Amicus Curiarum

VOLUME 23
ISSUE 11 November 2006

a publication of the office of the state reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

CIVIL PROCEDURE - DISCOVERY

Facts: The Appellee was employed by the Appellant as a meat cutter. The Appellee began having hand and elbow pain, and consulted a doctor. After being diagnosed with bilateral carpal tunnel syndrome and right cubital tunnel syndrome, the Appellee filed a claim with the Workers' Compensation Commission. Despite arguing that his ailments were occupational diseases, the Commission denied the claim, finding that the Appellee's condition did not arise "out of and in the course of employment." The Appellee sought judicial review of this decision in the Circuit Court for Anne Arundel County.

During the discovery process and prior to the deadline, the Appellant sent the Appellee a series of interrogatories, one of which asked him to identify potential expert witnesses, state the subject matter that the expert would be addressing, and state a summary of grounds for each expert opinion. Appellee responded with the doctor's name, and stated that he would testify as to the contents of his medical reports and to the causal relationship between the Appellee's ailment and his employment, attaching a one sentence medical report from the doctor. Although the Appellant noted the deposition of the doctor's custodian of records and obtained additional records from doctor's office, at no time, before or after the expiration of the discovery deadline, did it challenge the adequacy or the sufficiency of the Appellee's response to the interrogatory. Motions to compel or for summary judgment were not filed.

At trial, the Appellant made an oral motion to prohibit the doctor from testifying as to the causation between the Appellee's conditions and his employment, claiming that the doctor did not state sufficient grounds for his opinion in response to interrogatories, and, as such, should be prevented from providing additional bases at trial. The Circuit Court granted the Appellant's motion to preclude the doctor from testifying "as to the basis of his medical opinions," and granted the Appellant's motion for judgment, concluding that the doctor had not provided adequate grounds.

The Appellee asked for review of the judgment by an in banc panel of the Circuit Court. That panel reversed the judgment of the trial court, holding that the trial court's exclusion of the

Appellee's expert's testimony on causation was clearly erroneous, further observing that the discovery responses of the Appellee made clear that he would be relying on the doctor's testimony to explain his reports and the causal connection between his condition and his employment.

Held: Affirmed with Costs. A party who answers a discovery request timely and does not receive any indication from the other party that the answers are inadequate or otherwise deficient should be able to rely, for discovery purposes, on the absence of a challenge as an indication that those answers are in compliance, and, thus not later subject to challenge as inadequate and deficient when offered at trial. The testimony of an expert may not be excluded at trial on the basis of a disclosure, made during discovery in response to interrogatories, that has neither been claimed nor determined to be a discovery violation, but that is challenged at trial as deficient for failing to provide information required by Maryland Rule 2-402 (f) (1) (A), the rule governing requests for identities of those individuals whom the opposing party plans to call as expert witnesses at trial.

Food Lion v. McNeill, No. 2, September Term, 2004, Filed August 2, 2006. Opinion by Bell, C.J.

***

CONSTITUTIONAL LAW - DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS - ENCROACHMENT ON EXECUTIVE.

Facts: This case involved a challenge to the constitutionality of an Act of the General Assembly. On June 14, 2006, in response to an anticipated increase in the cost of electricity facing a large number of Maryland citizens and in reaction to certain acts taken by the Public Service Commission, the General Assembly convened a Special Session and passed Senate Bill 1 as emergency legislation. The Governor vetoed the legislation and on June 23, 2006, the veto was overridden.

The Public Service Commission is a statutorily created independent unit in the Executive Branch of State government. Appellant, the Chairman of the Public Service Commission, challenged two provisions of Senate Bill 1 which terminated the current Commissioners and restricted the Governor's ability to appoint new members to the Commission. No other issues were presented to the Court.

Appellant contended that Sections 12 and 22 of Senate Bill 1 violate Article II, § 15 of the Maryland Constitution; Article 24 of the Maryland Declaration of Rights; Article I, § 10 of the U.S. Constitution; and Maryland Code (1984, 2004 Repl. Vol.), § 3-307 of the State Government Article. The trial court heard the case on June 27, 2006, and issued a written order on June 28, 2006, denying appellant's motion for a temporary restraining order. On June 29, 2006, pursuant to Section 19 of Senate Bill 1, appellant filed a notice of appeal with this Court.

Held: Reversed. Case remanded to the trial court with instructions to render a declaratory judgment and a permanent injunction consistent with the opinion. Section 12 and parts of Section 22 of Senate Bill 1 are null and void because they permitted the Legislative Branch of government (1) to usurp the Executive's power to supervise the Executive Branch as set forth in Article II, § 1 of the Maryland Constitution, (2) to usurp the power of the Governor to execute the laws as set forth in Article II, § 9 of the Maryland Constitution, usurp the Executive's power to terminate officers of the Executive Branch as set forth in Article II, § 15 of the Maryland Constitution and are otherwise in violation of Section 8 of the Declaration of Rights of Maryland.

Kenneth D. Schisler, et al. v. State of Maryland, No. 140 September Term, 2005, filed June 5, 2006. Opinion by Cathell, J.

***

CRIMINAL LAW - EVIDENCE – PHOTOGRAPHIC ARRAY IDENTIFICATIONS – EVIDENTIARY HEARINGS

CRIMINAL LAW – BURGLARY - STOREHOUSE BREAKING - CRIMINAL BREAKING

Facts: Appellant, Kevin Cornell Jones, was convicted in the Circuit Court for Montgomery County of second degree burglary(storehouse breaking)in relation to events occurring at the Academy of the Holy Cross in Kensington, Maryland. Jones filed a pre-trial motion to suppress identification derived from a photo array shown by a detective to a witness. At the hearing on the motion to suppress, appellant sought to call the detective as a witness. The court denied this request and denied to motion to suppress. At the motion for judgment of acquittal, Jones argued that the State had failed to satisfy the breaking element of second degree burglary. The State's theory as to the breaking element was that appellant entered the premises either through fraudulent means, or through a kitchen window. The court denied the motion for judgment of acquittal and the jury convicted Jones. Jones noted a timely appeal to the Court of Special Appeals and the Court of Appeals granted certiorari on its own initiative.

Held: Reversed. The Court of Appeals held that the Circuit Court erred in not permitting appellant to call as a witness at the motions hearing the detective who conducted the photographic array. At a motions hearing to suppress a photo array identification, a defendant is entitled to present the facts and circumstances surrounding the procedures used by state agents. Furthermore, a defendant making a motion to suppress under Rule 4-252 is not required to present factual support within his motion of impermissible suggestiveness. A defendant need only offer sufficient information to put the court and State on notice of the evidence he or she wishes to suppress. The Court of Appeals also held that the evidence was insufficient to support a finding of guilt on second degree burglary. The State presented no evidence connecting appellant to the kitchen window, or that there was an actual breaking through that window. The Court found the State theory that appellant entered the Academy through fraud or artifice to be pure speculation.

Kevin Cornell Jones v. State of Maryland, No. 120, September Term, 2005, filed October 18, 2006. Opinion by Raker, J.

***

CRIMINAL LAW - JURIES - VOIR DIRE - NON-DISCLOSURE OF RELATIONSHIP

Facts: At the appellant's trial, a juror failed to disclose her familial relationship with an employee of the State's Attorney's Office. At appellant's motion for new trial hearing, the juror was not called to testify as to the reason for the non-disclosure.

Held: *Judgment of the Circuit Court for Baltimore City Reversed; Remanded for New Trial. Costs to be Paid by the Mayor and City Council of Baltimore.* Where there is a non-disclosure by a juror of information that a voir dire question seeks and the record does not reveal whether the non-disclosure was intentional or inadvertent, the defendant is entitled to a new trial. In prior cases involving similar situations, the trial judge, upon discovery of the jurors' non-disclosure of a relationship that was the subject of voir dire inquiry, recognizing the potential for prejudice, questioned the jurors, on the record, to determine whether there was, or cause to be concerned about, prejudice. Only after that inquiry and on the basis of the findings it made on the basis of the information it disclosed did, or could, the trial court exercise its discretion with respect to the requested relief. With no comparable inquiry as a predicate in this case, the trial judge incorrectly denied the Williams' motion for new trial.

Willard Williams v. State, No. 121, September Term 2004. Filed August 3, 2006. Opinion by Bell, C.J.

***

CRIMINAL LAW – POSTCONVICTION DNA TESTING

Facts: Appellant, George E. Blake, was tried and convicted of first degree rape and first degree sexual offense in January 1982. In December 2004, he filed a petition pursuant to § 8-201 of the Criminal Procedure Article requesting DNA testing of scientific identification evidence collected by the police. The State filed a motion to dismiss the petition, and in May 2005, filed a

supplemental motion to dismiss stating that the sought-after evidence had been destroyed. The supplemental motion included as an attachment an internal memorandum from a police sergeant to a police major, stating that "[t]he Evidence Control Section was checked by the undersigned, and there was no Evidence found for that case." On the same day the State filed the supplemental motion to dismiss, the Circuit Court summarily dismissed appellant's petition without holding a hearing or otherwise giving appellant an opportunity to respond to the State's motion. Appellant noted an application for leave to appeal to the Court of Special Appeals, which transferred the appeal to the Court of Appeals on grounds that the appeal should have been noted directly to the Court of Appeals.

Held: Reversed. The Court of Appeals held that the Circuit Court erred in dismissing the petition without first giving appellant an opportunity to respond to the State's assertion that the evidence at issue was no longer in its possession. The Court found that the Circuit Court should not have dismissed the petition based merely on the memorandum before it stating that the evidence no longer existed. Appellant was entitled to know, if such could be determined, that the evidence had been destroyed, and when it had been destroyed. Because the State gathered and served as custodian of the evidence, the burden was on the State to establish that the evidence no longer existed. Furthermore, the Circuit Court should have made findings of fact setting out the reasons underlying its decision to dismiss the petition.

Appellant also had requested appointment of counsel. The Court of Appeals held that appellant was not entitled to appointed counsel during the petition process. Neither the Federal Constitution, nor the Maryland Constitution provide a right to counsel in postconviction collateral attacks on criminal convictions. The plain and unambiguous language of § 8-201 makes clear that a person is not entitled to appointed counsel in order to file a petition requesting DNA testing.

George E. Blake v. State of Maryland, No. 88, September Term, 2005, filed October 24, 2006. Opinion by Raker, J.

***

CRIMINAL LAW - POSTCONVICTION DNA TESTING

Facts: Appellant James A. Thompson was convicted in 1988 in the Circuit Court for Baltimore City of first degree felony murder, first degree rape, burglary, and carrying a weapon with intent to injure. He was sentenced to life imprisonment, and his conviction and sentence were affirmed on direct appeal.

Appellant, through counsel, subsequently filed in the Circuit Court for Baltimore City a petition for postconviction DNA testing pursuant to Md. Code (2001, 2006 Cum. Supp.), § 8-201 of the Criminal Procedure Article ("CP"). After holding a hearing on the petition, the Circuit Court initially denied the petition on grounds that appellant had not shown that the testing requested in the petition satisfied CP § 8-201(c)(2), which requires that the testing method employed be "generally accepted within the relevant scientific community."

Appellant then filed a motion for reconsideration with the Circuit Court. The Circuit Court granted the motion and ordered DNA testing of two items of evidence. In its testing Order, the Circuit Court ordered the "Maryland Medical Examiner's Office, or appropriate State agency" to "retain a sufficient portion of the evidentiary samples for future confirmatory DNA testing," and it also ordered "that [appellant] is precluded from relying on any DNA test results" in the event that a sample for confirmatory retesting is not retained. Appellant noted a timely appeal to the Court of Appeals pursuant to CP § 8-201(j)(6), challenging these two aspects of the Order.

Held: Reversed and remanded. The Court of Appeals held that the Circuit Court abused its discretion when ordering postconviction DNA testing by ordering the State to retain samples of evidence to be tested for future confirmatory retesting, where there was no prior determination that nonconsumptive testing of the evidence was possible. Although CP § 8-201(e) permits a circuit court to order retention of samples for future confirmatory retesting, ordering retention without first determining that nonconsumptive testing is scientifically feasible frustrates the purpose of the postconviction DNA testing statute, which states unambiguously that "a court *shall* order DNA testing" if it finds that there is a reasonably probability that testing could be exculpatory and that the testing uses methods generally accepted within the relevant scientific community. In the event that retention is not possible, the Circuit Court's Order would prohibit the release of the evidence for DNA testing, contrary to the purpose of the statute.

In light of this holding, the Court vacated the portion of the Circuit Court's Order precluding appellant from using the DNA test result in future proceedings, as this portion of the Order presumed, on the basis of an inadequate record, that the evidence permitted retention of samples for future confirmatory retesting. The Court pointed out, however, that the Circuit Court did not have authority to issue such an order because it is tantamount to the imposition of an exclusionary rule. Lower courts do not have inherent authority to fashion exclusionary rules, and CP § 8-201(e) does not confer authority upon the Circuit Court to enter such an order.

James A. Thompson v. State of Maryland, No. 87, September Term, 2005, filed October 24, 2006. Opinion by Raker, J.

***

CRIMINAL LAW - TRANSFERRED INTENT

Facts: The appellee was charged and convicted of two counts of attempted first degree murder, where the unintended victims were shot but not killed. The trial judge gave the jury an instruction that transferred intent applied to specific intent to murder, and that the same principle applied to attempt to murder. Neither party objected to the instruction. The appellee noted an appeal to the Court of Special Appeals, which, in an unreported opinion, held that the Circuit Court committed reversible error by instructing the jury that the doctrine of transferred intent applied to the attempted murder.

Held: *Judgment Affirmed, with Costs.* The doctrine of transferred intent does not apply to attempted murder when an unintended victim is injured, but not killed.

State v. Brady, No. 27, September Term 2004. Filed July 28, 2006. Opinion by Bell, C.J.

***

FAMILY LAW - LIMITED DIVORCE - CONSTRUCTIVE DESERTION - CUSTODY

Facts: Appellant and Appellee married and produced three children. The parties' relationship began to fail, and marital relations ceased. They continued to reside in the marital household with their children, albeit in separate bedrooms. Appellant filed a complaint seeking a limited divorce and custody of their minor children, alleging desertion from denial of marital relations as grounds for the divorce. Appellee filed a Motion to Dismiss, arguing that because the parties continued to live under the same roof, had not separated and, therefore, were not living separate and apart, Appellant's complaint for divorce was "fatally defective" and, thus, "must be dismissed." In addition, Appellee argued Appellant's complaint for custody was also "fatally defective." Appellant admitted that the parties were still living together in the same house, under the same roof, but stated that this did not affect the validity of his complaint or the availability of the relief sought, i.e. limited divorce and custody.

Held: Reversed. Case Remanded to that Court for Further Proceedings Consistent with this Opinion. Costs to be Paid by the Appellee. A complaint for a limited divorce alleging constructive desertion based on lack of marital relations may be maintained when both parties continue to live under the same roof, albeit not in the same bedroom and without cohabitation. Moreover, in such a circumstance, a complaint for custody and visitation of the parties' children may be maintained.

Ricketts v. Ricketts, No. 136, September Term, 2003, Filed July 28, 2006. Opinion by Bell, C.J.

***

FAMILY LAW - CHILD IN NEED OF ASSISTANCE - MOOTNESS & PERIOD FOR FILING EXCEPTIONS TO MASTER'S FINDING

Facts: Petitioner, Leslie C. (Mrs. C.), and Christopher C.

(Mr. C.) are the biological parents of Kaela C., Gunner C., and Franklin C. Mr. and Mrs. C. were divorced in August, 2001, and Mrs. C. was awarded legal and physical custody of the children. On December 2, 2003, in response to allegations of abuse, the Frederick County Department of Social Services ("DSS") removed all three children from Mrs. C.'s care, placed them in emergency shelter care and subsequently filed a petition with the Circuit Court for Frederick County seeking a determination that the children were children in need of assistance (CINA). After the shelter care hearing, at which both Mr. and Mrs. C. appeared, the master recommended that the children be placed in licensed foster care pending an adjudicatory hearing.

The master held an adjudicatory hearing on March 3, 2004, at which Mrs. C., Mr. C., and the DSS all appeared with counsel, in addition to counsel for the children. Because the court-ordered family assessment had not been completed, the DSS requested that the disposition hearing be postponed. Before addressing DSS's request, the master summarized the state of the proceedings, stating that both Mr. and Mrs. C. were neither admitting nor denying the allegations set forth in the CINA petition, and rescheduled the disposition hearing to March 17, 2004.

During the rescheduled disposition hearing, Mr. C. requested that the CINA petition be dismissed and that custody of the children be transferred to him immediately. Mrs. C. opposed Mr. C.'s request and requested that the children remain in foster care so that she could continue working toward reunification with them. The master postponed ruling on these requests to afford Mr. C. the opportunity to undergo a psychological evaluation.

On April 21, 2004, the disposition hearing was continued and, after each of the parties was heard, the master concluded that, in light of the necessity to remove Gunner from his foster home, Mr. C. should be granted custody of the children immediately, and that Mrs. C. should be granted supervised visitation. Two days later the circuit court adopted the master's recommendations and ordered the transfer of legal and physical custody of the children to Mr. C., who immediately took them to California.

Mrs. C. noted an appeal to the Court of Special Appeals contending that the circuit court deprived her of her right to file exceptions to the master's recommendations within five days as provided by Maryland Rule 11-111 (c) by adopting the recommendations two days after the master entered her findings. The Court of Special Appeals affirmed the circuit court's judgment, holding that the court had the authority to immediately adopt the master's recommendations under Maryland Rule 11-115 (b).

While her appeal was pending, Mrs. C. registered the circuit court's custody determination in California. The California court subsequently conducted its own custody hearing and, relying upon the Maryland custody determination, issued an order granting Mr. C. full legal and physical custody of the C. children, and Mrs. C. supervised visitation.

Held: The Court of Appeals held that, although California had assumed jurisdiction over the C. children's custody determination, the case was not moot because Mrs. C. continues to suffer collateral consequences from the Maryland judgment because the California court has relied upon that judgment in making its own determination to leave the children with Mr. C. The Court determined that the trial court erred in adopting the master's recommendations before the five-day period provided by Rule 11-111 (c) for filing exceptions had expired.

In Re: Kaela C., Gunner C. And Franklin C., No. 63, September Term, 2005, Opinion by Battaglia, J. filed September 9, 2006.

***

FAMILY LAW - CONTESTED CUSTODY HEARING - MOTION FOR CONTINUANCE

Facts: Tara M. Touzeau and Scott E. Deffinbaugh are the biological parents of Victoria, who was born on June 27, 1994. In 1997, Touzeau and Deffinbaugh presented to the Circuit Court for Montgomery County a Child Custody, Visitation, and Child Support Agreement, which was adopted by the court and afforded the two shared legal custody of Victoria, granted Touzeau primary residential custody of their daughter, and gave Deffinbaugh liberal visitation rights. The agreement also provided that a party relocating outside of the D.C./Baltimore Metropolitan area would provide the other with at least sixty days' advance notice.

On September 1, 2004, Touzeau informed Deffinbaugh that she and Victoria would be moving from Silver Spring to Churchton, Maryland in two weeks. Churchton is located in Anne Arundel County

approximately forty miles southeast of Touzeau's former residence in Silver Spring, which is located in Montgomery County, and fifty miles southeast of Deffinbaugh's residence in Olney, which also is located in Montgomery County. Touzeau and Deffinbaugh agreed to meet with a court-appointed parent coordinator on September 22 to discuss Deffinbaugh's new visitation schedule and Victoria's schooling, but the two were not able to come to any agreement as to Deffinbaugh's new visitation schedule.

On September 28, Deffinbaugh, through counsel, filed an emergency motion for modification of custody and attorney's fees in the Circuit Court for Montgomery County, alleging that Touzeau's divorce from her husband and relocation to Churchton constituted a material change in circumstances sufficient to justify a modification in the custody arrangement. An expedited scheduling conference was set for September 30, 2004, at which Deffinbaugh appeared with counsel and Touzeau appeared pro se. The judge ordered that another custody/visitation evaluation be conducted, the results of which were to be announced at a January 21, 2005 settlement conference, and set a custody modification hearing for February 8, 2005.

The parties convened before a master at the January 21 settlement conference and were presented with the results of the court-ordered Custody/Visitation Evaluation Report. The evaluator recommended that Deffinbaugh be granted both residential and legal custody of Victoria and that Touzeau be consulted on major decisions with regard to Victoria and that she be granted liberal visitation. On January 28, 2005, Touzeau filed a motion for continuance of the February 8 custody modification hearing, alleging that, in light of the court evaluator's "unfounded recommendations," she was attempting to obtain pro bono counsel. The motion was denied.

At the custody modification hearing, convened on February 8, 2005, Deffinbaugh appeared with counsel and Touzeau appeared pro se. Before the proceedings began, Touzeau renewed her request for a continuance, alleging that she had found an attorney willing to represent her pro bono, but that he was not able to attend the hearing due to a scheduling conflict and offered an affidavit prepared by the attorney affirming those facts. The judge denied her motion and, after both sides had presented oral arguments, put on witnesses and presented evidence, concluded that Deffinbaugh should be awarded both residential and legal custody of Victoria, and Touzeau liberal visitation rights.

Touzeau, through the same pro bono counsel that was unable to represent her at the custody proceeding, noted a timely appeal to

the Court of Special Appeals. In an unpublished opinion, the intermediate appellate court affirmed the trial judge's denial of both Touzeau's pretrial motion for a postponement and her renewal of that motion on the day of the hearing.

Held: The Court of Appeals held that the trial judge did not abuse his discretion in denying the continuance because, under the circumstances, it was not mandated by law, the Petitioner had not been taken by surprise by an unforeseen event, and the Petitioner had not acted with due diligence to mitigate the consequences of not being represented by counsel at the hearing to modify custody. The Court determined that, even where the denial of the continuance has the effect of leaving the moving party without the benefit of counsel, it does not constitute a denial of due process of law. The Court further concluded that the denial of the pro se litigant's motion for a continuance was not subject to a higher standard of scrutiny than those put forth by litigants with retained counsel.

Tara M. Touzeau v. Scott E. Deffinbaugh, No. 126, Sept. Term 2005. Opinion by Battaglia, J., filed September 19, 2006.

***

TORTS - IMMUNITY - GOVERNMENTAL/PROPRIETARY DISTINCTION

Facts: Suzanne Whalen, respondent, who is legally blind, was injured when she fell into a utility hole in Leone Riverside Park. She filed suit against the Mayor and City Council of Baltimore, petitioner, claiming that Baltimore City, which owns and maintains Leone Riverside Park, was negligent by failing to ensure that the utility hole was safely covered. The hole is physically within Leone Riverside Park, but it is also within four feet of the Johnson Street public way. As a result of its proximity to the Johnson Street public way, respondent argued that the maintenance of the hole fell within the City's proprietary duty to maintain public ways. Petitioner moved for summary judgment and asserted, among others, the defense of governmental immunity. The Circuit

Court for Baltimore City granted petitioner's motion for summary judgment in an Order dated June 9, 2004. The Court of Special Appeals vacated that judgment. *Whalen v. Mayor & City Council of Baltimore*, 164 Md. App. 292, 883 A.2d 228 (2005). The Mayor and City Council of Baltimore filed a petition for a writ of certiorari, which this Court granted on December 19, 2005.

Held: Reversed. Case remanded to the Court of Special Appeals with instructions to affirm the judgment of the Circuit Court for Baltimore City. The trial court did not err in finding that the municipality was entitled to governmental immunity with respect to tort claims arising from the municipality's alleged negligence in the maintenance of a public park when the injury occurred within a public park and outside the boundaries of a public way.

Mayor and City Council of Baltimore v. Suzanne Whalen, No. 101, September Term, 2005, filed October 19, 2006. Opinion by Cathell, J.

***

ZONING - JUDICIAL REVIEW - ARTICLE 66B, MD CODE - "ZONING ACTION" BY BALTIMORE CITY COUNCIL - AMENDMENT OF A PREVIOUSLY APPROVED PLANNED UNIT DEVELOPMENT - QUASI-JUDICIAL ACT - REQUIRED FACT-FINDING SPECIFIC TO THE CIRCUMSTANCES AND USE OF THE AFFECTED PARCEL OR ASSEMBLAGE

Facts: Canton Crossing, LLC, is the developer of a 67 and one-half acre parcel of land in the Canton area of Baltimore City pursuant to an Industrial Planned Unit Development (PUD) previously approved by the Mayor and City Council. The original, approved development plan provided for residential units, a restaurant, and office and retail space, among other things. Due to a desired change in the development plan to create additional residential units and restaurant space, Canton Crossing was required to obtain approval of a substantive amendment of the PUD, via ordinance, from the Mayor and City Council, as in the case of a new application process. Canton Crossing submitted its proposed amended development plan, which was referred to various agencies of the

City government for analysis and reports. Each agency favorably reported upon the proposal, expressed as a draft ordinance and the City Council's Land Use and Planning Committee conducted a public hearing, which yielded the testimony of the developer, concerned members of the surrounding community, and committee members. Subsequent to the hearing, the City Council passed, and the Mayor signed, Ordinance 04-873, which granted the substantive amendments sought by Canton Crossing.

Appellant, Maryland Overpak Corporation, an abutting landowner, filed a petition for judicial review in the Circuit Court for Baltimore City alleging that the PUD amendment interfered with its leasehold interest in a street apparently included in the approved and amended development plan. The Circuit Court dismissed Appellant's petition for lack of subject matter jurisdiction under the rationale that the City's approval of the PUD amendment was not a "reclassification" of the parcel's zoning, and thus did not amount to a "zoning action" under Maryland Code (1951, 2003 Repl. Vol., 2005 Suppl.), Article 66B, § 2.09(a)(1)(ii). The Circuit Court relied on *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 160 Md. App. 376, 864 A.2d 218 (2004) and *Board of County Commissioners of Carroll County v. Stephans*, 286 Md. 384, 408 A.2d 1017 (1979), which had limited the conception of "zoning action" to only reclassifications. A timely appeal was filed in the Court of Special Appeals, but the Court of Appeals intervened and granted a *writ of certiorari* on its own initiative before the intermediate appellate court could decide the appeal. 389 Md. 398, 885 A.2d 823 (2005).

Held: Reversed and remanded to the Circuit Court. The Court of Appeals opined that the approval of the PUD amendment constituted a "zoning action" under Art. 66B, § 2.09(a)(1)(ii), regardless of whether it was a "reclassification." The Court was persuaded by the Court of Special Appeals's recent opinion in *Armstrong v. Mayor and City Council of Baltimore*, ___ Md. App. ___, A.2d (2006) (No. 1704, September Term, 2004) (filed September 1, 2006), which retreated from the intermediate appellate court's prior stance in *MBC Realty* that only a "reclassification" could qualify as a "zoning action" for purposes of statutory judicial review. The Court of Appeals adopted the approach taken by the Court of Special Appeals in *Armstrong*, which first asks whether a given governmental land use action is legislative or quasi-judicial in nature. This determination is made by ascertaining: (1) whether the action in question was made on individual, as opposed to general grounds, with an emphasis on a specific property; and (2) if the action was preceded by a deliberative fact-finding process with an evidentiary hearing and the weighing of evidence.

The Court found that the process observed during the approval of Ordinance 04-873 was of a sufficiently quasi-judicial character. The City Council's determination of whether to approve the amendment was focused almost exclusively on the specific parcel upon which the PUD is situated and its potential impact on the surrounding neighborhood. The myriad statutory standards and considerations governing the approval of the amendment required significant oversight of specific details concerning the proposed development of the PUD property. Also present was a deliberative fact-finding process marked not only by the reports of eight city government entities, but a substantial public hearing, which yielded testimony and evidence on various issues specific to the PUD property. Finding that the action was quasi-judicial, the Court was left to decide if that action was a "zoning action" as the term in used in Art. 66B, § 2.09. The meaning of the phrase "zoning action," which is not defined in the statute, had been construed by the Court of Appeals in *Stephans* and the Court of Special Appeals in *MBC Realty* as encompassing only piecemeal zoning reclassifications. This conclusion was based on judicial inference drawn from the legislative history of the statute that only a stylistic change occurred when the operative language of § 2.09 was changed from "reclassification" to "zoning action." The Court rejected this narrow view of the phrase "zoning action" and adopted, instead, a conceptualization that looked to the plain meaning of the words. Accordingly, the Court stated that a "zoning action" is any act that decides the use of a specific parcel of land, initiated by an individual application by a property owner, based on fact-finding adduced through governmental agency analysis of the proposal and through a public hearing, which act creates or modifies substantively the governing zoning classification; or which defines the permissible uses and other characteristics of a specific parcel of land by exercising some discretionary judgment after the consideration of the unique circumstances of the affected parcels and buildings. The Court held that the PUD amendment ordinance was a "zoning action" in that it affected the use of the land after a deliberative process, initiated by the developer, considering the specific characteristics of the land in question. Because the petition for judicial review challenged the amendment of the PUD generally, it could be viewed fairly as attacking the quasi-judicial process observed by the Mayor and City Council. Therefore, Appellant is entitled to maintain a petition for judicial review of the PUD amendment.

Maryland Overpak Corporation v. Mayor and City Council of Baltimore, No. 76, September Term, 2005, filed October 16, 2006. Opinion by Harrell, J.

***

ZONING - NONCONFORMING USE - INTENSIFICATION

Facts: The appellants' property was a nightclub and after-hours establishment that sometimes featured adult entertainment. Prior to his purchase, the property had been a nightclub primarily featuring adult entertainment, presented up to five nights a week since 1979. When the appellant purchased the property in 1983, the applicable zoning ordinance did not prohibit the use of the property as an adult entertainment facility. Nevertheless, the appellant reduced the number of nights of nude or exotic dancing from five to two nights per week, featuring music and comedy on the other nights. The Zoning Board approved his use of the premise as an "after hours establishment" in 1992. With this approval, the adult entertainment was presented after hours, exclusively.

In 1994, an ordinance was enacted that regulated adult entertainment businesses, providing that "[a]ny adult entertainment business existing on September 10, 1993 is considered a nonconforming use, subject to all Class III regulations." After this ordinance was passed, the appellant continued to use the facility as a club that provided adult entertainment after hours. That use was unchallenged until 2000, when the property received a violation notice that charged the appellant with operating an adult entertainment facility without a license.

The appellant appealed to the Board, and testified that the property featured adult entertainment only two times a week. The Board found that the property was a valid nonconforming use, but limited that use, based on the testimony, to two nights per week.

The appellant petitioned the Circuit Court for Baltimore City for judicial review, which upheld the Board's power to impose the two night per week restriction. The appellant noted an appeal to the Court of Special Appeals, which affirmed the judgment. The Court of Special Appeals held that the Board, because it had been presented with evidence of precisely how the property was being used - adult-entertainment twice a week - when the zoning ordinance prohibiting that use was enacted, was permitted to define the future further use in exactly the same way.

Held: *Judgment of the Court of Special Appeals Reversed. Case Remanded to that Court with Instructions to Remand to the Circuit Court for Baltimore City for Entry of Judgment in Favor of the Petitioner. Costs in this Court and in the Court of Special Appeals to be Paid by the Mayor and City Council of Baltimore.* A temporal increase in the frequency of a valid nonconforming use is not an unlawful expansion, but rather, an intensification of that use. Because the actual nature of the use had not changed, the

appellant is not temporally restricted as to when he can operate his valid nonconforming use.

Trip Associates, Inc. v. Mayor and City Council of Baltimore, No. 58, September Term, 2003. Filed May 9, 2006. Opinion by Bell, C.J.

***

COURT OF SPECIAL APPEALS

INTERPRETATION OF CONTRACTS - RADIUS RESTRICTION IN COMMERCIAL LEASE.

Facts: Wells Fargo Bank, N.A. (Wells Fargo) brought suit against Diamond Point Plaza, et al. (Diamond Point) for breach of contract based on loan default, fraud and misrepresentation and conversion of funds. Wells Fargo also sued Sam's P.W., Inc. and Wal-Mart Stores, Inc. (Sam's and Wal-Mart respectively) for various breaches of a lease agreement. Prior to Sam's and Ames Department store going dark at Diamond Point, Diamond Point sought a refinance of its property. Wells Fargo became the assignee of the loan through a merger. Although Sam's assigned the lease to a television production company (the Wire) and continued to pay rent, Ames declared bankruptcy after leaving, missed its rent payment to Diamond Point who subsequently missed its loan payment to Wells Fargo. Wells Fargo filed suit on March 7, 2003. It amended its compliant two times and the case proceeded to trial on April 4, 2005.

The court issued findings of fact and conclusions of law and shortly thereafter, amended them. The court entered judgment against Diamond Point for over $23.6 million plus post judgment interest. Sam's and Wal-Mart were jointly and severally liable for $1.25 million and $56,260.86 in damages as a result of violating the retail use and radius restrictions contained in the lease. The court denied Wells Fargo's request for over $2 million in attorneys' fees because some were unreasonable and others were not properly delineated. Wells Fargo sought a review of the court's summary judgment as to the radius restriction and denial of attorneys' fees. Diamond Point and Sam's and Wal-Mart appealed the judgments against them.

Wells Fargo construed the radius restriction to unambiguously refer to an earlier phrase "during the term of the lease" which, in its view, was not a specific moment in time and, thus, disallowed its circumvention by simply closing one store and opening another down the street.

Sam's agreed that the language was unambiguous, but an objective interpretation of the four corners of the lease contract showed that the restriction had two components, one of which would be rendered superfluous by Wells Fargo's interpretation. Sam's contended that the court's interpretation was a plain reading of the language and "during the term of the lease" meant so long as

the lease was in effect.

Held: The Court focused on the meaning of the word "then." The Court found the language to be ambiguous and remanded to the court to use extrinsic evidence to provide context for a proper determination of what the parties intended. The summary judgment by Sam's should have been denied to resolve the ambiguity of the word "then" in the lease.

The complexity of the case was acknowledged below and the blanket assignation of fifty percent liability as to each defendant without specifying an allocation to allow the court to properly apportion reasonable fees was correct, but the court should have required Wells Fargo to itemize its charges. Wells Fargo bears the responsibility of itemizing on remand so as to allow the court to apply the factors in Maryland Rule 1.5.

The Court also affirmed the finding that the non-retail use of the space by the Wire was proved by a reasonable certainty to have harmed Wells Fargo by effectively preventing Diamond Point from reletting the Ames space.

The Court upheld the court's factual findings as to Wal-Mart's having been a party to the Sam's lease and that it should have notified Diamond Point of the assignation of the Sam's lease to the Wire.

As to Diamond Point's cross-appeal, the Court upheld as a material fact that affected the value and marketability of the refinance loan, the finding that Diamond Point knew of the imminent vacancies and failed to disclose them to its mortgage lender.

The Court was persuaded by the unambiguous and plain meaning of the pertinent documents that the court did not err in finding that the debt was immediately due upon default and Wells Fargo did not have to notify or demand debt from Diamond Point.

The Court held appropriate the court's finding that, because there was failure to perform reasonably preventable maintenance, Diamond Point reduced the life of the roof and committed waste.

Finally, the Court rejected as without merit Diamond Point's contention that the court erroneously calculated the judgment and damages because the court properly interpreted the plain language of the amended mortgage. The Court further did not reverse the award of damages based on the assertion that Wells Fargo did not mitigate because it was Diamond Point's burden to prove that Wells Fargo could have avoided all the losses it claimed.

Wells Fargo Bank Minnesota, N.A., Trustee v. Diamond Point Plaza L.P. et al., No. 1663, September Term, 2005, decided September 29, 2006. Opinion by Davis, J.

***

EVIDENCE - EXPERT OPINION - *FRYE v. UNITED STATES*, 293 F. 1013 (D.C. CIR., 1923); *REED v. STATE*, 283 MD. 374 (1978); CSX *TRANSP., INC. v. MILLER*, 159 MD. APP. 123 (2004), *CERT. GRANTED*, 384 MD. 581 (2005), *CERT. DISMISSED*, 387 MD. 351 (2005); TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN CONCLUDING THAT THE METHODOLOGIES EMPLOYED BY APPELLEES' EXPERT WITNESS, DR. SHOEMAKER, IN HIS DETERMINATION REGARDING CAUSATION DUE TO EXPOSURE TO MOLD WERE NOT NEW OR NOVEL SCIENTIFIC TECHNIQUES REQUIRING APPLICATION OF THE FRYE-REED TEST.

Facts: Chesson et al. filed a claim with the Worker's Compensation Commission alleging that each sustained accidental injury or occupational disease, called "sick building syndrome," was caused by exposure to toxic mold. Three of the claims were dismissed and three partially awarded compensation. On petition for judicial review, the court consolidated the six petitions. Dr. Shoemaker examined all six claimants and wished to testify as an expert. Montgomery Mutual filed a motion *in limine* to exclude the testimony because the Doctor's methodology was not generally accepted by the medical community. After hearing argument, the court ruled from the bench that the Frye-Reed analysis did not apply. Because the doctor was a board-certified physician who attended law school, was published widely, and devoted the last five or six years and more than fifty percent of his time to this area of specialty, his opinions were deemed admissible. Montgomery Mutual's challenges went to the weight as opposed to admissibility. The court denied the motion and Montgomery Mutual appealed.

Held: Affirmed. Expert opinions concerning the cause or origin of an individual's condition are not subject to the Frye-Reed analysis. Dr. Shoemaker did not discuss allergy or airway testing, but an idea suggested by another physician. He also

published several articles and conducted presentations with colleagues who specialize in illnesses caused by exposure to toxins. His opinions as to the individuals' exposure to mold causing their illnesses was based upon generally accepted methods. The fact that there were opposing viewpoints, based upon other generally accepted methodologies, did not lead to the conclusion that Dr. Shoemaker's testimony should have been excluded.

Mongtomery Mutual Insurance Company v. Josephine Chesson et al., No. 1270, September Term, 2005, decided September 20, 2006. Opinion by Davis, J.

***

LABOR AND EMPLOYMENT - SOVEREIGN IMMUNITY

Facts: Appellant, Charles Magnetti, filed a complaint in circuit court against the University of Maryland, College Park, the University's College of Arts and Humanities, and the Director of the University's Professional Writing Program, Dr. Michael Marcuse, appellees, alleging claims for breach of contract and breach of the implied covenant of good faith and fair dealing, and seeking specific performance, stemming from the termination of his employment as a teacher. Appellant was terminated in May or June of 2002 but did not file suit against appellees until June of 2005.

Appellees filed a motion to dismiss, asserting that governmental immunity prevented appellant from maintaining his suit. Under Maryland Code (2004 Repl. Vol.), § 12-201 of the State Government Article ("S.G."), sovereign immunity is waived in certain contract actions against the state, but only if the claim is filed within one year from the alleged breach, as required by S.G. § 12-202.

Appellant responded that his claim should not be dismissed because Maryland Code (2006 Repl. Vol.), § 12-104(b) of the Education Article ("Ed."), waived the appellees' governmental immunity through a provision granting the Board of Regents the

authority to "sue or be sued." Appellant also contended that the one year time limitation in S.G. § 12-202, for bringing suit against appellees under S.G. § 12-201, should not apply to appellant's claim because Ed. § 12-104(a) states that restrictions on the authority granted to the Board of Regents, including the authority to "be sued" under Ed. § 12-104(b)(3), are only valid if imposed by "specific reference" to the University System of Maryland.

The circuit court agreed with appellees, applying S.G. § 12-201 (waiving the State's governmental immunity for contract actions) and S.G. § 12-202 and dismissing the appellant's complaint with prejudice on the ground of sovereign immunity.

Held: The Court of Special Appeals affirmed the order of the circuit court dismissing appellant's claims, holding that sovereign immunity prevented appellant from maintaining his action. The Court held that Ed. § 12-104(b) did not act as a waiver of sovereign immunity for appellant's claim absent an appropriation of funds sufficient to satisfy judgments awarded in suits brought pursuant to this subsection.

The Court further held that the language of Ed. § 12-104(a) limiting restrictions placed upon the authority of the Board of Regents to those specifically referencing the University System of Maryland did not affect the applicability of the time limitation in S.G. § 12-202 which was not a restriction on the functioning of the Board of Regents. Thus, appellant had failed to satisfy the one year time limitation in S.G. § 12-202 for bringing claims under the waiver of immunity in S.G. § 12-201.

In the absence of any applicable waiver of sovereign immunity, appellant's suit against the appellees was barred.

Charles Magnetti v. Univesity of Maryland, *et al.*, No. 2492, Sept. Term, 2005, filed October 27, 2006. Opinion by Eyler, James R., J.

***

TAXATION - HOMEOWNER'S PROPERTY TAX CREDIT, TAX PROPERTY CODE SECTION 9-104

Facts: A homeowner, James G. Bennett, the appellant, applied to the State Department of Assessments and Taxation ("SDAT"), the appellee, for a Homeowner's Tax Credit (HTC) pursuant to Md. Code, section 9-104 for the tax years 1997, 2000, and 2001. The SDAT denied his applications on the basis that his net worth exceeded the $200,000 eligibility limit for the tax credit.

In the 1996 tax year, Bennett had applied for the HTC and been denied on the same basis. His appeal of that prior denial resulted in a reported case in the Court of Special Appeals: *Bennett v. State Dep't of Assessments and Taxation*, 143 Md. App. 356 (2001) ("*Bennett I*"). The HTC statute provides that, in calculating "net worth" for the purpose of determining eligibility, the value of the homeowner's dwelling is not to be included as an "asset." In *Bennett I*, Bennett had argued that, even though his dwelling was not counted as an asset in computing his net worth, his mortgage-secured loan should be counted as a liability. The Court of Special Appeals disagreed, holding that net worth can be calculated sensibly only if the home is not counted as an asset *and* the mortgage on the home is not counted as a liability.

While *Bennett I* was pending, Bennett filed the HTC applications at issue in this case, contending that SDAT overstated his assets when computing his net worth by including what he termed a "mortgage asset." The "mortgage asset" was apparently an investment account created with the proceeds of the same mortgage-secured loan at issue in *Bennett I*. Bennett argued that, because the "mortgage asset" was derived from the value of his home, it should not be considered an asset in determining his net worth, just as the value of the home itself was not included. The SDAT disagreed and included the "mortgage asset" as an asset, but excluded the corresponding mortgage liability based on the holding in *Bennett I*.

Bennett was unsuccessful in his appeal of the denials to the Property Tax Assessments Board. He then appealed the decision to the Maryland Tax Court, which also rejected his argument. Bennett brought an action for judicial review in the Circuit Court for Montgomery County. The circuit court affirmed the decision of the Tax Court and denied Bennett's subsequent motion to revise the judgment. Bennett appealed.

Held: Affirmed. Under the plain language of TP section 9-104, Bennett's "mortgage asset" qualified as an "asset" and was properly included in computing his net worth. The statute excludes only the

value of the dwelling from consideration as an asset in computing net worth; it does not exclude assets derived from the value of the dwelling through refinancing or a home equity loan. Furthermore, the purpose of the HTC statute is to protect homeowners without significant assets from having to sell their homes because they can no longer afford to pay property taxes. A taxpayer who withdraws equity from his home through mortgage refinancing or a home equity loan is able to use the equity to pay his property taxes. Thus, the purpose of the HTC is thwarted if a taxpayer is allowed to use the equity in his home for investment purposes and still qualify for the HTC.

Bennett v. State Department of Assessments and Taxation, No. 1838, Sept. Term, 2005, filed October 2, 2006. Opinion by Eyler, Deborah S., J.

***

JUDICIAL APPOINTMENTS

On August 11, 2006, the Governor announced the appointment of DaNEEKA LaVARNER COTTON to the District Court for Prince George's County. Judge Cotton was sworn in on September 20, 2006 and fills the vacancy created by the elevation of the Hon. Albert Northrup.

*

On August 11, 2006, the Governor announced the appointment of PATRICK RIDGEWAY DULEY to the District Court for Prince George's County. Judge Duley was sworn in on October 3, 2006 and fills the vacancy created by the retirement of the Hon. Richard Palumbo.

*

On August 31, 2006, the Governor announced the appointment of CHARLES G. BERNSTEIN to the Circuit Court for Baltimore City. Judge Bernstein was sworn in on October 10, 2006 and fills the vacancy created by the retirement of the Hon. Joseph H. H. Kaplan.

*

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated October 11, 2006, the following attorney has been placed on inactive status by consent, effective immediately, from the further practice of law in this State:

CHARLES F. WILHELM

*

By an Order of the Court of Appeals of Maryland dated October 13, 2006, the following attorney has been disbarred by consent from the further practice of law in this State:

J. CHRISTOPHER LLINAS

*

By an Opinion and Order of the Court of Appeals of Maryland dated October 16, 2006, the following attorney has been disbarred from the further practice of law in this State:

ALPHONZO JEROME BUTLER

*