. As a for-profit, commercial enterprise, TransCare was not eligible for immunity under the Good Samaritan Act even if the statute provided immunity for its employee. In addition, because the general rule is that a principal in an agency relationship must establish an independent source for immunity apart from its agent's immunity, and TransCare had not done so, the company was not entitled to summary judgment for that reason either.

The legislative history of the Fire and Rescue Act, as well as a review of related immunity provisions, revealed that the Act was designed to extend governmental immunity to entities that performed the public function of responding to crises or emergencies. This would only include a commercial medical transport company if it was performing that function. TransCare had not made such a showing and therefore was also not entitled to summary judgment on the basis of immunity under the Fire and Rescue Act.

COURT OF SPECIAL APPEALS

In re: Darryl P., No. 2942, September Term 2011, filed March 25, 2013, Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2013/2942s11.pdf

CRIMINAL PROCEDURE – FOURTH AMENDMENT – EXCLUSIONARY RULE – MIRANDA V. ARIZONA – FIFTH AMENDMENT-BASED RIGHT TO COUNSEL – EDWARDS V. ARIZONA – SIXTH AMENDMENT RIGHT TO COUNSEL – WAIVER

Facts:

The appellant, Darryl P., a juvenile, was charged with first and second degree assault and with the use of a handgun in relation to a January 6, 2011 shooting. After turning himself in on a warrant issued by the District Court, he was released on bail on February 23, 2011. The appellant was interviewed while in custody but invoked his right to counsel and all questioning ceased. After being released on bail, the appellant retained counsel and counsel entered his appearance in the District Court.

On April 6, 2011, the appellant was indicted in the Circuit Court for St. Mary's County in relation to the January 6, 2011 shooting. The indictment included the original crimes charged in the District Court as well as four additional charges based on the same criminal conduct. An arrest warrant was issued on April 15, 2011. The appellant was rearrested at approximately 1:00 a.m. on May 6, 2011. He was then interrogated by police from approximately 1:30 a.m. to 4:00 a.m.

After jurisdiction had been waived to the juvenile court, the appellant moved to suppress inculpatory statements he made during the May 6 interrogation. The court denied the suppression motion and the appellant was adjudicated a delinquent upon an agreed statement of facts. He appealed that finding to the Court of Special Appeals.

At the suppression hearing and on appeal, the appellant argued that his inculpatory statements should be suppressed because 1) the May 6, 2011 questioning followed an "unlawful arrest" and was therefore "fruit of the poisonous tree"; 2) the statements were taken in violation of his prophylactic Fifth Amendment-based right to counsel as protected by *Edwards v. Arizona*; 3) the statements were taken in violation of his Fifth Amendment privilege against compelled self-incrimination; 4) the statements were involuntary according to Maryland common law; and 5) the statements were taken in violation of his Sixth Amendment right to counsel.

Held: Reversed

The exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), applies only to evidence obtained in violation of the Fourth Amendment. The related "fruit of the poisonous tree" doctrine is likewise limited to violations of federal constitutional rights. As the appellant's rearrest passed constitutional muster, *Mapp* is not available to him. Maryland has no independent exclusionary rule and, even if it did, it would surely not apply to sub-constitutional violations of Maryland statutes or rules of court. Regardless of whether the appellant was properly rearrested on May 6, 2011, this provided no grounds to suppress his confession.

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), also does not apply. *Edwards* only protects a suspect from further police-initiated interrogation once a suspect successfully invokes his Fifth Amendment-based right to counsel pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). There is not a sufficient record in this case to establish that the appellant invoked his Fifth Amendment-based right to counsel when he was first in police custody. As such, the appellant never acquired a *Miranda-Edwards* right to counsel. Even if the appellant were protected by *Edwards*, that protection would have expired 14 days after he was released from police custody on February 23, 2011, well before the interrogation on May 6, 2011. *See Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010).

With regards to the May 6, 2011 interrogation, the trial court's findings that the police properly administered *Miranda* warnings and that the appellant understood them were not clearly erroneous. Waiver of the *Miranda* rights to remain silent and to counsel may be implied when a suspect acts in a manner inconsistent with their exercise. *See Berghuis v. Thompkins*, ___U.S. ___, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). Under the totality of these circumstances, the trial court's finding of voluntariness also was not clearly erroneous.

The Sixth Amendment guarantees an accused the right to have counsel as a medium between himself and the State at all critical stages. *See Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). The appellant's Sixth Amendment right attached with respect to the original District Court charges at the time of his bail hearing on February 23, 2011, and with respect to the additional charges upon his indictment on April 6, 2011. A postindictment interrogation is a "critical stage" of criminal proceedings.

The Sixth Amendment right to counsel offers broader protection than the Fifth Amendment-based right to counsel, in that it confers the right not to be interrogated at all without counsel being present. A waiver of the prophylactic Fifth Amendment-based right to counsel operates as a waiver of the Sixth Amendment right to counsel only insofar as those rights are coterminous. *See Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988). Unlike the prophylactic Fifth Amendment-based right to counsel, the Sixth Amendment right to counsel is automatic and does not need to be unambiguously invoked. Also unlike the Fifth Amendment-based right to counsel, the Sixth Amendment right to counsel may not be waived inferentially. The appellant did not waive his Sixth Amendment right to deal with the State only through counsel. Accordingly, the statements he made during the May 6, 2011 interrogation should have been suppressed.

Juan Carlos Carrero-Vasquez v. State of Maryland, No. 1443, September Term, 2011, filed Mar. 21, 2013. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2013/1443s11.pdf

CRIMINAL LAW – IMPROPER COMMENTS IN CLOSING REMARKS

Facts:

Juan Carlos Carrero-Vasquez, appellant, borrowed a car from an acquaintance, Veronica de Luna. The following day, while driving Ms. Luna's car, appellant was pulled over by a Montgomery County police officer for speeding and intentionally skidding. During the ensuing license and registration check, police officers determined that appellant did not have a valid driver's license, and they arrested him for driving without a license. When they searched him, incident to that arrest, they discovered, on his person, "a small black grocery bag" containing "approximately 100 small plastic baggies," nine of which were filled with either cocaine or inositol, a cutting agent; $2,474 in U.S. currency; and identification cards in two different names. When they searched the car he was driving, they recovered, from the center console, a loaded revolver, which was later determined to have been stolen.

Appellant was thereafter tried and convicted of possession of cocaine with intent to distribute; possession of a regulated firearm after having previously been convicted of a disqualifying crime; sale, transfer, or disposal of a stolen, regulated firearm; wearing, carrying, or transporting a handgun in a vehicle; driving without a license; speeding; and intentionally skidding, but those convictions were reversed, on appeal, for reasons unrelated to the present case. At his first trial, Ms. Luna testified for the State, and, during cross-examination, she testified, over the State's objection, that she was in the United States illegally and that she was aware that, if she were convicted of possessing a stolen handgun, she would be eligible for deportation.

Appellant was re-tried, but this time, the trial court, at the State's request, issued an order prohibiting the defense from cross-examining Ms. Luna about her immigration status or her awareness that, if she were convicted of possession of a stolen firearm, she would be eligible for deportation. Ms. Luna thereafter testified for the State and denied that either she or her husband, the only people besides appellant who had access to her car, ever possessed (or had even been aware of) the handgun found by police in that vehicle. Appellant was convicted of all charges except the sale, transfer, or disposal of a stolen, regulated firearm, and he was sentenced to a total of fifteen years' imprisonment.

On appeal, he raised three issues: (1) whether the trial court erred in overruling the defense's objection to the prosecutor's statement, during rebuttal closing argument: "**Reasonable doubt. Trust your gut. If your gut says I think he's guilty, that's reasonable.**"; (2) whether the trial court's order, which prohibited the defense from cross-examining Ms. De Luna about her immigration status and the possibility that she could be deported if convicted of possessing a stolen

handgun, violated appellant's Confrontation Clause rights under the Sixth Amendment and Article 21 of the Declaration of Rights; and (3) whether the trial court erred in overruling the defense's objection to the "anti-CSI" jury instruction, which the trial court gave at the State's request.

Held: Reversed and remanded.

As to the issue of improper prosecutorial comment, the Court of Special Appeals first determined that that comment was, standing alone, improper, as it was not, contrary to the State's contention on appeal, directed toward the jurors' role in assessing the credibility of witnesses but, rather, plainly reduced proof "beyond a reasonable doubt" to a "gut" feeling and, thus, was a misstatement of the law regarding proof beyond a reasonable doubt. Then, applying the three-part test for determining whether a prosecutor's improper comments and the trial court's response to them resulted in reversible error, the Court determined that: (1) as to the severity of the remark, although made only once, its timing, immediately prior to the start of jury deliberations, magnified its impact on the jury; (2) as to the measures taken by the trial court to cure any potential prejudice, there were none, since the trial court overruled the defense's objection, thereby suggesting to the jury that nothing improper had occurred; and (3) as to the weight of the evidence against the accused, this factor weighed in favor of reversal, since the State's case, at least as to the handgun charges, hinged largely on witness credibility, especially that of Ms. De Luna.

As to the trial court's order, which prohibited the defense from cross-examining Ms. Luna about her immigration status and whether she was aware that if she were convicted of possessing a stolen handgun, she would be eligible for deportation, the Court held that that order improperly restricted appellant's ability to cross-examine a State's witness for bias, interest, or motive to testify falsely, in violation of the Sixth Amendment and Article 21 of the Declaration of Rights.

As to the "anti-CSI" jury instruction, the Court held that appellant had adequately preserved the issue for appeal and that, as to the merits, under a straightforward application of *Atkins v. State*, 421 Md. 434 (2011), and *Stabb v. State*, 423 Md. 454 (2011), the trial court abused its discretion in giving that instruction, since appellant's trial counsel did not "harp" impermissibly on the lack of physical evidence and, thus, there was no need to give a curative instruction.

Donnell Nance v. David A. Gordon, et al., No. 1574, September Term 2011, filed March 1, 2013. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2013/1574s11.pdf

HEALTH CARE MALPRACTICE CLAIMS ACT – CERTIFICATE OF QUALIFIED EXPERT – NEPHROLOGIST IN "RELATED SPECIALTY" TO UROLOGIST IN CONTEXT OF PREPARING DIFFERENTIAL DIAGNOSIS OF PATIENT WHO PRESENTS TO EMERGENCY ROOM WITH PROTEIN AND BLOOD IN HIS OR HER URINE

Facts:

In June and July 2005, Donnell Nance twice presented to (*i.e.*, arrived at) the emergency department at Sinai Hospital in Baltimore, complaining of blood in his urine. Urinalysis taken at the hospital revealed that Nance had gross hematuria (blood in urine) and proteinuria (protein in urine). During Nance's July visit, a physician's assistant examined Nance and had a telephone consult with Dr. David A. Gordon, a board certified urologist. After each visit, Nance was given antibiotics for what was diagnosed as a urinary tract infection and sent home. Medical tests taken nearly two years later, when Nance complained of spitting up blood, revealed that Nance's kidneys had suffered irreversible failure from nephritis, a severe kidney disease.

In April 2009, Nance filed suit under the Health Care Malpractice Claims Act ("the Act"), Md. Code (1974, 2006 Repl. Vol. & 2012 Supp.) §§ 3-2A-01 to 3-2A-10 of the Courts and Judicial Proceedings Article ("CJP I"), against the physician's assistant and Dr. Gordon, who evaluated him in July 2005, and their employer hospital, among others ("Defendants"). In support of his claim, Nance filed a Certificate of Qualified Expert from Dr. Stanley C. Jordan, a board certified nephrologist. Dr. Jordan opined in his Certificate and accompanying report that Defendants (among others) breached the standard of care by "[f]ailing to include nephritis on the differential diagnosis for [Nance]" during Nance's July 2005 visit to the emergency room. On May 8, 2009, after Nance's claim was transferred by order from the Health Care Alternative Dispute Resolution Office to the Circuit Court for Baltimore City, Nance filed a complaint in circuit court.

On July 30, 2010, Defendants filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, arguing that Dr. Jordan was not a "qualified" expert, because nephrology and urology are not "related specialt[ies]" under the Act. The circuit court granted summary judgment in favor of Defendants, ruling that Dr. Jordan "was not qualified to say what a urologist was able to do."

Held: Reversed.

The Court of Special Appeals noted that, pursuant to subparagraph 3-2A-02(c)(2) of the Act, a medical expert is qualified if he or she satisfies certain professional qualifications in "the same or a related specialty [or field]" as the defendant physician(s). The Court then framed the issue as

whether nephrology (the specialty in which Dr. Jordan is board certified) and urology (the specialty in which Dr. Gordon is board certified) are "related" fields under the circumstances of the case. The Court drew guidance from its previous opinions in *DeMuth v. Strong*, 205 Md. App. 521 (2012) and *Hinebaugh v. Garrett County Memorial Hospital*, 207 Md. App. 1 (2012).

In *DeMuth*, the patient sued his orthopedic surgeon after the doctor's alleged malpractice in caring for the patient's knee after knee replacement surgery led to the patient's leg being amputated. The patient called a vascular surgeon to testify that the orthopedic surgeon breached the standard of care following the knee replacement surgery. The Court of Special Appeals affirmed the trial court's decision to permit the vascular surgeon to testify. The Court set forth the principle that specialties are "related," as that term is used in § 3-2A-02(c)(2) of the Act, if they overlap in the context of the treatment or procedure in a given case. In other words, "if the procedure is one which both healthcare providers have experience with and the standard of care is purported to be similar, then the expert's qualifications satisfy the requirements of the Act." Applying this law to the facts, the Court concluded that vascular surgery was a "related" specialty to orthopedic surgery under the circumstances, because both vascular surgeons and orthopedic surgeons have knowledge about "the proper postoperative diagnosis and treatment of possible vascular complications of orthopedic surgery."

Conversely, in *Hinebaugh*, the patient sued a family medicine doctor and two radiologists who ordered and evaluated x-rays of the patient's facial bones after the patient had been hit in the face, because the three physicians failed to diagnose the patient's supraorbital fracture in a timely fashion. In support of his claim, the patient offered as an expert a dentist who specialized in Oral and Maxillofacial Surgery (OMS). Framing the issue as whether the specialties of the defendant physicians were related to that of OMS "in the context of the diagnosing, on a front line basis, of the medical condition of a patient who has been hit in the face by another person and is experiencing pain," the Court of Special Appeals held that the OMS specialist was not properly qualified. The Court reasoned that unlike family medicine doctors and radiologists, an OMS specialist is not "sought out by front line doctors presented with a complaint by a patient of being hit in the face when a simple x-ray does not reveal any fracture."

The Court explained that the procedure at issue was the preparation of a differential diagnosis of a patient who presents in the emergency room with blood and protein in his or her urine. The Court stated that, unlike the OMS specialist in *Hinebaugh*, and like Dr. Gordon and the physician's assistant, Dr. Jordan is a front line health care provider who participated in "on-call services for emergency departments." Specifically, the Court noted that Dr. Jordan had experience in seeing patients like Nance who presented to an emergency department with hematuria and proteinuria but had not yet been diagnosed. An evaluation of a patient like Nance would involve a differential diagnosis that required knowledge of possible medical conditions and diseases treated by both nephrologists and urologists. The Court concluded that, because both Dr. Jordan and the Defendants had experience with the procedure at issue, nephrology and urology overlap under the circumstances of the instant case and, therefore, are "related specialt[ies]" under § 3-2A-02(c)(2) of the Act. Accordingly, the Court held that the circuit court erred by granting summary judgment in favor of the Defendants, and Dr. Jordan should have been permitted to testify as an expert.

Return to ToC

ATTORNEY DISCIPLINE

This is to certify that

JOSE EXPEDITO M. GARCIA

has been replaced on the register of attorneys in this state as of April 4, 2013.

*

By an Order of the Court of Appeals dated April 9, 2013, the following attorney has been suspended:

WENDY K. WEIKAL aka WENDY WEIKAL BEACHAT

*

By an Order of the Court of Appeals dated April 15, 2013 the following attorney has been disbarred by consent:

WENDY K. WEIKAL aka WENDY WEIKAL BEACHAT

*

By an Order of the Court of Appeals dated April 18, 2013, the resignation of

JOSEPH ALEXANDER GOLDSTEIN

from the practice of law has been accepted.

*

By an Order of the Court of Appeals dated April 19, 2013, the following attorney has been disbarred by consent:

MARK HOWARD FRIEDMAN

*

By an Opinion and Order of the Court of Appeals dated April 25, 2013, the following attorney has been disbarred:

BRIEN MICHAEL PENN