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COURT OF APPEALS

Maryland Insurance Commissioner v. Central Acceptance Corp. et al., No. 7, September Term 2011, filed December 20, 2011, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2011/7a11.pdf>

ADMINISTRATIVE LAW - DUE PROCESS - "COMMAND INFLUENCE"

ADMINISTRATIVE LAW - RULEMAKING VERSUS ADJUDICATION

STATUTORY INTERPRETATION - PLAIN MEANING RULE - PREMIUM FINANCING ACT - ALLOWABLE INTEREST CHARGES ON PREMIUM FINANCE AGREEMENTS

Facts: Petitioner, the Commissioner of the Maryland Insurance Administration (MIA), issued a Cease-and-Desist Order to Respondents, premium finance companies (PFCs), to prevent them from charging Maryland MAIF customers interest on insurance premium loans in excess of the statutory maximum in Maryland Code (1957, 2011 Repl. Vol), Ins. Art., § 23-304. Respondents requested a hearing to be held at the Office of Administrative Hearings, but the Commissioner denied the requests, choosing instead to delegate the hearing and decision-making responsibilities to the Assistant Deputy Insurance Commissioner (ADIC). The ADIC held a hearing on the Cease-and-Desist Order and issued a final order upholding the Commissioner's interpretation and application of Ins. Art., § 23-304. Respondents sought judicial review of the administrative decision by the Circuit Court for Baltimore City. The Circuit Court, relying on a theory of undue "command influence" by virtue of the Commissioner's appointment of the ADIC to hear and decide the administrative appeal, did not reach the statutory interpretation questions and, instead, remanded the case to the MIA with instructions to provide Respondents with a hearing before an impartial official. The Court of Special Appeals affirmed the Circuit Court judgment. The Court of Appeals granted certiorari to determine whether 1) the theory of "command influence" was applicable to the case; 2) the MIA was required to proceed by rulemaking rather than adjudication; 3) the MIA followed proper procedures issuing the Cease and Desist Order; 4) the MIA had statutory authority to issue cease and desist orders against the PFCs; and 5) the MIA interpreted properly Ins. Art., § 23-304.

Held: Reversed. The judgment of the Court of Special Appeals was vacated and the case remanded to that court with instructions

to vacate the judgment of the Circuit Court with instructions to that court to affirm in part and reverse in part the decision of the MIA, consistent with this opinion. The Court of Appeals held that the factual circumstances in this case were distinguishable from the "command influence" found in *Mayer v. Montgomery County*, 143 Md. App. 261, 794 A.2d 704 (2002). The Commissioner was enabled expressly by the Insurance Article to delegate hearing authority to the ADIC to preside over administrative appeals. Further, Respondents provided no evidence of any actual "command influence" by the Commissioner over the ADIC's conduct of the hearing or the decision rendered, and even if they had, the non-deferential review of the questions of law by the Circuit Court cured any improper influence. The Court held also that, under the "arbitrary and capricious" review standard, the MIA was not required to address the issues by rulemaking, rather than ad hoc adjudication, because it did not change any laws of widespread application; rather, it applied simply the law to the facts in this case. The parties in the adjudication were afforded all the procedural protections of a contested case hearing. Although the Premium Financing Title does not provide expressly the power of the Commissioner to issue cease-and-desist orders, the duty of the Commissioner to enforce the Insurance Article, set forth in § 2-108, and those powers reasonably implied from the Article, allow the Commissioner to issue enforcement orders to force compliance with the Insurance Article. The Court concluded that, even if Respondents alleged properly procedural missteps on the part of the MIA, these procedural irregularities did not affect a "substantial right" of Respondents. Concluding that the plain language of § 23-304 was unambiguous, the Court agreed with the MIA that PFCs were precluded from charging interest in excess of 1.15% over any 30-day period. When policies were voided *ab initio*, the Court concluded that the PFCs may charge interest for the period of time that money was advanced on behalf of consumers, as long as the finance charges did not exceed 1.15% for each 30 days (or pro rata portion thereof).

Anderson v. Burson, No. 8, September Term, 2011, filed 20 December 2011. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2011/8a11.pdf>

COMMERCIAL LAW - NEGOTIABLE INSTRUMENTS - DEED OF TRUST
PROMISSORY NOTES - NONHOLDER STATUS

Facts: The Andersons refinanced their residential mortgage by signing a promissory note and its corresponding deed of trust. The original mortgagee transferred, but never indorsed, the note to investors, who securitized the note by placing it in an investment trust. The Andersons failed to make scheduled note payments, and the substitute trustees under the deed of trust foreclosed. The substitute trustees filed, along with their order to docket, a lost note affidavit, claiming the note was lost or unavailable and could not be produced. The Andersons filed for an injunction in the Circuit Court for Howard County to block the pending foreclosure sale of their home, based on a claim that the substitute trustees had no right to enforce the note. At an evidentiary hearing, the substitute trustees produced, despite their earlier lost note affidavit, the note, unindorsed on its face. They produced also an unattached allonge, signed by the original mortgagee but lacking the indorsements of intermediate possessors. The substitute trustees urged that this allonge indorsed the note to them. The Circuit Court held that the substitute trustees were holders of the promissory note and denied the Andersons' injunction request. The Andersons appealed to the Court of Special Appeals, which affirmed the trial court, although on different grounds. The Court of Special Appeals, disregarding the allonge as void, concluded that the substitute trustees were nonholders in possession under Maryland Code, Commercial Law § 3-203(b) and the "shelter rule." The Andersons sought from the Court of Appeals certiorari, which we granted.

Held: Affirmed. A transferee who possesses an unindorsed deed of trust note that is payable to another person or entity may enforce the note under Maryland Code, Commercial Law § 3-203(b). Under § 3-203(b), the transferee's right to enforce the note, if any, derives from his or her transferors. Therefore, the transferee must establish that his or her transferors had the right to enforce the note by proving that a prior transferee was a holder. The Andersons conceded their note's entire transfer history, which established the substitute trustees' right to enforce the instrument.

Gary James Smith v. State of Maryland, No. 10, September Term, 2011, filed November 29, 2011. Opinion by Rodowsky, J.

<http://mdcourts.gov/opinions/coa/2011/10a11.pdf>

CRIMINAL LAW - EVIDENCE - HEARSAY - ANTICIPATORY REBUTTAL IN STATE'S CASE-IN-CHIEF - SUICIDE DEFENSE - STATE OF MIND EXCEPTION TO HEARSAY - REMOTENESS - RELEVANCY - TOTALITY OF CIRCUMSTANCES - TIME LAPSE - FUNDAMENTAL FAIRNESS - HARMLESS ERROR

Facts: Smith was convicted at a jury trial of depraved heart second-degree murder and use of a handgun in the commission of a felony.

The following facts were undisputed by the parties. The decedent, Michael McQueen (McQueen), had been in the Army with Smith: specifically, they were both Army Rangers who had been deployed in the same intelligence unit in Afghanistan together. At the time of McQueen's death, Smith and McQueen were roommates. On the night of McQueen's death, Smith and McQueen smoked marijuana, had dinner, and drank a couple of beers. Following this, they went to the VFW Post in Gaithersburg, where they continued to drink and play pool. They then went to a local restaurant, where they each consumed part of a beer. McQueen's autopsy demonstrated that his blood alcohol content at the time of death ranged from .2% per volume in the heart to .13 percent peripherally. There was no evidence proffered that there were any bad feelings between the two men the night of McQueen's death.

After police responded to Smith's 9-1-1 call following McQueen's death, Smith was arrested and interrogated. During this taped interrogation, Smith gave police three different versions of what had transpired that evening. In all three versions, Smith stated that he dropped McQueen off at the apartment following their night out and went to his mother's house to pick up clean laundry. In the first version of Smith's account, Smith stated that he was not in the apartment when the shot was fired, but rather that he came home and found McQueen slumped over on his chair. He stated there was no weapon in the apartment, and he suggested some possible suspects. In Smith's second version of events, he stated that there was a gun in the apartment that was kept hidden in a counter. Smith stated that when he returned, McQueen was slumped over on his chair, and that Smith panicked because the gun was his and because there was marijuana on McQueen's lap. Smith stated he then drove to a nearby lake and threw the gun and the bullets into the lake separately. In Smith's third version, he stated that he had brought the gun from his mother's house that evening after he picked up his laundry. He stated that he put it in a case and

warned McQueen that it was loaded when Smith returned home. Smith then stated that he was in the bathroom, and he heard a shot fire just as he was walking back out into the hallway of the apartment.

Smith's defense was that McQueen committed suicide. At trial, both sides' experts disagreed over the analysis of the blood splatter surrounding McQueen's corpse, the analysis of the gun shot residue, and the ultimate cause of death. The main contentious issue regarding the blood splatter evidence centered around a V-shaped void area without blood splatter near McQueen's body. The State's blood splatter expert testified that the void was formed by the outline of Smith's right shoe which had blood splatter on the right side and top, thereby placing Smith within contact range of McQueen's temple at the time of the shot. The defense's blood splatter expert witness, who had initially been contacted by the State, testified that the void's outline was inconsistent with having been formed by Smith's shoe. He also testified that McQueen's right hand and arm were raised when the shot was fired. The defense's second blood splatter expert testified to the same. Another defense expert witness testified that, in his opinion, the cause of death was suicide: he based his opinion on the nature of the contact wound, McQueen's blood alcohol level, the lack of motive for murder, and the gunshot residue. The State then called an expert rebuttal witness who testified that the defense's expert who had testified as to the ultimate cause of death being suicide did not account for either the blood splatter evidence nor the fact that the scene was "staged," in that there was no gun found at the scene.

Both sides also called experts to testify as to the gunshot residue (GSR) found at the scene. The State's GSR expert testified that based on his analysis of the GSR, he was unable to conclude who the shooter was. The defense's GSR expert testified that while the absence of GSR is not proof that an individual is not the shooter, he found the number of a certain type of GSR particles on McQueen's hand to be most interesting.

At trial, the court did not permit Smith to introduce evidence, during his defense case, regarding McQueen's state of mind roughly a month before his death. Specifically, Smith wanted to put on as a witness a Georgia state trooper who had arrested McQueen for Driving While Intoxicated. If deemed admissible, the trooper would have testified that following his arrest, McQueen stated to the trooper that "he did not need this [DWI] on top of all the other shit in his life." The trial court did not permit the trooper to testify in front of the jury, stating that the statement was hearsay and it did not fit within the Maryland Rule

5-803(b) (3) state of mind exception because it was too remote, was not relevant, and was not trustworthy.

The trial court did permit the State to anticipatorily put on witnesses, ranging from McQueen's mother to his old Army buddies, during its case-in-chief, to testify as to McQueen's state of mind up to almost a year before his death.

On appeal, Smith raised three questions:

1. "In this case where homicide versus suicide was the cornerstone issue, did the Court of Special Appeals err in affirming the trial court's decision to admit prosecution evidence of the decedent's 'normal' state of mind but refused to admit equally relevant defense evidence of the decedent's 'depressed' state of mind?;"

2. "Did the Court of Special Appeals err in finding an erroneous jury instruction on voluntary intoxication to be harmless after both parties and the court acknowledged that it likely had a significant influence on the outcome of the case?;" and

3. "Did the Court of Special Appeals err in concluding that a key discovery violation made by the State was harmless error when such a violation was found to be reversible in this Court's case of *Hutchins v. State*[,339 Md. 466, 663 A.2d 1281 (1995)]?"

Held: Reversed and remanded to the Court of Special Appeals with instructions to that court to reverse the judgment of the Circuit Court for Montgomery County and to remand the case to that court for a new trial.

The Court first noted that because of its conclusion it reached in regards to Smith's first question on appeal, it was unnecessary for the Court to address the second two.

The Court next addressed the trial court's refusal to allow Smith's lay witness, the Georgia trooper, to testify as to McQueen's mental state roughly one month before his death. The Court stated that the trooper's proffered evidence consisted of two types of evidence: the trooper's direct observation, categorized as a collective fact, and McQueen's statement to the trooper itself, categorized as hearsay. The latter, as hearsay, would only be admissible if it fell under the state of mind exception to hearsay pursuant to Maryland Rule 5-803(b) (3).

The Court next discussed the general parameters concerning the admissibility of evidence. The Court noted that evidence must be relevant to be admissible. It then explained that relevant evidence contains two components: materiality and probative value. In terms of the materiality of the trooper's proffered testimony, the Court stated that because the proposition the defense sought to prove was that McQueen committed suicide, the trooper's statements needed only to make that proposition more probable. Because, when taken in conjunction with the opinions of the defense forensic experts, the trooper's proffered testimony could have caused the jury to accept the defense's ultimate proposition of suicide, the Court held that it was material-consequential.

The remoteness of the trooper's proffered testimony, which goes to the evidence's probative value, was then taken up by the Court. It first noted that it reviews relevancy determinations on an abuse of discretion standard. The Court then stated that a homicide victim's state of mind is relevant to a defense theory that the decedent committed suicide. The Court held that, where suicide is at issue in a homicide case, the remoteness of evidence bearing on the deceased's state of mind must be determined under all the circumstances. Thus, the Court concluded, the trial court was in error to apply a limitation of thirty days preceding McQueen's death to the admissibility of the trooper's evidence. The Court heavily relied on an 11th Circuit case when making its determination. See *United States v. Veltmann*, 6 F.3d 1483 (11th Cir. 1993) (holding that, in a homicide prosecution, where the ultimate issue was whether or not the decedent committed suicide, a witness's testimony regarding the fact that the decedent mentioned suicide several times in the months before her death was admissible under the state of mind hearsay exception because, while possibly cumulative, its exclusion violated the defendant's right to put on a defense). The Court then noted that there were other circumstances during the trial which contributed to the non-remoteness of the trooper's testimony: (1) the State asserted in its opening statement that it would prove McQueen was not suicidal; (2) the State produced lay witnesses to testify to such during its case-in-chief; and (3) the State's witnesses on this matter testified as to McQueen's state of mind up to one year before his death, thereby setting the standard for what the State deemed to not be too remote to be probative.

The Court then averred that the trial court's ruling was unfair to Smith. The principle of fundamental fairness required that Smith be allowed to question the trooper in front of the jury. The Court then distinguished the case at hand from that of *Robinson v. State*, 66 Md. App. 246, 503 A.2d 725 (1986), determining that an individual's intent, over the passage of time, to commit suicide

was not equivalent to an individual's intent, over the passage of time, to shoot another person. The Court reasoned that if an individual wanted to shoot another person on one day, he might not have the same resolve thirty days hence because of the cooling off effect of the passage of time. The Court stated that it was not persuaded that the same logic applied to an individual's resolve to commit suicide.

The Court continued its reasoning by addressing the trustworthiness of the trooper's proffered testimony. It stated that it was unlikely that the McQueen's statement to the trooper immediately following his arrest was false and made for the purpose of obtaining favorable treatment from the trooper. The Court noted that even though McQueen's statement to the trooper did not specifically mention suicide, it could still have a tendency to make suicide more probable.

The final issue addressed by the Court was that of harmless error. The Court stated that the error committed by the trial court in not admitting the trooper's testimony into evidence was not harmless because it was not clear, beyond a reasonable doubt, that the error in no way influenced the verdict. The Court determined that there was evidence falling on both sides of the aisle, and that because the trooper's proffer was excluded, the State was able to argue to the jury that there was no evidence of McQueen's depression or suicidal tendencies and thus the Court as unable to conclude beyond a reasonable doubt that the error in no way influenced the verdict.

Gerald Thomas Titus, Jr. v. State of Maryland, No. 6, September Term 2011, filed November 29, 2011. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/6a11.pdf>

CRIMINAL LAW - OBSTRUCTING AND HINDERING A LAW ENFORCEMENT OFFICER IN THE PERFORMANCE OF A DUTY

Facts: On July 9, 2008, an officer conducting routine patrol performed a lawful traffic stop of Petitioner, the driver of a motorcycle. After initiating the stop, the officer ran the vehicle information and found that it was registered to Gerald Thomas Titus, Jr., whose license was suspended and revoked in the state of Maryland. When the officer approached Petitioner and asked for his license and registration, Petitioner produced a Florida driver's license with his picture and the name Frederick John Karr, Jr. The officer detected an odor of an alcoholic beverage emitting from Petitioner's breath or person, and he noticed that Petitioner had bloodshot, glassy eyes. At the officer's request, Petitioner agreed to perform standardized field sobriety testing. As a result of Petitioner's poor performance on the tests, the officer placed him under arrest. The results of the samples obtained from the breathalyzer test administered to Petitioner shortly after his arrest were .09 grams of alcohol per 210 liters of breath. At some point after the evening of the traffic stop, another officer provided information to the arresting officer indicating that Petitioner had used an alias at the time of the stop. The arresting officer performed a subsequent investigation by viewing Petitioner's MVA records and photograph. The officer then determined that Petitioner had provided a false name during the traffic stop.

At trial, Petitioner was convicted by a jury of obstructing and hindering a law enforcement officer, driving under the influence of alcohol per se, driving while impaired by alcohol, and giving a false or fictitious name to a uniformed police officer. Petitioner appealed his conviction for obstructing and hindering to the Court of Special Appeals, which affirmed his conviction.

Held: Reversed and Remanded.

The State has the burden of proving beyond a reasonable doubt each of the following elements of the common law offense of obstructing and hindering a law enforcement officer in the performance of his or her duty: (1) a police officer engaged in the performance of a duty; (2) an act, or perhaps an omission, by

the accused which obstructs or hinders the officer in the performance of that duty; (3) knowledge by the accused of facts comprising element (1); and (4) intent to obstruct or hinder the officer by the act or omission constituting element (2). This test applies to all categories of the offense of obstructing and hindering. A conviction for obstructing and hindering a law enforcement officer in the performance of his or her duty requires proof beyond a reasonable doubt of actual obstruction or hindrance of a police officer. The evidence adduced at trial by the State was insufficient to establish whether the arresting officer was in fact obstructed or hindered, or the manner and degree of any obstruction or hindrance. In the absence of any testimony at trial from the arresting officer, or any other evidence presented by the State, regarding how Petitioner's actions actually obstructed or hindered the officer in the performance of his duties, there was insufficient evidence to convict Petitioner of obstructing and hindering.

Kenneth E. Barnes v. State of Maryland, No. 124, September Term, 2010, filed October 27, 2011. Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2011/124a10.pdf>

CRIMINAL LAW—POST CONVICTION—MD RULE 4-345(a) MOTION TO CORRECT AN ILLEGAL SENTENCE—COMPLETION OF SENTENCE RENDERS CASE MOOT

Facts: In 1998, Petitioner Kenneth Barnes pleaded guilty to third-degree sexual offense involving a minor under 15. He was thus directed to register as a sexual offender in Maryland. He initially complied with this requirement but was later convicted of violating the registration statute by failing to notify local law enforcement of a change in his address. Petitioner was placed on probation, and a subsequent violation of that probation result in prison time.

Upon release, Petitioner filed a Motion to Correct an Illegal Sentence under Maryland Rule 4-345(a). He argued that his probation and incarceration were the result of an erroneous imposition of the sexual offender registration requirement. The Circuit Court for Baltimore City denied his motion, on the grounds that he was subject to the registration requirement. Petitioner then appealed to the Court of Special Appeals. The state opposed his appeal, arguing that the registration statute is not a "sentence" that could be challenged under Rule 4-345(a). The Court of Special Appeals affirmed in a reported opinion.

Held: Vacated and remanded.

The Court held that Petitioner's claim was not justiciable because he was not serving a "sentence" for the purposes of Rule 4-345(a). Because there was no sentence to correct, the Court dismissed Petitioner's claim as moot, and vacated the Court of Special Appeals' opinion. The Court observed that Rule 4-345(a) simply permits a court to revise an illegal sentence, rather than to modify or overturn the underlying conviction. Once the defendant has completed his sentence, therefore, a court can no longer provide relief under the Rule.

In this case, the Petitioner filed his motion almost a year after he had finished serving his sentence. The only lasting consequence was the requirement that he register as a sex offender. He did not argue for the Court to consider whether the registration requirement was a sentence. Instead, he argued that he was subjected to an illegal sentence because he should have never been required to register in the first place. The Court rejected this argument, stating that a Rule 4-345(a) motion is not specifically or exclusively designed to challenge the validity of incarceration.

Rodney Taureen Moore v. State of Maryland, No. 20, September Term 2010, filed December 21, 2011. Opinion by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2011/20a10.pdf>

CRIMINAL LAW - REGULATED FIREARMS - STATUTORY INTERPRETATION - OPERABILITY OF A HANDGUN

Facts: The Petitioner, Rodney Taureen Moore, after entering into an agreed statement of facts, was convicted of illegal possession of a regulated firearm under Section 5-133(c) of the Public Safety Article, Maryland Code (2003) and sentenced to five years' imprisonment without possibility of parole. Moore appealed his conviction, arguing that the handgun was not operable and therefore was not a "firearm" as defined in Section 5-101(h) of the Public Safety Article, Maryland Code (2003). Specifically, Section 5-101(h)(1) defined a "firearm" as "a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive" or "the frame or receiver of such a weapon." The Court of Special Appeals affirmed, agreeing with the trial court that did not require the handgun to be operable to sustain a conviction under Section 5-133(c). The Court of Appeals granted certiorari to consider whether operability is a prerequisite for a handgun to be considered a firearm under Section 5-101(h).

Held: The Court of Appeals affirmed Moore's conviction. The Court interpreted the plain meaning of the definition of "firearm" in Section 5-101(h), specifically the terms "designed" and "converted," as including inoperable weapons. This plain meaning interpretation, the Court observed, was supported by the legislative history of Section 5-101(h). Enacted by the Maryland Gun Violence Act of 1996, the firearm definition in Section 5-101(h) was intended by the Legislature to be consistent with federal law. The language of Section 5-101(h) is nearly-identical to Section 921(a)(3), Title 18 of the United States Code and a multitude of federal appellate courts have interpreted Section 921(a)(3) to not require operability. Thus, the plain meaning, legislative history and federal analogue of Section 5-101(h) supported the Court's conclusion that Moore's conviction under Section 5-133(c) was properly upheld, regardless of the operability of the handgun that was found in his possession.

Charles Y. Kim v. Maryland State Board of Physicians, No. 1, September Term 2011, filed November 29, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/1a11.pdf>

HEALTH - BOARD OF PHYSICIANS - CASE RESOLUTION CONFERENCE - USE OF INFORMATION FOR INVESTIGATION AND PROSECUTION

BOARD OF PHYSICIANS - REPRIMAND OF LICENSEE - CONDUCT IN THE PRACTICE OF MEDICINE

BOARD OF PHYSICIANS - REPRIMAND OF LICENSEE - WILLFUL CONDUCT

Facts: Petitioner came to the United States in 1973. He completed a three-year residency in English and received his initial license to practice medicine in Maryland in 1977. He subsequently passed written and oral exams administered in English. He practices in the area of Obstetrics and Gynecology and communicates with colleagues and patients in English.

In 2005, A medical malpractice lawsuit was filed against him. He answered the complaint and then was deposed for the case in November 2005. While the malpractice case was pending, Petitioner filed his medical license renewal application. In response to several pertinent questions, Petitioner denied that either he, his partners or associates, or his family or household members had been named as defendants in any malpractice actions, filings or settlements.

Subsequent to Petitioner's renewal application filing, Petitioner's counsel communicated with the Attorney General's office with respect to the scheduling of a Case Resolution Conference ("CRC") for an unrelated matter. In the course of that communication, Petitioner's counsel indicated to the Assistant Attorney General that Petitioner would be in court on a proposed date. The Assistant Attorney General relayed the information to the Board of Physicians ("Board"), which investigated further. The Board reviewed Petitioner's license renewal application and performed a Maryland Judiciary Case Search. The Board, thereby, determined that Petitioner had been involved in a malpractice action when he submitted his application.

The Board charged Petitioner with three separate violations of Maryland Code (1981, 2009 Repl. Vol.), § 14-404 of the Health-Occupations Article: (a) (3) unprofessional conduct in the practice of medicine; (a) (11) willfully making a false record or report in the practice of medicine; and (a) (36) willfully making a false representation when making an application for licensure in the practice of medicine. The Board of Physicians found that Petitioner had violated all three subsections and sanctioned him.

The Court of Special Appeals affirmed the decision of the Board. Before the Court of Appeals, Petitioner raised three issues challenging the Board's final order: 1) whether the Board impermissibly used statements made by counsel concerning a CRC to bring the charges against Petitioner; 2) whether completing a renewal application for a physician's license is "in the practice of medicine"; and 3) whether "willfully" making false representations requires the intent to deceive.

Held: Affirmed. The Court of Appeals accorded deference to the Board's determination and affirmed the final order. First, the Board permissibly used information obtained while scheduling a CRC to prompt an investigation of Petitioner's renewal application. The information was not confidential pursuant to COMAR 10.32.02.03.C(7)(d) because it was not a commentary, admission, fact revealed or position taken at a CRC, but rather was only related to the scheduling of the CRC. Furthermore, the information was not confidential pursuant to the express language of the regulation because it was obtainable from other sources—the Maryland Judiciary Case Search and the Health Claims Arbitration Office.

Next, the Court of Appeals held that Petitioner's conduct occurred in the practice of medicine. The term "in the practice of medicine" is construed broadly and is not limited to diagnosing and treating patients. The Board relies on information provided in licensing applications to assess physicians' fitness to practice. Because licensing is directly related to the provision of patient care, filing a license renewal application occurs in the practice of medicine.

Finally, the Court of Appeals held that "willful" does not require the intent to deceive. The Board committed no legal error in adopting the common definition of "willful," that a willful act is committed voluntarily and intentionally, as opposed to accidentally or inadvertently. There was substantial evidence to support that Petitioner knew about the pending malpractice matter when he filed his license renewal application but that he failed to disclose that information. Furthermore, the Board's final order rejected Petitioner's defense of mere misunderstanding, as the Administrative Law Judge had found that Petitioner's assertion was "illogical and unconvincing." An appellate court does not reevaluate the evidence presented or make credibility determinations anew. Petitioner, therefore, acted willfully.

Julia M. Taylor v. Giant of Maryland, LLC, Nos. 9 & 10, September Term 2010, filed December 6, 2011. Opinion by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2011/9a10.pdf>

LABOR & EMPLOYMENT LAW - ARTICLE 49B OF THE MARYLAND CODE - SEX DISCRIMINATION - COMPARATOR EVIDENCE - RETALIATORY TERMINATION - CIRCUMSTANTIAL EVIDENCE

Facts: Julia M. Taylor, an African American female, worked full-time as a tractor-trailer driver for Giant, making local deliveries of merchandise and groceries. She was diagnosed with menorrhagia, or heavy, prolonged menstrual bleeding, and fibroid tumors, which would often result in her delayed arrival at work. Giant required its drivers to provide 1.5 hours' advance notice of lateness or absence. Often, because of her condition, Ms. Taylor called her Giant supervisors less than 1.5 hours before the start of her shift to notify her Giant supervisor that she would be late or absent.

When Ms. Taylor was reprimanded for violating the call-in policy, she explained her gynecological conditions to her supervisors at Giant, who thereafter required that she take an independent medical examination. Ms. Taylor then filed sex and racial discrimination claims with the Prince George's County Human Relations Commission, alleging that similarly situated Giant employees were not required to undergo independent medical examinations. Notice of this claim was sent to Giant. Approximately three weeks later, Ms. Taylor met with several Giant supervisors, who communicated to her that she would not be permitted to drive until she undertook the independent medical examination, which Ms. Taylor understood to mean that she was terminated.

Ms. Taylor filed a retaliatory discharge claim against Giant, in addition to her sex and race discrimination claims, in the Circuit Court for Prince George's County. A jury found that Giant had engaged in sex discrimination and had terminated Ms. Taylor in retaliation for filing her claim with the Prince George's County Human Relations Commission. Giant filed a motion for judgment notwithstanding the verdict, alleging that Ms. Taylor's gender discrimination and retaliation claims were preempted by Section 301 of the Labor-Management Relations Act and that, in the alternative, Ms. Taylor failed to adduce legally sufficient evidence of discrimination and retaliation to support the jury verdict. The circuit court denied the motion and, thereafter, awarded Ms. Taylor attorney's fees.

Giant appealed both the denial of its post-trial motion and the award of attorney's fees. As to Giant's motion for judgment notwithstanding the verdict, the Court of Special Appeals reversed,

determining that Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a) preempted, that the independent medical examination was not an adverse employment action because Ms. Taylor's provided insufficient comparator evidence, and that Ms. Taylor failed to show that the Giant supervisors who terminated her had knowledge of her discrimination claim prior to her termination.

As to Giant's challenge of the attorney's fees, which was filed with the Court of Special Appeals more than thirty days after the trial court's order, the intermediate appellate court reversed the award. The Court of Appeals granted certiorari to consider the intermediate appellate court's rulings.

Held: The Court of Appeals reversed and remanded the case to the Court of Special Appeals to consider a number of issues that the intermediate appellate court did not reach in Giant's previous appeal. Initially, the Court reviewed the impact of Section 301 of the Labor-Management Relations Act, which requires that all state law claims arising out of collective bargaining agreements be preempted by federal law. The Court resolved that Ms. Taylor's claim did not arise out of her collective bargaining agreement between the union and Giant and, thus, her discrimination claims, grounded in Article 49B of the Maryland Code and Section 2-222 of the Prince George's County Code, were not preempted by federal law. The Court also considered whether Ms. Taylor established that Giant's independent medical examination requirement constituted an adverse employment action by showing that comparators, or male employees who were similarly situated to Ms. Taylor, were not required to undergo a similar examination. The Court held that the comparators, four male employees with serious health conditions who were not required to undergo an independent medical examination prior to driving, were appropriate. The Court further held that Ms. Taylor proved, by circumstantial rather than direct evidence, that her Giant supervisors knew of her discrimination claim at the time of her termination. Finally, the Court held that Giant's untimely filed notice of appeal of the attorney's fees award was fatal.

COURT OF SPECIAL APPEALS

Carroll v. State, No. 2583, September Term, 2010, filed December 5, 2011. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2011/1184s09.pdf>

CRIMINAL LAW - BURDEN OF PROOF; FUNDAMENTAL FAIRNESS; JURY INSTRUCTION; REASONABLE DOUBT; FORFEITURE; PRESERVATION; WAIVER; SUPPRESSION

Facts: On April 24, 2010, appellant and two other men robbed four high school students at a campsite in Frederick, Maryland. The men had machetes and a baseball bat.

Appellant ultimately was arrested and interviewed by police. At trial, the State introduced into evidence a recording of the interview. Appellant initially told police that he did not have any knowledge of the incident, and he denied going to any campsite other than his own. Eventually, he admitted entering the teenagers' campsite, but he denied any wrongdoing or awareness of a plan to rob the students.

Held: Judgments affirmed. The failure to instruct the jury explicitly that the State's burden of proof applies to each element of each offense is not error, as long as this burden of proof is clear from the instructions as a whole. The circuit court did not err in following the Maryland Pattern Jury Instructions when instructing the jury on reasonable doubt.

If a defendant fails to raise a ground seeking suppression of evidence, which is required to be raised pre-trial by Maryland Rule 4-252, the defendant has waived his or her right to appellate review of that issue. Plain error review generally is not applicable to waiver issues. Rather, an appellant seeking review must show good cause for the failure to raise the issue in the circuit court. One basis for a finding of good cause is a change in the law after trial. There was no good cause shown for the failure to move to suppress appellant's statement to the police.

Convictions of conspiracy to commit robbery and attempted robbery do not merge pursuant to principles of fundamental fairness. The

crimes address different criminal behavior and warrant separate sentences.

Kenneth Thomas v. State of Maryland, No. 2062, September Term, 2010, filed December 2, 2011. Opinion by Raker, J.

<http://mdcourts.gov/opinions/cosa/2011/2062s10.pdf>

CRIMINAL LAW - EVIDENCE - HEARSAY EXCEPTIONS - PRIOR CONSISTENT STATEMENTS

Facts: The central issue in this case was whether the circuit court erred in admitting a witness's prior consistent statements to rebut defense allegations that the witness had multiple motives to fabricate testimony, when the prior consistent statements were made before one of the alleged motives arose but after the second alleged motive arose.

Appellant was charged with one count of distribution of a controlled dangerous substance ("CDS") in the Circuit Court for Montgomery County. Police observed appellant and an individual, who later testified as a State's witness against appellant, engaging in what police believed to be a drug transaction in the parking lot of a shopping center. Police followed and pulled over both men, who left the parking lot in their own cars. After police stopped the witness and found a rock of crack cocaine on his person, the witness told the officers that he had just purchased the drugs from appellant in the shopping center parking lot for \$50. The witness was arrested and charged with possession of a CDS. When police pulled appellant over and searched him, they found \$50 on his person but no drugs.

At trial, the witness testified that he purchased the crack cocaine from appellant and described the details of the transaction. On cross-examination, defense counsel alleged that the witness had two motives to fabricate his testimony: (1) to minimize his criminal liability by portraying himself as the buyer rather than the seller and by currying favor with the State with respect to the possession charge stemming from the transaction with appellant; and (2) to obtain consideration from the State with respect to a charge of unauthorized use of a motor vehicle. The witness denied these allegations.

Thereafter, the State called two of the officers who had searched the witness and found the drugs on him. When the State asked the officers if the witness had made any statements, appellant objected that any responses would be hearsay. The circuit court overruled the objection, and the officers repeated the witness's prior consistent statements identifying appellant as the seller. In closing arguments to the jury, defense counsel repeated the two allegations of bias against the witness. The jury found appellant guilty of distribution, and the court imposed sentence.

On appeal, appellant argued that, even if the witness's

prior consistent statements were elicited by the State to rebut an allegation that the witness had a motive to fabricate testimony, the statements were not made before the motive to fabricate arose, and thus were not admissible under Md. Rule 5-802.1(b).

Held: The Court of Special Appeals affirmed.

Acknowledging the Court of Appeals' holding in *Holmes v. State*, 350 Md. 412 (1998), that to be admissible under Rule 5-802.1(b) a prior consistent statement must have been made before the alleged motive to fabricate arose, the Court of Special Appeals observed that appellant in this case alleged two motives to fabricate, one arising before the prior consistent statements were made, one arising after. Based upon the language of Rule 5-802.1(b) and case law from other jurisdictions, the Court held that a witness's prior consistent statements are admissible if made prior to the existence of any one of multiple biases or motives that an opposing party charges, expressly or impliedly, might have influenced the witness's testimony. Because the statements were made before one of the alleged motives arose, the statements were admissible under Rule 5-802.1(b).

The Court further held that the prior consistent statements were admissible for rehabilitative purposes, rather than as substantive evidence, under Md. Rule 5-616(c). The Court noted the Court of Appeals' holding from *Holmes* that prior consistent statements admitted under Rule 5-616(c) need not "meet the stringent premotive requirement of Md. Rule 5-802.1(b)," as well as the Court of Special Appeals' admonition in *McCray v. State*, 122 Md. App. 598 (1998), that a defendant bears the burdens of inquiring for what purpose a prior consistent statement is being admitted and, if for rehabilitative purposes only, requesting that a limiting instruction be given to the jury. Because appellant in this case did not shoulder these burdens, the circuit court did not err in admitting the statements.

Jose D. Vargas-Aguila v. State of Maryland, Office of Chief Medical Examiner

No. 1638, September Term, 2010, filed December 2, 2011. Opinion by Zarnoch, J.

<http://mdcourts.gov/opinions/cosa/2011/1638s10.pdf>

CRIMINAL LAW - DISTRICT COURT - JURISDICTION; DECLARATORY JUDGMENTS - PENDENCY OF OTHER ACTION; DECLARATORY JUDGMENTS - PROPRIETY; DECLARATORY JUDGMENTS - NECESSITY

Facts:

Appellant/cross-appellee, Jose D. Vargas-Aguila stood trial in the District Court for Montgomery County on charges of driving under the influence of alcohol and other violations of the motor vehicle laws. When the County offered evidence of the breath test results from the date of his arrest, Vargas-Aguila objected on the grounds that the standards governing breath tests, which are promulgated by the state toxicologist, were invalid because they had not been adopted in accordance with Maryland's Administrative Procedure Act, Md. Code (1984, 2009 Repl. Vol.) State Government Article (SG), §§ 10-101 et seq ("APA").

The district court granted Vargas-Aguila a stay of his criminal trial so he could file an action for declaratory relief in the Circuit Court for Montgomery County, against appellee / cross appellant, State of Maryland, Office of the Chief Medical Examiner ("the State"), to challenge the adoption of the toxicologist's standards. The circuit court declared that the toxicologist's standards were not required to be adopted under the APA. Vargas-Aguila appealed the adverse declaratory judgment. The State cross-appealed, challenging the jurisdiction of the circuit court to issue declaratory relief while Vargas-Aguila's criminal trial was still pending in the district court.

Held:

The Court of Special Appeals reversed. The Court held it was improper for the district court to stay the criminal proceedings and allow Vargas-Aguila to seek a declaratory judgment in the circuit court because the district court has the authority to make a finding of law concerning the validity of the toxicologist's standards under the APA. Therefore, Vargas-Aguila's request for declaratory relief was unnecessary.

Turning to Maryland's Declaratory Judgment Act, Md. Code (1973, 2006 Repl. Vol.), Courts and Judicial Proceedings Article

(CJP), §§ 3-401 through 3-415, the Court found additional reasons declaratory relief was improper in Vargas-Aguila's case. Under CJP §3-409(b), if a statute already provides a "special form remedy for a special type of case, that statutory remedy shall be followed" instead of declaratory relief. Because Vargas-Aguila was charged with a statutory offense, for which acquittal was the special remedy provided by the statute, declaratory relief would have been improper. Additionally, because Vargas-Aguila could have been convicted of the charges against him with evidence other than the breath test, a declaratory judgment would not serve to terminate "the uncertainty or controversy giving rise to the proceeding," as required by CJP §3-409(a). Finally, public policy dictates that a criminal defendant should not be allowed to pursue a legal strategy which would delay and possibly prejudice the pending criminal trial. Accordingly, the decision was reversed.

Mabel Y. Apenyo v. Kofi Apenyo, No. 1461, September Term, 2010, filed December 2, 2011. Opinion by Moylan, J.

<http://mdcourts.gov/opinions/cosa/2011/1461s10.pdf>

FAMILY LAW - JURISDICTION - DIVORCE - COMITY - CUSTODY - CONCURRENT JURISDICTION - PERSONAL SERVICE - UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT - FOREIGN JURISDICTION - HOME STATE JURISDICTION - INTERNATIONAL COMITY - SUBSTANTIAL CONFORMITY - DECLINING JURISDICTION

Facts: Mabel Apenyo ("Wife"), appealed the ruling from the Circuit Court for Harford County, dismissing her complaint for divorce from the appellee, Kofi Apenyo ("Husband"). The Wife and Husband are both natives of Ghana, where they married in 1995. They have two children, Tsikata and Dede. The Apenyos came to the United States in 2002 and both the Husband and Wife became naturalized U.S. citizens. Dede returned to Ghana in 2003, where she remains to this day. Tsikata returned to Ghana with the Husband on July 1, 2009.

On August 31, 2009, the Husband filed for divorce from the Wife and for custody of both children in a circuit court in Ghana. The Wife was also in Ghana following the death of her father, and she was personally served with a copy of the Husband's divorce petition. The Wife contested Ghana's jurisdiction over the divorce, and on April 15, 2010, the circuit court in Ghana found that because the Husband intended to make Ghana his permanent home, it was thus his official domicile, and therefore the Ghana judge denied the Wife's motion to dismiss.

Following these events, on September 28, 2009, the Wife filed, in the Circuit Court for Harford County, her petition seeking a divorce from her Husband and also asking for the custody of both children. This petition was served on the Husband in Ghana, who thereafter filed a Motion to Dismiss this petition in the circuit court for Harford County. The circuit court conducted a hearing on this motion, after which the circuit court dismissed the Wife's petition.

On appeal, Wife alleged the following:

1. The circuit court abused its discretion by granting the motion of the Husband to dismiss his Wife's complaint for divorce.

Held: Affirmed.

The Court first noted that there was no legal merit in the Wife's contention that the Husband served her in Ghana under

egregious circumstances and thus Ghana's jurisdiction over her was improper because the Husband's conduct was not fraudulent by American legal standards. The Court stated that to be opportunistic is not to, ipso facto, be fraudulent.

The Court then discussed the intricacy of the entwined issues before it: a divorce case, and a custody petition for each of the two children. The Court averred that divorce proceedings are governed by more customary and generic laws, whereas custody is governed by the Uniform Child Custody and Jurisdiction Enforcement Act ("UCCJEA"), codified as Maryland Code, Family Law Article §§ 9.5101 - 9.5-318. The Court noted the role that the notion of "comity" played in this case: comity with a capital "C," referring to the deference that one jurisdiction affords to finally litigated judgments and orders of another jurisdiction, and comity with a small "c," which is, to a large extent, a rule of judicial courtesy.

The Court then stated that the case before it involved the lesser variety of comity of "Who shall defer to whom?" and that this sort of comity is reviewed on an abuse of discretion standard. In this regard, the Court stated, it would give great deference to circuit court's decision and that there were many factors to balance when making a jurisdictional deference decision. The Court held that the circuit court did not abuse its discretion in dismissing the Wife's divorce complaint because the Husband's divorce complaint was already pending before the court in Ghana.

The Court then addressed the Wife's custody petition as to the Apenyos' son, Tsikata. First, the Court noted that Maryland has jurisdiction over custody cases pursuant to the UCCJEA. As per the UCCJEA, foreign countries are treated as a sister state when enforcing custody decrees, so long as the foreign custody law does not offend our public policy. The Court stated that while Maryland was the home state of Tsikata within the six-month period prior to the Wife's filing of her petition, which ordinarily would entitle Maryland to take jurisdiction over the custody proceeding, the Court also noted that there are three times when a State will nonetheless decline such jurisdiction. (1) pursuant to § 9.5-206, when the same proceeding is pending in another state; (2) pursuant to § 9.5-207, when Maryland determines that it is an inconvenient forum and that another state is a more appropriate forum; and (3) pursuant to § 9.5-208, when Maryland declines jurisdiction because the party seeking jurisdiction has engaged in unjustifiable conduct. The Court also noted that Maryland would not decline jurisdiction if the Wife, who had the burden of production, persuaded the Court that Ghana's laws were not in substantial conformity with Maryland's laws. The Court stated, however, that not only was this issue not preserved for appellate review, but it

also would lost on the merits because the Wife did not proffer anything to meet her burden of production to overcome the presumption that Ghana's laws were, in fact, in substantial conformity with ours.

The Court finally turned to the custody case as to Dede. Since Dede had lived in Ghana since 2003, it was her home state jurisdiction for custody purposes. Thus, the circuit court's dismissal of the custody case with respect to her was legally correct because it did not have any jurisdiction over her case in the first place.

The Court made a final note that the circuit court's decision not to fragment this case into two or three separate parts could not, in any way, be seen as an abuse of discretion.

USA Cartage Leasing, LLC v. Todd A. Baer, et al., No. 1797, September Term, 2010, filed November 30, 2011. Opinion by Kehoe, J.

<http://mdcourts.gov/opinions/cosa/2011/1797s09.pdf>

REAL PROPERTY - APPEALABILITY - FINAL JUDGMENT - DECLARATORY AND INJUNCTIVE RELIEF - MARYLAND RULE 2-602(b) AND COURTS AND JUDICIAL PROCEEDINGS ARTICLE § 12-303.

EASEMENT - DESCRIPTION IN DEED - REAL PROPERTY ARTICLE §4-101.

EASEMENT - LOCATION - LACK OF AGREEMENT OR HISTORY OF USAGE - BALANCING ANALYSIS.

EASEMENT - TERMINATION BY ADVERSE POSSESSION

Facts:

The parties' predecessors-in-interest, the Glesners, originally owned both parcels involved in this dispute as a single lot. In 1984, the Glesners subdivided their property into two separate lots and, in 1985, sold one lot to Baer's predecessors-in-interest. When the Glesners sold the Baer lot, they granted Baer's predecessors an easement over what would later become the Cartage lot. The deed to the Baer property **described the easement as "a non-exclusive right-of-way 25 feet in width, leading from the existing entrance from Governor Lane Boulevard, shown on the Plat of the above-referenced property . . . to the property hereby conveyed."** The deed did not otherwise describe the easement and the plat referenced in the description did not depict it. **Not all of the mesne deeds between Baer and his predecessors-in-interest mentioned the easement over the Cartage property.** In 1995, the Glesners sold the second lot to USA Cartage. The deed of conveyance made no mention of the right-of-way.

Before Cartage purchased the property, a predecessor-in-interest had placed a line of old telephone poles flat on the ground, end-to-end, running close to, and parallel with, the boundary line with the Baer Parcel, and extending to cover almost the entirety of the boundary line. After purchasing the property, Cartage planted a row of trees alongside the telephone poles. At this time, neither Cartage, nor the then-owner of the Baer parcel were aware of the easement. After learning of the easement in 2008, Baer filed a Complaint for Declaratory Judgment and Other Relief

against Cartage, seeking a declaratory judgment that his right-of-way over Cartage's property is valid and asking the court to determine the proper location of his right-of-way. Baer also contended that Cartage was interfering with his use and enjoyment of his right of way and sought an injunction prohibiting Cartage from further interference. Cartage denied the allegations and filed a third party claim against the Glesners for breach of warranty of title.

Baer filed a motion for summary judgment. The circuit court granted the motion, determining that: the easement was recorded and would have been evident from a title search of either property; the easement, which was a general easement, was not extinguished simply because the deed did not specifically describe its location; and Baer's claims were not barred by estoppel, abandonment, or adverse possession.

After receiving testimony and proposals regarding the appropriate location of the easement, the court entered an order setting out a precise location for the easement. Cartage filed a request to make the court's judgments final for the purpose of appeal pursuant to Maryland Rule 2-602(b). Neither Baer nor the Glesners opposed the motion and the court granted it, finding no just reason for delay.

Held: Vacated and remanded for further proceedings.

1. The court did not err in declaring the judgment as final for the purposes for appeal. First, because the court's judgment enjoined Cartage from interfering with Baer's use and enjoyment of his right of way, it constituted an appealable interlocutory order pursuant to Courts and Judicial Proceedings Article § 12-303(3)(i), which authorizes the interlocutory appeal of an order granting or dissolving an injunction. Furthermore, while the circuit court did not explain its reasoning in entering the Maryland Rule 2-602(b) order, this Court's review of the record demonstrated that considerations of fairness and judicial economy clearly supported the circuit court's decision.

2. Maryland Code Real Property Article §4-101(a)(1) requires that, for a deed to be valid, it must contain "a description of the property sufficient to identify it with a reasonable certainty." A deed conveying an easement is valid under RP §4-101(a)(1) when, as in this case, it clearly identifies the servient estate, specifies the width of the easement, and provides a fixed starting point for the easement.

3. When, after the grant of a general easement, the owners of the dominant and servient estates fail to agree on the precise location of the easement, and there is no history of usage, a court of equity is empowered to determine the location by balancing the equities of the parties. Here, the Baer easement was reserved in general terms, there was no evidence of past usage, and Baer and Cartage could not agree on a location for the easement. Accordingly, the circuit court was empowered to determine the location of the Baer easement such that the easement location was "the least onerous to the owner of the servient estate while, at the same time, being of reasonable convenience to the owner of the dominant estate" in light of the purposes of the easement. See *Sharp v. Downey*, 197 Md. App. 123, 178-179 (2010).

4. Finally, in analyzing a claim by a servient property owner that an easement across its property was terminated by its own adverse possession, the servient property owner's intent is irrelevant to the adverse possession determination. Instead of focusing on the subjective intent of the owner of the servient estate, the court should determine whether the actions of the servient estate owner, considered objectively, were hostile to the use of the easement by the dominant estate owner. In this case, Cartage, the servient estate owner, planted trees and placed obstructions along the parties' common boundary line, making the boundary line impassable by vehicle. While Cartage's subjective intent in so doing was for reasons other than blocking Baer's use of the easement, as Cartage was not even aware of the easement, the existence of these barriers created an issue of fact regarding whether Cartage's actions were objectively hostile to Baer's use of the easement. Accordingly, the court erred in granting Baer's motion for summary judgment solely on the basis of Cartage's purported intent.

The judgment is vacated and the case remanded for further proceedings consistent with this opinion.

John T. Turner, et ux. v. Donald E. Bouchard, No. 1573, September Term, 2010, filed December 2, 2011. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2011/1573s10.pdf>

REAL PROPERTY - PROPERTY LAW-EASEMENTS BY PRESCRIPTION

Facts: The parties own and live on two adjacent properties. In a declaratory judgment action between two neighbors, it was undisputed that one had an express easement, granted by a properly recorded deed, over a portion of another's property to serve as a driveway for pedestrian and vehicular ingress and egress. The case concerned an area outside the boundary of the express easement (the "disputed area"). The neighbor's tenants, and later the neighbor himself, used the disputed area to park vehicles, store boats, and access the lake. The circuit court held that the neighbor's use of the disputed area created an easement by prescription.

Held: The Court of Special Appeals affirmed. The circuit court did not err in holding that the neighbor had a prescriptive easement over the disputed area. To establish an easement by prescription a person must make an adverse, exclusive, and uninterrupted use of another's real property for twenty years. As a general rule, a permissive use of another's land cannot ripen into a prescriptive easement. Neither the existence of an express easement nor allegations of neighborly accommodation create a presumption that a use in excess of that express easement is permissive. Further, the so-called "woodlands exception" did not apply because the servient estate was not "unenclosed and unimproved wildlands." Accordingly, it was the servient estate owner's burden to prove that the use was permissive, rather than adverse.

The neighbor's use of the disputed area was adverse because it exceeded the scope of the express easement, was visible to the other neighbor, and was met with acquiescence rather than permission. The circuit court was entitled to infer that the servient estate owner would have seen the neighbor's use of the disputed area, and claims to the contrary exceeded credulity. The use was exclusive because it did not depend on the claim of anyone else. It was continuous and uninterrupted by either the neighbor or his tenants from 1984 through 2006, thus satisfying the twenty year statutory period.

Because neither party challenged the circuit court's adjudication of their rights and responsibilities regarding the disputed area, that part of the order was left undisturbed.

Long Green Valley v. Bellevale, No. 0228, September Term, 2009, filed November 30, 2011. Opinion by Kenney, J.

<http://mdcourts.gov/opinions/cosa/2011/0228s09.pdf>

REAL PROPERTY - ESTATES & TRUSTS - AGRICULTURAL PRESERVATION EASEMENTS AS CHARITABLE TRUSTS.

STANDING - USE RESTRICTIONS - BY TERMS OF AGREEMENT - BY THIRD-PARTY BENEFICIARIES - BY ASSOCIATIONS.

STANDING - LAND USE - NEIGHBORING PROPERTY OWNERS - SPECIAL HARM.

Facts:

Bellevale owns a dairy farm in Baltimore County. The Yoders own an adjacent dairy farm. On January 12, 1997, the State, on behalf of the Maryland Agricultural Land Preservation Foundation (MALPF), purchased an "agricultural preservation easement" on Bellevale Farm for \$796,500. The Easement Agreement stated that the grantee may enforce the easement, and that "[t]his easement does not grant the public any right to access or any right of use of the . . . land." Although the Easement Agreement stated that the land could "not be used for any commercial, industrial, or residential purpose," under the Easement Agreement and § 2-513 of the Agriculture article, there may be exceptions, as determined by MALPF, for "farm and forestry related uses and home occupations." Bellevale filed an application with MALPF to build a creamery, which MALPF approved.

The Yoders and the Long Green Valley Association (LGVA) ("complainants") filed a complaint seeking mandamus, declaratory judgment, and permanent injunctive relief based on MALPF's alleged failure to enforce the Easement Agreement and the law. After cross-motions for summary judgment, the case came before the motions court on the issue of whether the complainants had standing. Complainants asserted three independent, common law bases for standing in this case: (1) that "they are intended third party beneficiaries" of the Easement Agreement; (2) that "the Easement Agreement created a charitable trust, which is enforceable by interested third parties such as [complainants];" and (3) that "they will be 'specially harmed' by the proposed Creamery Operation in a manner different from the public at large." The court granted summary judgment in favor of Bellevale and MALPF, and issued a declaratory judgment that complainants did not have standing to challenge the creamery operation "through direct primary jurisdiction" of the court. Complainants filed a timely notice of appeal.

Held:

The court concluded that complainants were not intended beneficiaries of the Easement Agreement. Based on the case law and relevant statutory authority, the charitable trust doctrine is not *required* to be applied to the agricultural preservation easement in this case. However, complainants could have standing as neighboring landowners to challenge as an illegal or *ultra vires* action the approval of a proposed use of land subject to the agricultural preservation easement; neighboring land owners are deemed *prima facie* aggrieved and relieved of the burden of *alleging* specific harm.

Lavine v. American Airlines, No. 2917, September Term, 2009, filed December 1, 2011. Opinion by Kenney, J.

<http://mdcourts.gov/opinions/cosa/2011/2917s09.pdf>

TORT LAW - CONTRACTUAL LIMITATION OF LIABILITY CLAUSE

TORT LAW - NEGLIGENT & INTENTIONAL MISREPRESENTATION - PROXIMATE CAUSE

FEDERALISM - PREEMPTION - AIRLINE DEREGULATION ACT

Facts:

The Lavines booked a trip on American Airlines's website from Washington, D.C. to Key West, which included a connection in Miami. The Lavines received an "E-Ticket Confirmation" email, which included a line stating, "[a] summary of Terms and Conditions of travel is available by selecting the Conditions of Carriage button below." The connecting flight was scheduled to depart approximately 40 minutes after the first flight. The Lavines claim to have never seen the Conditions of Carriage.

The Lavines, informed that their first flight was delayed, claimed an American agent assured them that the delay would not cause them to miss their connecting flight. When they arrived in Miami, they claimed that they were told that they had fifteen minutes to reach the gate for their connecting flight. They ran through the airport, where construction was ongoing, and allegedly inhaled debris. When they arrived at the gate, they were denied boarding because they had not arrived in time before the scheduled departure, as stipulated in the Conditions of Carriage. Because the next flight to Key West was not until the next day, American paid for a hotel room for the Lavines, but the Lavines also purchased a different hotel room. The Lavines later filed a complaint alleging negligent and intentional misrepresentation based on American's alleged promise that it could transport the Lavines to Key West "within the time identified."

The Circuit Court for Howard County granted summary judgment in favor of American, finding there to be no genuine dispute of material fact and reasoning that (1) the Conditions of Carriage precluded American's liability for delays and/or missed connections, (2) passengers did not prove that their injuries were the proximate cause of American's actions, and (3) § 41712(b)(1) of the Airline Deregulation Act (the "ADA") preempts the enforcement of Maryland tort law in this context.

Held:

The court concluded that the Conditions of Carriage, coupled with 14 CFR 253, permit an airline to incorporate by reference the Conditions of Carriage to an "E-Ticket confirmation" email, and the Conditions of Carriage are thus part of the contract. The limitation of liability clause in the Conditions of Carriage would justify denial of an airline's liability for a passengers' tort claims based on the airline's "failure to make connections, or to operate any flight according to schedule, or for a change to the schedule of any flight." The injuries allege by the Lavines were not foreseeable. The Lavines' claims for economic injuries, which were based on a denial of boarding as provided in the Conditions of Carriage, were preempted by the ADA.

Carroll Independent Fuel Co. v. Washington Real Estate Investment Trust, No. 467, Sept. Term, 2010, filed December 1, 2011. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2011/1184s09.pdf>

TORTS - BREACH OF CONTRACT; HOLDING OVER; HOLDOVER TENANT; LANDLORD-TENANT; PROPERTY; REAL ESTATE; SUBTENANTS

Facts: The Carroll Independent Fuel Company ("Carroll"), a wholesale distributor of motor fuels that sells to retail service station operators, entered into a ten-year commercial lease agreement with the Washington Real Estate Investment Trust ("WRIT") to lease a gasoline service station in Westminster, Maryland. Approximately one year later, Carroll and WRIT entered into another ten-year commercial lease agreement for another nearby gasoline service station. Carroll subsequently provided notice to WRIT that it was terminating its leases with WRIT, shut down its businesses, and vacated both sites.

WRIT filed suit against Carroll, alleging that Carroll had failed to properly surrender possession of the properties upon termination of the lease. WRIT requested a judgment of \$3,000,000, consisting of rent at the holdover rate and additional damages, including attorneys' fees and costs and expenses associated with remediation related to the removal of the gasoline storage tanks.

The circuit court found that Carroll was liable as a holdover tenant because it : (1) failed to remove the underground storage tanks; (2) it allowed B&E Automotive, a mechanic shop, to utilize their leased land, failing to have them removed from the premises when CIF left in August of 2005; and (3) Carroll failed to provide an environmental certificate showing the demised premises to be free from contamination.

Held: Judgments reversed. None of Carroll's conduct constituted "holding over." A tenant is deemed to be "holding over" pursuant to a lease if the tenant continues in possession of the leased premises after the expiration of the lease. The typical way that a tenant retains possession of the leased premises is to physically remain on the premises at the expiration of the lease term. There can be circumstances, however, which justify a finding that a tenant is holding over even after the tenant has physically left the premises. The circumstances, however, must indicate the tenant's continued control and possession of the premises, which interferes with the lessor's use or possession of

the premises.

A tenant's failure to remove its personal property from the leased premises may be deemed to be holding over. The failure of a tenant to remove from the premises property owned by the landlord, however, does not constitute holding over.

Although Carroll's failure to deliver an environmental certificate may have constituted a breach of the lease, there was no evidence presented that supported a finding that the tenant's failure to deliver such a certificate interfered with the landlord's possession and control of the premises. The circuit court erred in finding that Carroll's failure to deliver an environmental certificate rendered it a holdover tenant.

Carroll was not a holdover tenant based on the acts of B&E Automotive remaining on the premises after the termination of the lease. There is authority for the proposition that a tenant who enters into a sublease with another person will be held liable for holding over if the sublessee fails to vacate the premises at the expiration of the lease. That is not the case here, however, where the court made a factual finding that there was no sublease or other contractual relationship, and that B&E remained on the premises as a trespasser. In that situation, it is not clear what, if any, actions were available to Carroll to remedy the situation. Although there are causes of action available to a person with a right to possession of premises to take against a person interfering with that right, these causes of action were not available to Carroll once the lease was terminated, at which point Carroll had neither title nor possession of the premises. B&E's action in remaining on the property as a trespasser after Carroll had vacated the premises did not constitute holding over by Carroll.

Heavenly Days Crematorium, LLC v. Harris, Smariga and Associates, Inc., et al., No. 1453, September Term, 2010, filed December 1, 2011. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2011/1453s10.pdf>

TORT LAW—COURTS AND JUDICIAL PROCEEDINGS ARTICLE, SUBTITLE
2C—MALPRACTICE CLAIMS AGAINST LICENSED PROFESSIONALS

Facts: Appellant contracted with appellee, a civil engineering firm, to assist in obtaining plan approval, zoning variances, and various building permits required to relocate appellant's animal crematorium. Appellee's employee prepared and submitted a site plan that received conditional approval, but required revision to cure certain deficiencies. Appellant alleged that appellee's employee failed to: (1) correct deficiencies in the site plan; satisfy timely the conditions of a conditional approval granted by the county, and; (3) request timely an extension to satisfy such conditions. As a result, the county forced appellant to begin the application process anew.

Maryland Code (1973, 2006 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP") section 3-2C-02 provides that the claimant must file a certificate of a qualified expert with the court in an action alleging professional negligence by a licensed professional. The claimant sued appellee, the employer of a non-licensed professional, for breach of contract and professional negligence based on alleged negligence by its employee, but did not file the requisite certificate of qualified expert. The circuit court dismissed the action for failure to comply with CJP § 3-2C-02.

Held: The Court of Special Appeals affirmed. The circuit court was correct in granting a motion to dismiss, without prejudice, for failure to file a certificate of qualified expert under CJP section 3-2C-02. Although appellant focused on the negligence of a non-licensed employee, the crux of its claim was alleged negligence in providing professional services. The engineering firm was the only named defendant, and at all times the employee and the firm performed professional engineering services, some of which were performed by a professional engineer. Problems with the engineering services qualified as "professional negligence," despite appellant's attempt to paint them as "ordinary negligence."

The purpose of CJP § 3-2C-02 is to weed out, shortly after suit is filed, nonmeritorious professional negligence claims. In light of

two prior amendments to the statute, the General Assembly intended the statute to apply to circumstances such as these. Further, the General Assembly did not provide for an extension of time for a claimant to request a waiver or modification of the certificate requirement, as it had done under the medical malpractice statute. Therefore, the circuit court did not err or abuse its discretion in declining to grant appellant's request to waive or modify the certificate requirement.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated October 28, 2011, the following attorney has been disbarred by consent, effective December 1, 2011, from the further practice of law in this State:

PAUL CALVIN EWELL

*

By an Order of the Court of Appeals dated December 15, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

JOHN K. REIFF

*

By an Order of the Court of Appeals dated December 15, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

ANTHONY JOSEPH DELAURENTIS

*

By an Order of the Court of Appeals dated December 16, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

ROBERT SCOTT ABRAMSON

*

By an Order of the Court of Appeals dated December 16, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

WILLIAM ORR SMITH

*

By an Order of the Court of Appeals dated December 21, 2011, the following attorney has been placed on inactive status by consent from the further practice of law in this State:

THOMAS D. WALL

*