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COURT OF APPEALS

Blondell v. Littlepage, No. 73, September Term 2009. Opinion filed March 17, 2010 by Battaglia, J.

ATTORNEYS - FEE SHARING AGREEMENT - BREACH OF CONTRACT - ACTIONABLE TORT DUTY - INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS.

<http://mdcourts.gov/opinions/coa/2010/73a09.pdf>

Facts: An attorney, William J. Blondell, Petitioner, was retained by the Corbins in May 2000, to pursue a possible medical malpractice claim in connection with Mrs. Corbin's breast cancer diagnosis. While the case was in its early stages, Blondell referred the matter to another attorney, Diane M. Littlepage, Respondent, and on January 15, 2004, the Corbins executed an "Acknowledgment and Consent to Fee-Sharing Agreement," which stated that Blondell and Littlepage would share in any fee based upon the "anticipated division of services to be rendered," that Littlepage would assume "primary responsibility" for prosecuting the Corbin claim, and that Blondell would act as "co-counsel," performing services "as requested" by Littlepage. As trial approached, Littlepage discussed with the Corbins several factors influencing a possible settlement and stated her opinion that Blondell may have delayed in filing their claim, thereby creating an issue that would diminish the settlement value of the case; she suggested that the clients pursue a potential malpractice action against Blondell. The Corbins eventually settled their claim for \$225,000 and Littlepage remitted one-half of the fee to Blondell. Thereafter, Blondell filed a complaint against Littlepage alleging various contract and tort claims involving alleged breaches of duties of good faith, fair dealing and disclosure, other than those related to the fee itself. Blondell emphasized that this case "is not a fee dispute," describing his injuries as more related to his inability, during Mrs. Corbin's lifetime, "to call her to tell her what really occurred and how sorry [he] was." The Circuit Court for Baltimore County granted summary judgment in favor of Littlepage on all counts and the Court of Special Appeals affirmed.

Before the Court of Appeals, Blondell posited two theories in support of his breach of contract claim. First, he asserted that the fee sharing agreement imposed a duty of good faith and fair dealing, implied in all contracts. Second, Blondell argued that the agreement created a joint venture, giving rise to fiduciary duties accompanying that relationship. According to

Blondell, Littlepage breached these duties by engaging in "self-dealing," "withholding material information" regarding the settlement, and "surreptitiously convincing" the Corbins to pursue a malpractice claim against him. In support of his negligence and fraudulent concealment counts, Blondell asserted that Littlepage owed actionable duties of communication and disclosure to him concerning her settlement advice to the clients and in suggesting that they pursue a malpractice action against Blondell. Finally, Blondell contended that Littlepage intentionally interfered with his economic relationship with the Corbins by "defaming Blondell," "inducing the settlement," and "encouraging the Corbins" to file a malpractice claim.

Held: The Court of Appeals affirmed. The Court considered whether a fee sharing agreement may give rise to actionable contract and tort duties between co-counsel, other than those related to the fee itself. In reviewing Blondell's breach of contract claim, the Court recognized that the implied duty of good faith and fair dealing concerns the performance and enforcement of the contract, and does not "interpose new obligations about which the contract is silent." Littlepage had fulfilled the covenant of good faith and fair dealing by delivering to Blondell his proportionate share of the settlement. The Court also declined to recognize a joint venture with attendant fiduciary duties on the basis of the fee sharing agreement, because the sharing of profits "does not by itself establish a partnership." The Court further emphasized that Littlepage was primarily responsible for handling the matter, while Blondell would perform services "as requested" by Littlepage, so that a joint venture, ostensibly premised on participation and authority over the representation by both attorneys, could not exist. Turning to whether Littlepage owed Blondell an actionable duty in tort, the Court reasoned that the fee sharing agreement in issue directly contradicted the existence of duties of communication and disclosure, because Littlepage unilaterally was to determine the level of Blondell's involvement; Blondell, in essence, conceded any necessity of consultation. Finally, the Court concluded that Blondell's intentional interference with an economic relationship claim must fail, because Littlepage could not tortiously interfere with an economic relationship to which she was a party.

Odum v. State, No. 41, September Term 2008, filed February 23, 2010. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/41a08.pdf>

CRIMINAL LAW - DOUBLE JEOPARDY - COLLATERAL ESTOPPEL

CRIMINAL LAW - EVIDENCE - MD. RULES 5-402, 5-403, AND 5-404(B)

Facts: During the early morning hours of June 10, 2001, five men, one of whom was Petitioner, committed an armed robbery, carjacking, kidnapping, and murder of two individuals. Petitioner was tried before a jury on charges related to those crimes. The jury acquitted him of all charges except for two counts of kidnapping. He challenged the kidnapping convictions on appeal and won the right to be retried on those charges. See *Odum v. State*, 156 Md. App.184, 846 A.2d 445 (2004). At the retrial, the State presented, over Petitioner's objection, evidence concerning the crimes of which he was acquitted in the previous trial. Petitioner again was convicted of both kidnapping charges.

Petitioner then challenged those convictions, arguing that the jury should not have been presented with evidence of the murders and other criminal conduct involving Petitioner and his cohorts. Petitioner contended that (1) the State was collaterally estopped from presenting evidence of the crimes of which he was acquitted at the first trial; and (2) the evidence was not relevant to prove the kidnappings and, even if relevant, the trial court should have excluded it because its probative value was outweighed by the danger of unfair prejudice to his right to a fair trial.

The Court of Special Appeals, in an unreported opinion, affirmed Petitioner's convictions. With regard to Petitioner's collateral estoppel argument, the Court of Special Appeals observed that "the doctrine of collateral estoppel prohibits re-litigation of the *same factual issue*" and that Petitioner had "not established that - when acquitting him of various charges - the jury resolved in his favor any factual issue that would have to be resolved in the second trial." The court therefore held that "the evidence was not subject to exclusion on the ground of double jeopardy collateral estoppel." The court further held that the trial court correctly ruled that the other crimes evidence was relevant to the charged kidnapping offenses and did not abuse its discretion in deciding that the probative value of the evidence outweighed the risk of unfair prejudice to Petitioner. Petitioner filed a petition for writ of certiorari, which we granted, *Odum v. State*, 405 Md. 290, 950 A.2d 828

(2008), to answer the following question: Was it was error to allow, at the retrial, evidence of the many other felonies and crimes of violence of which Petitioner was acquitted by a jury, at his first trial?

Held: Petitioner did not carry the burden of establishing that the State was collaterally estopped from offering evidence of the other crimes that occurred before and after the kidnappings. The collateral estoppel form of double jeopardy did not bar the State from using evidence of crimes of which the defendant was acquitted at the first trial, because the acquittals did not necessarily decide in the defendant's favor an issue that was required as part of the State's proof of the charged offenses.

In deciding the evidence question, the Court concluded that evidence of crimes of which Petitioner was previously acquitted was properly admitted at his retrial on charges arising out of the same transaction. The strictures of "other crimes" evidence law, now embodied in Rule 5-404(b), do not apply to evidence of crimes (or other bad acts or wrongs) that arise during the same transaction and are intrinsic to the charged crime or crimes. Evidence of the robberies that precipitated the kidnappings, the carjacking that facilitated the kidnappings, the murders that brought a tragic close to the kidnappings, and the subsequent use of the proceeds of the robbery to purchase drugs arose out of the same criminal episode. Therefore, admissibility of evidence of those crimes was not governed by Rule 5-404(b).

Concerning the relevance and ultimate admissibility of the evidence of Petitioner's involvement in the murder and other criminal activity, the Court held that evidence of those other crimes tended to establish Petitioner's complicity in the kidnappings and, therefore, was relevant proof of the kidnappings, under Rule 5-402. Therefore, the trial court did not abuse its discretion by declining to exclude the relevant evidence, pursuant to Rule 5-403, because the probative value of the evidence was not "substantially outweighed" by the danger of unfair prejudice to the defendant.

Rafael Flanagan v. Department of Human Resources, Baltimore City Office of Child Support Enforcement Ex Rel. Baltimore City Department of Social Services, No. 64, September Term 2009, Filed 9 February 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/64a09.pdf>

FAMILY LAW - CHILD SUPPORT ORDERS - CONTEMPT PROCEEDINGS - SERVICE OF PROCESS - IN A CONSTRUCTIVE CIVIL CONTEMPT PROCEEDING AGAINST A DEFENDANT FOR FAILURE TO PAY CHILD SUPPORT IN ACCORDANCE WITH A CONSENT PATERNITY AND CHILD SUPPORT DECREE, A CIRCUIT COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANT WHERE THE DEFENDANT WAS NOT SERVED PROPERLY, IN ACCORDANCE WITH THE MARYLAND RULES AND THE FAMILY LAW ARTICLE OF THE MARYLAND CODE, WITH THE SHOW CAUSE ORDER AND PETITION FOR CONTEMPT.

Facts: Sherry Flanagan, now emancipated, was born to Cynthia Rhodes on 13 August 1983. On 19 March 1987, Rhodes filed in the Circuit Court for Baltimore City a petition to establish the paternity of Sherry, then three years old, alleging that Rafael Flanagan ("Flanagan") was Sherry's father. In response to the paternity petition, Flanagan entered into a consent paternity decree on 5 May 1987. Among other things, the decree declared Flanagan to be Sherry's father and obligated him to pay \$20 per week in child support.

Over the years that followed entry of the consent paternity decree, Flanagan utterly failed to make any child support payments. On 9 July 1990, Rhodes petitioned the Circuit Court to issue a show cause order for contempt of court. The court issued the order, which required that Flanagan appear for a 6 August 1990 show cause hearing to explain why he should not be held in contempt for his failure to make the child support payments, which were by that time \$2,780 in arrears. The record indicated that, on 26 July 1990, the Sheriff attempted to serve a copy of the petition and show cause order on Flanagan at 3459 Cottage Avenue, Baltimore, Maryland, the address Flanagan had provided the court in the earlier paternity proceedings. Copies of the petition and order were left at the address, without making personal contact with Flanagan. The Sheriff made a *non est* return, according to the court record.

Five years later, on 11 August 1995, the Department of Human Resources, Baltimore City Office of Child Support Enforcement ("DHR"), on behalf of Rhodes, filed with the Circuit Court a new petition for a show cause order for contempt of court, alleging that Flanagan was in contempt for failure to pay ordered child support, which now totaled \$5,568.47 in arrears. On 21 August 1995, the Circuit Court issued the requested show cause order,

which directed Flanagan to appear at a hearing scheduled for 11 September 1995, provided the order was served on him by 1 September 1995. The record indicated that, on 24 August 1995, a copy of the show cause order was left under the door of the residence at 1925 Pennsylvania Avenue, Baltimore, Maryland, which, according to DHR, was Flanagan's last known address at that time. On 11 September 1995, Flanagan's case was called, but he was not present. Accordingly, the Circuit Court issued a paternity contempt arrest warrant for Flanagan.

Flanagan was not arrested on the paternity contempt arrest warrant until January 2007, twelve years after issuance of the warrant. At Flanagan's bail review hearing on 26 January 2007, he was served with an Incarceration Show Cause Order, which again required him to appear at a hearing to explain why he should not be held in contempt for failure to pay the agreed child support. On 23 May 2007, Flanagan, now represented by an attorney from the local State Public Defender's Office, filed a motion to dismiss the contempt petition pursuant to Rule 2-507(b), based on lack of personal jurisdiction. He contended that the court lacked jurisdiction over him because he was not served personally or properly with the petition as required by the Maryland Rules governing service of pleadings that originate a new civil action. As his argument went, Flanagan iterated that service of the order by leaving it under the door at 1925 Pennsylvania Avenue was insufficient, and that service of the paternity contempt warrant in 2007 was invalid because the warrant had been issued improperly (in sort of a "fruit of the poisonous tree" theory). In addition, he argued that service of the Incarceration Show Cause Order on him at the January 2007 bail hearing was inadequate because the original contempt petition was not served with it and more than 120 days had elapsed since the contempt petition was filed.

The Circuit Court denied Flanagan's motion to dismiss the petition for lack of personal jurisdiction. On 18 October 2007, Flanagan appeared in the Circuit Court for the contempt hearing and, after presentation of an agreed admission of fact that Flanagan was \$11,683.47 in arrears on his child support payments, the court found him in constructive civil contempt, but deferred disposition.

Flanagan appealed timely to the Court of Special Appeals. On 11 March 2009, the Court of Special Appeals, in an unreported opinion, affirmed the Circuit Court, rejecting Flanagan's claim that the lower court lacked personal jurisdiction over him. Specifically, the Court of Special Appeals found: (1) that the 1987 consent paternity decree provided Flanagan with notice of his obligation to pay child support; (2) that the Circuit Court

obtained personal jurisdiction over Flanagan at the outset of the paternity proceedings in 1987 and continued to have jurisdiction to enforce the terms of the consent decree; and, (3) that the personal delivery of the Incarceration Show Cause Order to Flanagan at his bail review hearing constituted proper service. The court noted that, while it agreed that service of the 21 August 1995 show cause order at 1925 Pennsylvania Avenue was defective, Flanagan's substantive due process right to notice and his procedural due process right were satisfied; thus, the Circuit Court obtained personal jurisdiction over him to adjudicate the contempt proceedings.

We granted Flanagan's petition for writ of certiorari to consider whether the Circuit Court, at the time of the 2007 contempt proceedings, lacked personal jurisdiction over Flanagan and therefore erred in denying Flanagan's motion to dismiss the contempt petition.

Held: Reversed and remanded. The Court held that the Circuit Court lacked personal jurisdiction over Flanagan when it adjudicated the contempt proceedings against him in 2007, due to the failure to effect proper service upon him. Specifically, the Court found that: (1) service of the 1995 show cause order on the real property at 1925 Pennsylvania Avenue by leaving the order under the door of the residence did not comply with the Maryland Rules or case law; (2) the 1995 paternity contempt warrant had been issued improperly; (3) service of the 2007 Incarceration Show Cause Order failed to include a copy of the 1995 contempt petition as required by the Rules; and (4) by operation of the statute of limitations for collection of child support arrearages, further action against Flanagan for payment of back child support was foreclosed.

Addressing first the attempted service of the 1995 show cause order, the Court found that leaving the show cause order under the door of 1925 Pennsylvania Avenue, was insufficient under the relevant Maryland Rules and case law to provide the Circuit Court with personal jurisdiction over Flanagan for purposes of conducting a contempt proceeding, particularly in light of the fact that, according to a "Wage History Report" in the record, DHR possessed at least seven potential alternative business addresses for where Flanagan might be found. The Court began by noting that the attempted service of the order did not comply with the requirements of either Rule 1-321 or Rule 2-121, which govern service of process for original and subsequent pleadings, respectfully, because the order had not been left with an individual of suitable age and discretion residing at the residence, no attempt had been made to serve Flanagan at one of the alternative addresses (whether residential or places of

business), and no motion for alternative service on grounds of evasion had been made. In addition, the Court found that the attempted service was insufficient under the relaxed standards of the continuing jurisdiction doctrine, which requires merely that reasonable notice and a reasonable opportunity to be heard be afforded to a defendant over which the court has obtained previously personal jurisdiction in the action. Thus, the Court held that the attempted service of the 1995 show cause order could not be used to provide the Circuit Court with personal jurisdiction over Flanagan to justify proceeding on the contempt petition.

Turning to the issuance and service of the 1995 paternity contempt warrant, the Court found that the Circuit Court issued improperly the warrant under § 5-1041 of the Family Law Article of the Maryland Code, which provides that a paternity contempt warrant shall issue only if the defendant (1) fails to appear after proper service of the show cause order or (2) cannot be served with the show cause order. Because the attempted service of the show cause order by leaving a copy of it under the door at 1925 Pennsylvania Avenue was inadequate, and because there was no suggestion that service upon Flanagan was impossible, the Court found that issuance of the warrant in 1995 was unjustified under the statute. As such, service in 2007 of the improperly issued warrant could not form the basis for the Circuit Court's exercise of personal jurisdiction in the contempt proceedings.

Regarding the Incarceration Show Cause Order served on Flanagan at his 2007 bail review hearing, the Court noted that, under Rule 15-206(d), service in a constructive civil contempt proceeding must include providing the alleged contemnor with a copy of the show cause order and a copy of any petition for contempt filed in the action. As the record did not reflect that Flanagan was served with the original petition for contempt in conjunction with service of the Incarceration Show Cause Order, the Court found that service of the order alone was insufficient to provide the Circuit Court with personal jurisdiction over Flanagan to adjudicate whether he was in contempt of the 1987 child support order.

Lastly, the Court noted that, according to § 10-102 of the Family Law Article, the statute of limitations for a contempt proceeding for failure to make a child support payment under a court order is three years from the date that the payment of support became due. The Court observed that more than ten years had passed between the time the child support payments became due and the 2007 contempt proceedings. As such, relying on the clear mandate of the statute of limitations, the Court rejected DHR's contention that, rather than ordering dismissal of the contempt

petition, the proper remedy would be to direct the Circuit Court to continue the proceeding and allow for proper service of a new show cause order and petition for contempt upon Flanagan, and held that, where a circuit court lacks personal jurisdiction to adjudicate a contempt proceeding, the only proper remedy is to grant dismissal, with prejudice, of the contempt petition.

Seyed Mehran Mirjafari, et al. v. Edward S. Cohn, et al., No. 38, September Term 2009, Filed 16 February 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/38a09.pdf>

REAL PROPERTY - FORECLOSURE - APPEALS - SUPERSEDEAS BOND - BONA FIDE PURCHASER STATUS, FOR THE PURPOSE OF DETERMINING THE APPLICABILITY OF THE SUPERSEDEAS BOND PROVISIONS CONTAINED IN MARYLAND RULES 8-422 AND 8-423, IS DETERMINED BASED ON THE RELEVANT FACTS KNOWN (OR WHICH SHOULD HAVE BEEN KNOWN) BY THE FORECLOSURE PURCHASER AT THE TIME OF THE PURCHASER'S SUCCESSFUL BID AND SUBMISSION OF A DEPOSIT AT THE FORECLOSURE SALE.

Facts: Petitioners, Maziar Mirjafari and Seyed Mehran Mirjafari ("the Mirjafaris"), owned investment property located in Harford County, Maryland. The property consists of 2.728 acres, zoned R-3, and is improved by two separate buildings containing a total of six rental units. In 2006, the Mirjafaris received the proceeds of a \$75,000 loan from Home Equity Mortgage, repayment of which was secured by a note and deed of trust on the property. The note required monthly payments beginning on 1 June 2006. The Mirjafaris made the initial monthly payment on time, but failed to pay the 1 July 2006 payment until 8 August 2006. A pattern of falling behind on their monthly payments continued. On 17 January 2007, the Respondents/Trustees instituted, in the Circuit Court for Harford County, foreclosure proceedings. At the time of the foreclosure sale, the Mirjafaris were seven months in arrears.

The property was advertised on 31 January 2007, 7 February 2007, and 14 February 2007 for sale. On 15 February 2007, Alex Cooper Auctioneers conducted the foreclosure auction. Respondent/Intervenor JSG Campus Hills LLC ("JSG") was the high bidder at \$250,000. In accordance with the advertised terms of sale, JSG delivered an \$8,000 deposit to secure its bid. A report of the sale was filed with the Circuit Court on 22 February 2007.

On 15 March 2007, the Mirjafaris, through counsel, filed in the Circuit Court exceptions to the sale, contending that the sale should be set aside because the advertisements for the sale of the property violated the time requirements in Maryland Rule 14-206(b) and contained certain inaccuracies in its description of the property that adversely affected the amount of the bids. The Trustees opposed the exceptions, arguing that the advertising, description of the property, and sale price were adequate. On 11 June 2007, JSG, as the foreclosure purchaser, moved successfully to intervene in the action.

Hearings on the Mirjafaris' exceptions were held on 17 September 2007, 20 September 2007, 12 December 2007, and 13 December 2007. On 13 December 2007, the Circuit Court entered an order overruling the Mirjafaris' exceptions and ratifying the 15 February 2007 sale of the property to JSG. At the close of the Circuit Court's oral ruling, counsel for JSG inquired of the Circuit Court whether it would impose a requirement for an appeal bond in accordance with Rules 8-422 and 8-423. The judge asked counsel for the Mirjafaris if he wished to address the matter, but he declined. At no further time did the Mirjafaris or their counsel request that the Circuit Court determine the amount of a bond, consider alternative security, or stay ratification of the sale.

The Mirjafaris, on 12 February 2008, noted timely an appeal to the Court of Special Appeals, presenting four issues for review: (1) the withdrawal of the Mirjafaris' counsel between the second and third exceptions hearings; (2) the admissibility of JSG's appraisal of the property and the fairness of the sales price; (3) the adequacy of the description of the property in the advertisement; and, (4) the Circuit Court's finding that there was no tender or other payment sufficient to stop the sale. While the appeal remained pending in the Court of Special Appeals, on 19 June 2008, JSG went to settlement on the property, paid the balance of the auction price, and recorded its new deed. As of that date, the Mirjafaris had not posted a supersedeas bond or alternative security in any amount.

On 25 June 2008, JSG moved to dismiss the appeal on the ground that the Mirjafaris had not posted a supersedeas bond or alternative security. The Mirjafaris opposed dismissal, contending that the appeal was not moot as no bond was required because JSG was not a bona fide purchaser. Specifically, the Mirjafaris argued that bona fide purchaser status is determined at the time the purchase money is paid by the foreclosure sale purchaser and the deed is conveyed, rather than at the time of the foreclosure sale, and that, through its participation as intervenor in the Circuit Court exceptions hearings subsequent to the sale, JSG acquired notice of the alleged defects in the foreclosure proceedings, thus preventing it from claiming the protections afforded by the supersedeas bond provisions to bona fide purchasers.

The Court of Special Appeals granted JSG's motion to dismiss the Mirjafaris' appeal as moot based on their failure to post a supersedeas bond or other security. The intermediate appellate court held explicitly that "the status of a foreclosure purchaser, as *bona fide* or not, is determined as of the time of the auction sale, not at the time of the exceptions hearing or

ratification by the circuit court, or when legal title passes to the foreclosure purchaser." The court noted that, if the rule were otherwise, lenders would be discouraged from foreclosing on delinquent mortgages. Likewise, bidders would be discouraged from participating in foreclosure actions and, subsequently, from protecting their bid by participating in exceptions hearings before the circuit court.

The Mirjafaris filed with this Court a petition for writ of certiorari, which was granted, to consider potentially two related issues: (1) whether the time of determining bona fide purchaser status is to be determined at the time of the successful bid at a foreclosure sale or at the time the foreclosure purchase price is paid; and, (2) whether a foreclosure purchaser who does not settle on his purchase until fourteen months after the foreclosure sale, long after an appeal has been noted and long after the date required by the Terms of Sale, and by the time of settlement has notice of the defects in the sale and the judicial proceedings, is a bona fide purchaser. The Mirjafaris maintained that the Court of Special Appeals erred in dismissing as moot their appeal because JSG was not a bona fide purchaser, thus vitiating the normal requirement of posting a supersedeas bond, and that we should consider the merits of their contentions below to reverse the Circuit Court's ratification of the foreclosure sale. As it had in the Court of Special Appeals, JSG filed with this Court a motion to dismiss the case as moot based on the Mirjafaris' failure to file a supersedeas bond or alternative security.

Held: Affirmed. The Mirjafaris' failure to post a supersedeas bond rendered their appeal moot because JSG qualified as a bona fide purchaser, based on its knowledge (or what was reasonably knowable) regarding the alleged defects in the foreclosure proceedings as of the date of its successful bid and submission of the deposit at the foreclosure sale, rather than as of the date it paid the full purchase price.

The Court began by noting the general rule that an appellate challenge to a ratified foreclosure sale, in the absence of a supersedeas bond to stay the judgment of a trial court, is moot if the property is sold to a bona fide purchaser, who takes the property without notice of defects in the foreclosure sale, because a reversal on appeal would have no effect. The rule is intended to encourage non-party individuals or entities to bid on foreclosure sale properties, as bidders justifiably would be reluctant to purchase a foreclosure property without assurance in the form of some security that their investments will be protected from subsequent litigation by recalcitrant mortgagors seeking to retain their property. Likewise, the rule protects

lenders who have succeeded in foreclosure but who, without operation of the rule, could not enjoy their success until the new action was fully litigated, all the while bearing the lost interest income. The Court also observed that the filing of a supersedeas bond or alternative security has but two exceptions: (1) the occasion of unfairness or collusion between the purchaser and the trustee, and (2) when a mortgagee or its affiliate purchases the disputed property at the foreclosure sale.

In rejecting the Mirjafaris' contentions that bona fide purchaser status for the purpose of determining the applicability of the supersedeas bond provisions is determined as of the date the foreclosure purchaser pays the full purchase price, rather than as of the date of the successful bid at the foreclosure sale, the Court noted that the cases addressing similar issues refer consistently to bona fide purchasers *at the foreclosure sale*. Thus, the Court found that the prior decisions implied that the status of a foreclosure purchaser, as bona fide (or not) based on knowledge of defects in the foreclosure sale, is determined as of the time of the successful foreclosure sale, not at the time of the exceptions hearing or ratification by the circuit court, or when legal title passes to the foreclosure purchaser upon payment of the full purchase price. The Court observed that adopting the Mirjafaris' contention, that bona fide purchaser status, for determination of whether an appeal bond or security is required to stay the effect of the judgment, is determined at the time of settlement, would undercut the purpose of the supersedeas bond requirement, namely, to encourage bidding at foreclosure sales and protect bidders from prolonged litigation at their risk and expense.

Applying its holding regarding the timing of the determination of bona fide purchaser status for the purposes of applying the supersedeas bond requirement to the facts of the present case, the Court noted that any knowledge of JSG of alleged defects in the foreclosure sale could have been revealed at the exceptions hearing, subsequent to it making its bid at the foreclosure sale and giving valuable consideration, namely, the \$8,000 deposit. Because nothing was found by the Circuit Court to disqualify JSG, the Court found that it was a bona fide purchaser for purposes of determining applicability of the supersedeas bond requirement to stay the ratification of the foreclosure sale. As such, the Mirjafaris were required to post a supersedeas bond in order to secure their right to pursue appellate review, and their failure to do so rendered their appeal moot.

COURT OF SPECIAL APPEALS

Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, et al. v. Moreland, LLC, et al., No. 00823, September Term, 2008, filed March 25, 2010, Opinion by Kehoe, J.

<http://mdcourts.gov/opinions/cosa/2010/823s08.pdf>

AGENCY LAW - STANDARDS FOR VARIANCES UNDER THE CRITICAL AREA ACT

Facts: The Anne Arundel County Board of Appeals denied an application of Moreland, LLC for variances from the strict application of certain provisions of the critical area provisions of the Anne Arundel County zoning ordinance, finding that Moreland "failed to meet [its] burden of proof regarding six of the variance criteria. Thus, a variance cannot be granted in this appeal."

Moreland filed a petition for judicial review, arguing that the Board's denial of the variances was based on general policy grounds as opposed to its consideration of the evidence specific to this case. Moreland also argued that the Board failed to state its reasons for concluding that Moreland's application did not satisfy the requirement that each variance granted must be the "minimum variance necessary to afford relief." The circuit court reversed and remanded the Board's decision, finding that it failed to provide reasoned explanations based upon the evidence presented to it to permit the parties to make reasonable decisions and to allow meaningful judicial review, as necessitated by *Becker v. Anne Arundel County*, 174 Md. App. 114, 145 (2007).

Held: The Court of Appeals affirmed the decision of the circuit court and remanded it to that court with instructions to remand the matter to the Board for proceedings consistent with the opinion.

The Critical Area Act authorizes boards of appeal to grant variances from the strict application of critical area regulations when, without the variance, "an applicant would be denied reasonable and significant use" of the property. MD. CODE ANN., NAT. RES. § 8-1808(d)(1) (2000, 2007 Repl. Vol., 2009 Supp.). The statutory mandate to grant only the "minimum variance necessary to afford relief" refers to variances necessary to allow a "reasonable and significant use," not a

minimal use, of the property in question. The purpose of the variance procedure is to permit a board to determine, based upon the evidence, whether the variances requested are the minimum necessary to permit a reasonable and significant use of the property and, if they are, whether the proposal can be accommodated on the property in compliance with the statutory criteria.

Weichert Co. Of Maryland, Inc. v. Dorothy Crago Faust, et al.,
filed March 1, 2010. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2010/2255s08.pdf>

ATTORNEYS' FEES - DUTY OF LOYALTY - THE PLAIN MEANING OF
"INCURRED" - THE "COMMON CORE OF FACTS" DOCTRINE

Facts: Appellee, Dorothy Crago Faust ("Faust"), was employed by appellant, the Weichert Company of Maryland, Inc. ("Weichert"). Faust's employment agreement with Weichert included a non-solicitation clause. The non-solicitation clause comprised an introduction and eight subsections, the last of which was a mutual fee-shifting provision. Faust resigned from her position with Weichert and joined another major real estate brokerage. Weichert brought suit against Faust, alleging breach of contract, employee piracy, breach of fiduciary duty, and unfair competition. Appellee counterclaimed for breach of contract, fraud, negligent misrepresentation, and violation of the Maryland Wage Act. A jury found appellee liable for breach of the duty of loyalty and awarded Weichert \$250,000.00 in damages. The jury also found that Weichert violated the Maryland Wage Act and awarded Faust \$116,000.00. Both parties petitioned for attorney's fees and expenses according to the terms of their employment agreement. The trial court granted Faust's petition and awarded her \$946,014.50 in attorney's fees but denied Weichert's petition for fees.

Held: The trial court correctly found that the structure of the contract limited their fee agreement to the non-solicitation clause. Although the jury found that Faust breached her duty of loyalty, it also found that she did not breach the non-solicitation agreement, so that solicitation could not have been the jury's grounds for finding breach of loyalty. Therefore, Faust prevailed according to the terms of the fee provision. Faust did not forfeit her rights to a fee award by breaching her duty of loyalty. First, the fee provision contemplates opposite and simultaneous fee awards, predicated on mutual breach of contract. Second, it would be inconsistent to hold that attorney's fees and expenses expressly conditioned upon successfully defending claims for breach of the non-solicitation clause should be denied when Faust met that condition. Where the parties' agreement did not specify who must "incur" the prevailing party's fees, their award was proper even though they were paid by a third party with no expectation of repayment. The trial court did not err when it awarded fees for claims falling outside the fee provision, so long as those claims had a "common core of facts" with the claims that merited the fee award.

Linda Benway, Individually etc. v. Maryland Port Administration et al., No. 2260, September Term, 2008, decided March 1, 2010. Opinion by Davis, J.

<http://mdcourts.gov/opinions/cosa/2010/2260s08.pdf>

CIVIL LAW - MOTION FOR SUMMARY JUDGMENT - RULE 2-504. SCHEDULING ORDER (providing that "(a) (1) Unless otherwise ordered by the County Administrative Judge for one or more specified categories of actions, the court shall enter a scheduling order in every civil action, whether or not the court orders a scheduling conference pursuant to Rule 2-504.1[;]" *Beyer v. Morgan*, 369 Md. 335 (2002); *Rodriguez v. Clarke*, 400 Md. 39 (2007)).

Facts: Appellant filed a claim with the Workers' Compensation Commission of Maryland against her husband's employer and its insurer seeking death benefits as the result of the death of her husband. The Commission disallowed the claim and appellant filed a Petition for Judicial Review in the Circuit Court for Baltimore City. The circuit court issued a Pre-Trial Scheduling Order in which it required that all motions for summary judgment be filed no later than September 28, 2008. Over a month after the deadline, appellees filed their Motion for Summary Judgment on October 31, 2008, arguing that there was no genuine dispute as to any of the material facts. They contended that the uncontradicted testimony from witnesses to the accident proved that Benway was engaged in acts that were not part of his employment at the time of the alleged incident, that he was not in an authorized location and was guilty of willful misconduct and deviation from employment. Appellant countered that the motion for summary judgment should not be granted because it was not filed timely. Nonetheless, the court granted summary judgment in favor of appellees on November 25, 2008.

Appellant appealed and contended that the deadline set forth by the circuit court at the pre-trial conference controlled; therefore, the motion was not timely and should not have been granted. Appellant also posited that summary judgment was inappropriate because the trial court did not consider her opposition to the motion for summary judgment and that there were material facts in dispute. Appellees argued that a motion for summary judgment may be filed at any time and that appellant presented no conflicting evidence which would defeat their motion for summary judgment.

Held: Affirmed. Citing *Beyer v. Morgan*, 369 Md. 335 (2002), the case cited in the Committee Note following Rule 2-501(a), and *Rodriguez v. Clarke*, 400 Md. 39 (2007), the Court of Special Appeals noted that the Court of Appeals, despite removing the

language "at any time" from Rule 2-501, nevertheless intended that a party may make a motion for summary judgment at any time. In those cases, the Court of Appeals noted that "A motion for summary judgment may be made, even orally, at any time during proceedings." *Rodriguez*, 400 Md. at 74, n.21 (citing *Beyer*, 369 Md. at 359). Accordingly, the deadline in the scheduling order did not control and the court properly considered appellees' motion for summary judgment.

With regard to whether the grant of summary judgment was appropriate, the Court of Special Appeals held that there was no indication from the record that the circuit court did not consider appellant's opposition to the motion for summary judgment. The record reflected that appellant filed her opposition on November 19, 2008, the court signed the Order on November 24, 2008 and the court stated "upon consideration of [appellees'] Motion for Summary Judgment and Appellant's response thereto. . . ." Moreover, appellant failed to present evidence upon which a reasonable jury could find in her favor, other than bald allegations and assertions that the court should not believe appellees' witnesses.

Board of Education of Worcester County v. BEKA Industries, Inc., No. 1924, September Term, 2008, filed February 26, 2010. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2010/1924s08.pdf>

COURTS AND JUDICIAL PROCEEDINGS - SOVEREIGN IMMUNITY; S.G. § 12-201; C.J.P. § 5-518; RECOUPMENT; DAMAGES FOR DELAY.

Facts: The Board of Education of Worcester County and BEKA entered into a written contract for BEKA to perform the sitework portion of the construction of Ocean City Elementary School. BEKA began work in June 2004. The project was scheduled to be completed by December 5, 2005, but there were delays, and BEKA did not complete the work until May 2006. Disputes arose regarding payment pursuant to the original contract and for additional work that BEKA performed.

On October 12, 2007, BEKA filed a Complaint in the Circuit Court for Worcester County, asserting 46 counts of breach of contract, and three counts alleging negligent misrepresentation, unjust enrichment and quantum meruit. BEKA sought damages in the amount of \$1,157,053.75. The Board filed an Answer generally denying liability and subsequently filed two amended Answers, asserting the defenses of recoupment and sovereign immunity.

On October 6, 2008, the first day of trial, the circuit court granted BEKA's Motion *in Limine* to Exclude Evidence of the Board's Back-Charges, and it precluded the Board from presenting any evidence of its recoupment. On October 9, 2008, after four days of trial, the circuit court ruled in favor of BEKA, entering a "compromise" judgment against the Board in the amount of \$1,100,000.

Held: Judgment reversed. A county board of education is a State agency entitled to the defense of sovereign immunity. The defense, however, may be waived by the General Assembly. Md. Code (2006 Repl. Vol.), § 5-518(b) of the Courts and Judicial Proceedings Article ("C.J.P.") which limits the liability of a self-insured board of education to \$100,000, applies only to tort claims. It does not apply to BEKA's contract claims against the Board. Md. Code (2009 Repl. Vol.), § 12-201 of the State Government Article ("S.G."), waives the defense of sovereign immunity for the State and its units in contract actions. This statute constitutes a legislative waiver of immunity for county boards of education in contract actions.

A legislative waiver of the defense of sovereign immunity, however, is an effective waiver only if there are funds available

for the satisfaction of the judgment or the agency has been given the power to raise funds. The party seeking waiver of the defense of immunity has the burden to show that funds are available. BEKA's three arguments to make this showing are unavailing. Initially, S.G. § 12-203 does not provide a mechanism for appropriation of State funds to satisfy a judgment against a county board of education. Moreover, although BEKA made arguments in the appellate court regarding funds that were potentially available for satisfaction of the judgment, no such argument was made below, and the trial court made no factual finding regarding the existence, or not, of available funds. Finally, because the judgment is reversed on the basis of the other issues raised on appeal, the money deposited by the County Commissioners to stay enforcement of the judgment pending appeal will be returned. Therefore, it does not qualify automatically as funds available if judgment is rendered against the Board after another trial.

Recoupment, which allows a reduction of an adversary's claim, is not an affirmative defense that must be specifically pled. The defense of recoupment is preserved by an answer generally denying liability.

A no-damages-for-delay clause in a contract will be enforced, in the absence of intentional wrongdoing, gross negligence, or fraud or misrepresentation. A trial court, consistent with the requirement of Maryland Rule 2-522(a), must provide the reason for its decision regarding an award of damages for claims alleged to be seeking damages for delay.

Larry Neal v. State of Maryland, No. 1118, September Term, 2008, filed March 25, 2010, Opinion by Kehoe, J.

<http://mdcourts.gov/opinions/cosa/2010/1118s08.pdf>

CRIMINAL LAW - CRIM. L. § 5-621 - OPERABILITY OF FIREARM NOT REQUIRED

Facts: Larry Neal was convicted of possession of cocaine with intent to distribute, possession of cocaine, possession of a firearm in relation to a drug trafficking crime, illegal possession of a regulated firearm and possession of marijuana.

At the close of all of the evidence, Neal moved for a judgment of acquittal of all the charges against him. His argument for acquittal on the charge of possession of a firearm in relation to a drug trafficking crime, CRIM. L. § 5-621, was based solely on the assertion that the offense required proof of the gun's operability and that the State had failed to prove operability. The trial court denied Neal's request on the basis that operability need not be proven to obtain a conviction for possession of a firearm in relation to a drug trafficking crime.

Held: The Court of Special Appeals affirmed the convictions. Md. Code Ann. Crim. L. § 5-621 (2002) establishes a separate crime for possession of a firearm during and in relation to a drug trafficking crime. Operability of the firearm is not required to sustain a conviction for possession of a firearm during and in relation to a drug trafficking crime under Crim. L. § 5-621(b).

Constance Walker v. State of Maryland, No. 1388, September term, 2008, filed February 25, 2010. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2010/1388s08.pdf>

CRIMINAL LAW - RIGHT TO COUNSEL: MARYLAND RULE 4-215(B): INELIGIBILITY FOR REPRESENTATION BY PUBLIC DEFENDER: INDEPENDENT INQUIRY REQUIRED TO ASCERTAIN RIGHT TO COURT-APPOINTED COUNSEL

Facts: On March 17, 2008, the appellant repeatedly hit Tahlene Shipley and bit her on the cheek when the two became involved in a disagreement. The disagreement concerned money that the appellant allegedly owed for construction work performed by Ms. Shipley's husband. The appellant was charged that same day with second-degree assault and trial was scheduled for June 6, 2008. On that date, appellant appeared without counsel. The case was postponed because no jury was available. Trial was rescheduled for July 16. On that date, appellant again appeared for trial without counsel and notified the Judge that she did not qualify for representation by the Public Defender's Office and could not afford a private attorney but wanted to proceed without an attorney. She was ultimately convicted of second-degree assault and sentenced to 23 months of imprisonment, all but 12 months suspended in favor of three years probation.

On appeal, appellant contends that the trial court erred by finding that she had waived her right to court-appointed counsel when the court did not inquire as to whether she would be eligible for court-appointed counsel after she told the court that she had been found ineligible for representation by the Public Defender's Office and could not afford private counsel.

Held: Md. Rule 4-215(b), which is mandatory, states, in pertinent part: "If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until it determines, after an examination on the record conducted by the court, the State's Attorney, or both, that the defendant is knowingly and voluntarily waiving the right to counsel." If the mandates of Rule 4-215(b) are not complied with, reversal is required. In *Baldwin v. State*, we established guidelines for the court's inquiry and held: "the court should consider any information offered by the parties which may reasonably bear upon the defendant's ability to afford private counsel, and make its own evaluation of the relevance and credibility of such information and the weight to be accorded it." Here, the holding in *Baldwin* compels the conclusion that the trial court erred by not conducting an indigence inquiry when it became aware that appellant was found ineligible for representation by the Public Defender's Office but could not afford private counsel. The State argues that

"[r]ather than requiring the trial court to inform the defendant orally, the drafters of the Rules mandated that a defendant be informed of these rights, in writing, at the commencement of the adversarial criminal process when the defendant receives his or her charging document." However, there is no evidence that in adopting Rule 4-202(a)(6)-(7), the Court of Appeals was shifting the responsibility from informing a defendant of his constitutionally protected right to counsel from an oral advisement from the trial court to a written advisement stated in the midst of a charging document. In addition, Court of Appeals has adopted a low tolerance for any erosion of a defendant's constitutionally protected right to counsel. Because compliance with Rule 4-215 is mandatory and the failure to conduct the proper inquiry, which is necessary to resolve whether an accused is entitled to the right to proceed *pro se*, is not considered harmless, reversal is required.

Lazara Arellano DeHogue v. State of Maryland, No. 2186, September Term 2007, filed February 24, 2010, Opinion by Kehoe, J.

<http://mdcourts.gov/opinions/cosa/2010/2186s07.pdf>

CRIMINAL LAW - SUFFICIENCY OF THE EVIDENCE - APPELLANT'S POST ACCIDENT CONDUCT SUFFICIENT TO PROVIDE BASIS FOR CONVICTION FOR VIOLATION OF MARYLAND'S VEHICULAR MANSLAUGHTER STATUTE (MD. CODE ANN., CRIM. LAW §2-290 (2002)).

Facts: On December 1, 2006, Lazara Arellano DeHogue, with her vehicle, struck a woman and her grandson, who was in a stroller. After impact, the stroller and child became entangled under the vehicle's front passenger tire. DeHogue fled the scene of the accident driving an additional .8 miles even though the vehicle was not steering properly. During that time, numerous motorists attempted to alert DeHogue of the stroller lodged under her front passenger tire. Also during that time, DeHogue pulled over and dislodged the stroller from under her vehicle and then continued to flee the scene of the accident. There was no evidence regarding exactly when the child became dislodged from beneath the vehicle, however the child was found approximate 20 feet from the stroller. According to the testimony of the Assistant Medical Examiner, the child died as a result of the injuries sustained from being lodged beneath the vehicle for .8 miles as DeHogue fled.

On November 7, 2007, the Circuit Court for Baltimore County convicted DeHogue of manslaughter by vehicle, failing to remain at the scene of an accident, failing to remain at the scene of an accident resulting in bodily injury, failing to remain at the scene of an accident resulting in death, failing to render assistance and give information in an accident resulting in death or bodily injury, knowingly failing to remain at the scene of an accident resulting in death, reckless driving, and negligent driving. On November 16, 2007, De Hogue was sentenced to ten years incarceration for the crime of vehicular manslaughter and the merged convictions for reckless driving and negligent driving and five years for the crime of failing to remain at the scene of the accident and merged convictions for related lesser offenses, which was to be served concurrently with the manslaughter sentence. De Hogue filed her appeal on November 29, 2007.

Held: The Court of Special Appeals affirmed. The Court held that DeHogue's post-impact conduct was sufficient for a finder of fact to conclude that appellant was guilty of a "wanton and reckless disregard for human life" even though the circuit court found that there was no pre-impact negligence. The Court held that the post-impact conduct constituted gross negligence

for the purposes of CRIM. LAW §2-209.

Walter Carl Abbott v. State of Maryland, No. 1900, September Term, 2008. Opinion by Hollander, filed February 25, 2010.

<http://mdcourts.gov/opinions/cosa/2010/1900s08.pdf>

CRIMINAL LAW - § 3-708(b); THREAT TO HARM A STATE OFFICIAL; "TRUE THREAT"- POLITICAL HYPERBOLE - JURY INSTRUCTIONS.

Facts: Following a trial in October 2008, a jury in the Circuit Court for Baltimore County convicted Walter Carl Abbott, Jr., appellant, of threatening to injure Governor Martin O'Malley, a State official, in violation of Md. CODE (2002, 2008 Supp.), § 3-708 (b) of the Criminal Law Article ("C.L."). The alleged threat was contained in an e-mail message that appellant sent to a State website in March 2008. The text of the electronic message provided:

O'Malley, getting ready to lose my wife after 24 years of marri[a]ge. 3rd construction co. & 2nd house I am going to lose because of no good fucking government like you and pieces of shit like you. If i [sic] ever get close enough to yoy [sic], I will rap [sic] my hands around your throat and strangle the life from you. This will solve many problems for true AMERICAN'S [sic]. Maybe you can send your MEXICAN army after me, you no good AMERICAN SELL OUT PIECE OF SHIT. I HOPE YOU DROP DEAD BEFORE I GET TO YOU, I WOULD HATE TO TO [sic] LOSE MY LIFE BECAUSE OF A PIECE OF SHIT LIKE YOU. FUCK YOU TRULY

WALTER C. ABBOTT JR.

The parties stipulated that the Governor's office received the e-mail.

At trial, appellant claimed that he was unhappy with the Governor's policy toward illegal aliens, as reflected in the e-mail. Later, he asked the court to instruct the jury as to his constitutional right to free speech, and to inform the jury of his right to political expression. The court declined to do so.

Held: The court erred in failing to propound a jury instruction explaining that the defendant could not be convicted of a violation of C.L. § 3-708(b) unless the State proved that the content of the communication in issue constituted a "true threat," rather than protected political speech.

Injured Workers' Insurance Fund v. Orient Express Delivery Service, Inc., et al., No. 2283, September Term, 2008, filed February 3, 2010. Opinion by Wright, J.

<http://mdcourts.gov/opinions/cosa/2010/2283s08.pdf>

LABOR AND EMPLOYMENT LAW - EMPLOYMENT RELATIONSHIPS - INDEPENDENT CONTRACTORS

GOVERNMENTS - LEGISLATION - INTERPRETATION

Facts: Injured Workers' Insurance Fund ("IWIF") filed suit against Orient Express Delivery Service, Inc. ("OEDS"), seeking to recover premiums allegedly owed under OEDS's workers' compensation policy. OEDS filed a motion for summary judgment, arguing that IWIF is not entitled to recover its premiums because the OEDS delivery persons are independent contractors, rather than employees of the company. The circuit court granted the motion because IWIF failed to file an affidavit with its response to the motion, and because the delivery persons signed independent contractor and sole proprietor agreements with OEDS.

Held: The Court of Special Appeals reversed. The Court concluded that whether delivery persons are to be considered employees or independent contractors for workers' compensation insurance purposes is a fact-specific inquiry that depends upon the circumstances of each case. First, the circuit court erred when it granted summary judgment for OEDS based on the conclusion that a response to a motion for summary judgment must be supported by affidavit. Maryland Rule 2-501(b) specifically allows a response to a motion for summary judgment to be supported by an affidavit or other written statement under oath. Second, independent contractor agreements and sole proprietor status forms are not sufficient to conclusively determine a worker's status. Courts must thoroughly examine the factors set forth by the Court of Appeals in *Whitehead v. Safway Steel Products, Inc.*, 304 Md. 67, 77-78 (2005) to determine whether a worker is an employee or an independent contractor. In doing so, courts must be mindful of the general trend in Maryland to protect access to workers' compensation insurance.

JUDICIAL APPOINTMENTS

On January 28, 2010, the Governor announced the appointment of Thomas V. Miller, III to the District Court for Anne Arundel County. Judge Miller was sworn in on March 1, 2010 and fills the vacancy created by the retirement of the Hon. Robert C. Wilcox.

*

On January 28, 2010, the Governor announced the appointment of the Hon. Cheryl A. McCally to the Circuit Court for Montgomery County. Judge McCally was sworn in on March 5, 2010 and fills the vacancy created by the retirement of the Hon. Ann S. Harrington.

*

On January 28, 2010, the Governor announced the appointment of Joseph M. Quirk to the Circuit Court for Montgomery County. Judge Quirk was sworn in on March 19, 2010 and fills the newly created position created by the General Assembly.

*

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated January 29, 2010, the following attorney has been disbarred by consent, effective March 1, 2010, from the further practice of law in this State:

PETER MICHAEL CALLEGARY

*

By an Opinion and Order of the Court of Appeals of Maryland dated March 16, 2010, the following attorney has been suspended for forty-five (45) days, effective immediately, from the further practice of law in this State:

JEFFREY KEITH GORDON

*

RULES ORDERS AND REPORTS

Rules Order pertaining to the **163rd Rules Report** and the Maryland Code of Judicial Conduct was filed on March 9, 2010:

<http://www.mdcourts.gov/rules/ruleschanges.html>