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ADMINISTRATIVE LAW — JUDICIAL REVIEW — ALCOHOL CONCENTRATION TESTING

Facts: John Edward Dove (Dove) was involved in an automobile accident on March 3, 2008. When Officer Traas arrived on the scene he found Dove lying in the median receiving medical treatment and he noticed Dove's red, watery eyes, and a "strong odor" of alcohol emanating from his person. Upon questioning, Dove acknowledged that he had consumed one beer earlier in the day. Dove was subsequently transported to Calvert Memorial Hospital for medical treatment.

At Calvert Memorial Hospital, Officer Traas read Dove his rights granted by statute, as contained in the DR-15 Advice of Rights form ("DR-15"), and asked him to submit to a blood test to determine alcohol concentration based on the officer's suspicion that Dove was driving under the influence of alcohol. Dove indicated that he was not willing to submit to a blood test because he does not "do needles." He volunteered to take a breath test, which Officer Traas declined to administer. Dove also offered to refuse medical treatment and proceed to the police station, which Officer Traas rejected. Officer Traas asked Dove to sign the DR-15 form to acknowledge that he was advised of the consequences of refusal, which Dove signed. Subsequently, Officer Traas confiscated Dove's driver's license and issued him a temporary license.

Dove requested a hearing on the pending 120-day mandatory license suspension for refusal to take an alcohol concentration test. After conducting an administrative hearing, the Administrative Law Judge (ALJ) found that Officer Traas had reasonable grounds to believe that Dove was driving his vehicle while under the influence or impaired by the consumption of alcohol and that Officer Traas requested that Dove submit to an alcohol concentration test, which Dove refused. The ALJ found that Officer Traas had fully advised Dove of the administrative sanctions to be imposed should he refuse an alcohol concentration test. The ALJ determined that when an individual is not available to take a breath test at the police station, Maryland law requires that a

blood test be offered. In this case, Officer Traas offered a blood test but Dove refused.

Dove then requested judicial review of the ALJ decision. The Circuit Court for Calvert County reversed the ALJ's decision and held that it is improper to request a blood test rather than a breath test when a suspect states a preference for a breath test due to a fear of needles. Also, the court opined that a blood test was not required pursuant to Md. Code (1973, 2006 Repl. Vol.), § 10-305(a)(1)(ii) of the Courts and Judicial Proceedings Article because it was "debatable" whether Dove's injures "required" removal to a hospital, given that Dove was conscious, aware, and refusing medical treatment at the scene. Because this Court noted the Legislature's preference for breath tests rather than blood tests in *Hyle v. MVA*, 348 Md. 143, 156, 702 A.2d 760, 764 (1997), the Circuit Court strictly construed the exceptions warranting a blood test enumerated in § 10-305(a)(1) of the Courts and Judicial Proceedings Article. The Circuit Court also held that Dove did not make a knowing and voluntary refusal of the alcohol concentration test because he believed that signing an acknowledgment of refusal was a prerequisite to receiving medical treatment. Finally, the Circuit Court held that the ALJ erred in refusing to accept evidence of th
e preliminary breath test administered by the hospital staff.

The State petitioned the Court of Appeals for review.

Held: The Administrative Law Judge ("ALJ") determined correctly that Dove should have his driver's license suspended for refusing a blood test to determine alcohol concentration.

The record provided the ALJ with substantial evidence that Officer Traas had reasonable suspicion that Dove was driving his vehicle while under the influence of alcohol, based on the odor of alcohol detected on Dove's person at the scene, his watery eyes, and his involvement in a motor vehicle collision. Dove's refusal to submit to a blood test as required by § 16-205.1(a)(2) of the Transportation Article and § 10-305(a)(1)(ii) of the Courts and Judicial Proceedings Article, resulted in him correctly facing the administrative penalty mandated by § 16-205.1(b) of the Transportation Article of having his license suspended for 120 days.

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Norman C. Usiak v. State of Maryland, No. 75, September Term 2009, filed 15 April 2010, Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/75a09.pdf

ATTORNEYS - CONTEMPT – MARYLAND RULE 15-203 – BECAUSE THE DISTRICT COURT'S INITIAL SUMMARY ORDER OF INTENDED DIRECT CRIMINAL CONTEMPT DID NOT COMPLY WITH THE MANDATES OF RULE 15-203, IT WAS ERROR FOR THE CIRCUIT COURT TO AFFIRM A CORRECTED ORDER WITH PURPORTED SUMMARY SANCTIONS ENTERED THREE MONTHS AFTER THE ALLEGEDLY CONTEMPTUOUS CONDUCT OCCURRED.

Facts: On 15 May 2008, Norman C. Usiak, Esquire, appeared in the District Court of Maryland, sitting in Frederick County, as defense counsel for Ruben Paz-Rubio, who was scheduled to go to trial on that day on a criminal charge of driving without a license. When the case was called for trial, the Assistant State's Attorney moved to place the case on the stet docket. The court inquired why the State wished to stet the case. Usiak, apparently believing that the court had no authority or discretion other than to grant the State's motion, interrupted the colloquy between the court and the prosecutor. After repeatedly objecting and interrupting the court, Usiak left the courtroom without the permission of the court while the case was still before the court for trial. The judge announced that it found Usiak in direct contempt of court based on his rude and disrespectful behavior.

On 22 May 2008, the District Court judge entered a written order of contempt against Usiak. The order stated merely that the court found him in direct contempt and referred to findings made on the transcript record of the 15 May 2008 proceedings.

Usiak appealed to the Circuit Court for Frederick County. That court vacated the written order of contempt on the ground that it did not comply with Maryland Rule 15-203 in that the order did not specify (1) whether the contempt is civil or criminal in nature and (2) the evidentiary basis of the court's finding of contempt. The Circuit Court remanded the case to the District Court.

On 11 August 2008, almost three months after the original contempt order was entered, the District Court judge entered a second, corrected order of contempt. The second order stated that the judge found Usiak in direct criminal contempt of court and summarized the facts giving rise to the contempt charge. It specified that as a sanction Usiak pay $250 or apologize to the District Court judge.

Usiak appealed to the Circuit Court once more, arguing, among other contentions, that it was impermissible for the District Court judge to enter a second, corrected contempt order. The Circuit Court affirmed the contempt order finding that Usiak's words and conduct constituted direct criminal contempt and supported the trial judge's decision to impose summary sanctions.

The Court of Appeals granted Usiak's petition for a writ of certiorari, 409 Md. 413, 975 A.2d 875.

Held: The Court of Appeals reversed the judgment of the Circuit Court and remanded the case with directions to vacate the contempt order of 11 August 2008 and dismiss the action. There are two forms of contempt–direct and constructive–and two types of each form–criminal and civil. Criminal contempt serves a punitive function, while civil contempt is remedial or compulsory and must provide for purging. A court may charge someone with direct contempt if the contempt was committed in the presence of the judge presiding in court or so near to the judge as to interrupt the court's proceedings. Constructive contempt means any contempt other than a direct contempt.

A court may impose summary sanctions for direct contempt if (1) the presiding judge personally saw, heard, or otherwise perceived directly the conduct constituting the contempt and has personal knowledge of the identity of the person committing it, and (2) the contempt interrupted the order of the court and interfered with the order of the court. Md. Rule 15-203(a). Summary procedures are appropriate where the conduct of the alleged contemnor poses an open and serious threat to the orderly procedures that instant. Such procedures are necessary in such a circumstance because of the need for *immediate* vindication of the dignity of the court. The court, in its discretion, may defer imposition of sanctions until the conclusion of the proceeding during which the contempt was committed. *Id.* Deferral of a sanction does not affect its summary nature. The sanction remains summary in nature in that no hearing is required; the court simply announces and imposes the sanction." The term "summary" generally connotes an immediate action undertaken without following the usual formal procedures.

If a court chooses not to issue sanctions summarily, it shall, reasonably promptly after the contemptuous conduct, issue a written order specifying the evidentiary facts within the personal knowledge of the judge as to the conduct constituting the contempt and the identity of the contemnor. Md. Rule 15-204. In that event, the proceeding shall be conducted as a

constructive contempt proceeding, with a separately docketed action. Md. Rule 15-204.

Here, the asserted contemptuous conduct occurred on 15 May 2008. The District Court judge issued the initial order of contempt on 22 May 2008. The Circuit Court vacated the defective order, and, on remand, the District Court judge issued a revised, new order on 11 August 2008. The Court of Appeals held that the almost three-month delay between the original order of contempt and the revised order is inconsistent with the nature of a summary contempt proceeding. Although the court may defer imposition of sanctions until the conclusion of the proceeding during which the contempt was committed, the length of time of such deferral should be de minimis and typically should be no later than the end of the proceeding during which the triggering conduct occurred. The Court determined that three months, in these circumstances, is not de minimis. The imperative to vindicate the dignity or the efficient operations of the court almost three months after the misconduct occurs diminishes greatly the immediacy of the justification for summary sanctions. Proceeding summarily at a late date circumvents compliance with the Rules.

The unique facet of contempt law that permits summary imposition of sanctions also militates against a judge having two bites at the contempt apple. In effect, in circumstances such as occurred here, where the trial judge believes summary action is required, he or she must get it right the first time. Here, by the time the District Court entered the second order, the justification for the summary nature of the contempt order had dissipated greatly. Accordingly, the Court held that the Circuit Court erred when it affirmed the second order of contempt.

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Falik v. Hornage, No. 60, September Term, 2009; *Falik v. Holthus*, No. 90, September Term 2009, filed 5 April 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/60a09.pdf

CIVIL PROCEDURE – DISCOVERY– EXPERT WITNESSES – TRIAL COURT DID NOT ABUSE ITS DISCRETION WHERE IT ORDERED A PROPOSED NON-TREATING MEDICAL EXPERT OPINION WITNESS TO PRODUCE FINANCIAL RECORDS REFLECTING ANY PAYMENTS MADE TO THE WITNESS IN CONNECTION WITH MEDICAL-LEGAL SERVICES AND PAYMENTS RECEIVED FROM A SPECIFIC INSURANCE CARRIER.

Facts: On 4 February 2008, James Hornage and Lora Ard Hornage (collectively, "Hornage") filed an amended complaint in the Circuit Court for Anne Arundel County alleging that they and their minor son were injured in an automobile accident caused by Heather Britt's alleged negligence. The defense designated Dr. Joel Falik, M.D., to conduct an independent medical examination of Ms. Hornage. Hornage thereafter issued a notice of a "records deposition duces tecum" seeking information regarding the physician's prior provision of forensic services. Dr. Falik filed a motion for a protective order in which he objected to several of Hornage's requests. Over his objection, the trial court ordered him to provide (1) all income tax records from the last three years to include all 1099 forms and W-2 forms related to medical employment; (2) a list of any and all depositions the doctor has attended and any and all times he has testified at trial within the last three years; (3) a list containing the total number of persons Dr. Falik has examined at the request of an insurance company or defense attorneys in any personal injury litigation case for the last two years; (4) copies of any and all documents that reflect the amount of money that Dr. Falik has been paid for defense medical examinations in the yers 2006, 2007, and 2008; and (5) a list of all cases in which Dr. Falik was retained by any insurance carrier and by any of the defendant's attorneys and their respective law offices. The order provided also that the "discovered material may only be used by counsel in this matter or in other legally related circumstances." In a footnote, the trial court noted that "the use of the discovered material should not be vulnerable to wide-spread public dissemination." Dr. Falik filed timely a notice of appeal to the Court of Special Appeals. The Court of Appeals, on its motion, issued a writ of certiorari prior to decision of the appeal by the intermediate appellate court. 409 Md. 46, 972 A.2d 861 (2009). After Dr. Falik filed his appeal, but before trial, Britt withdrew Dr. Falik as an expert witness in the underlying Circuit Court case.

On 18 January 2008, Clint and Julia R. Collins-Holthus (collectively, "Holthus") filed in the Circuit Court for Montgomery County a complaint against Gilberto Martinez alleging that they were injured in an automobile accident that occurred allegedly as a result of Martinez's negligence. Martinez designated Dr. Falik, the same expert that the defendant in *Hornage* designated, as a non-treating medical expert witness. Holthus filed a "notice of records deposition duces tecum," to be followed by a testimonial deposition, seeking information relating to Dr. Falik's prior services as a forensic expert witness. Dr. Falik filed a motion for a protective order, which the trial court granted in part and denied in part. The court's order directed Dr. Falik to produce (1) copies of all 1099 forms and/or those portions of his income tax returns for the years 2007 and 2008 and (2) all 1099s for the years 2007 and 2008, for work done by Dr. Falik at the request of or which was paid by State Farm Insurance Company. The order also addressed carefully Dr. Falik's privacy concerns and provided that(1) Dr. Falik may redact all identifying information from the documents produced, such as social security numbers and tax identification numbers; (2) Dr. Falik may mark/stamp "CONFIDENTIAL" on all produced financial documents; (3) only counsel, counsel's staff , the parties, and any expert in the case may review Dr. Falik's financial documents; (4) any and all confidential financial documents produced by Dr. Falik shall not be photocopied, scanned, reproduced, or disseminated in any way to anyone, other than counsel in the case, the parties, or any expert and may not be utilized outside of the case, shall be returned to Dr. Falik within thirty days of a final judgment or settlement, and any expert or party who receives or views Dr. Falik's confidential financial documents shall abide by the court's order and an executed copy or each such agreement shall be provided to Dr. Falik's counsel by Hornage's counsel promptly upon the execution of the agreement; and (5) any confidential documents shall not be posted on the Internet, emailed, disseminated, or communicated to any person or to any email list-serve or any similar such group or organization. Dr. Falik and Martinez filed timely separate notices of immediate appeal to the Court of Special Appeals. While that case was pending in the intermediate appellate court, but before arguments could be held, Dr. Falik filed in the Court of Appeals a petition for a writ of certiorari, pointing out the common issue assumedly presented in *Hornage*, for which the Court had issued already a writ of certiorari. The Court granted the petition, 410 Md. 559, 979 A.2d 707 (2009) and consolidated *Holthus* with *Hornage*.

Held: The Court of Appeals affirmed *Holthus* and dismissed the appeal in *Hornage*. The Court held that the Circuit Court for

Montgomery County did not abuse its discretion where it ordered a proposed non-treating medical expert opinion witness to produce financial records reflecting any payments made to the witness in connection with medical-legal services and payments received from a specific insurance carrier. At the outset, the Court addressed Holthus's contention that Martinez, the defendant in *Holthus*, may not be an appellant in this matter. Holthus argued that the trial court's order was not a final judgment with regard to Martinez as a defendant and, because it does not fall within any exceptions to the final judgment rule, Martinez must wait for a final judgment before he may appeal the order.

The Court noted that generally a party may appeal only from a final judgment. There are, however, three limited exceptions to the final judgment rule which permit appellate review before a final judgment has been rendered. The exceptions are: appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602, and appeals from interlocutory orders allowed under the common law collateral order doctrine. Martinez did not contend that this appeal fits within any of exceptions to the final judgment rule, but argued that Dr. Falik is the real party in interest and, thus, the issue is not whether Martinez has the right to maintain his own appeal pursuant to the final judgment rule or its exceptions, but whether Martinez has the right to join in the appeal maintained by Dr. Falik by virtue of Martinez's abundant interest in the outcome of the appeal. The Court discussed *St. Joseph Med. Ctr, Inc. v. Cardiac Surgery Assocs.*, 392 Md. 75, 896 A.2d 304 (2006), which held that a non-party has standing to challenge a trial court's refusal to grant a protective order from discovery in favor of the non-party. Therefore, it was pellucid that Dr. Falik possessed a right to appeal from the orders presented. That conclusion, does mean, however, that Martinez had a right to appeal under his theory that he may "tag along" in Dr. Falik's appeal. The Court held that his appeal did not fit within any of the exceptions to the final judgment rule, therefore it dismissed Martinez's appeal.

In *Wrobleski v. de Lara*, 353 Md. 509, 727 A.2d 930 (1999), the Court of Appeals held that it is appropriate generally for a party to inquire whether a witness offered as an expert in a particular field earns a significant portion or amount of income from applying that expertise in a forensic setting and is thus in the nature of a "professional witness." If there is a reasonable basis for a conclusion that the witness may be a "professional witness," the party may inquire both into the amount of income earned in the recent past from such services as an expert witness and into the approximate portion of the witness's total income

derived from such services. In *Wrobleski*, the Court highlighted two caveats to that holding: (1) the allowance of the permitted inquiry, both at the discovery and trial stages, should be tightly controlled by the trial court and limited to its purpose, and not permitted to expand into an unnecessary exposure of matters and data that are personal to the witness and have no real relevance to the credibility of his or her testimony and (2) the fact that an expert devotes a significant amount of time to forensic activities or earns a significant portion of income from these activities does not mean that the testimony given by the witness is not honest, accurate, and credible, but is simply a factor that is proper for the trier of fact to know about and consider.

The Court noted that the other courts, that have considered the issue of whether a trial court may compel an expert witness to produce potentially relevant income-stream financial records at the request of an opposing party, agree that the evidence may be relevant to the expert witness's bias, yet all jurisdictions do not permit the production of such documents. The Court of Appeals concluded that the trial court in *Holthus* followed thoughtfully its guidance in *Wrobleski* to allow only a controlled inquiry into whether a witness offered as an expert earns a significant portion or amount of income from applying his or her expertise in a forensic nature and is thus in the nature of a "professional witness." The Circuit Court for Montgomery County's order was limited in scope to those portions of Dr. Falik's tax returns which referenced any payments in connection with medical legal services and to a narrow sweep of contemporary time ,the two years prior to the inquiry. Similarly, the ordered production of 1099 forms was limited in scope to the proffered expert's services as an expert witness or for work done at the request of the defendant's insurance carrier. The trial court's order also contained very specific confidentiality provisions to ensure that the information would not be disseminated to anyone beyond those individuals mentioned in the order.

With regard to *Hornage*, the Court concluded that the question was moot because the defendant withdrew Dr. Falik as an expert in the case after the trial court issued its discovery order, but before the physician complied with the ordered discovery. There is some concern that the issue of this sort of discovery dispute may evade appellate review as a result of a party requesting overly broad financial information from an expert as a tactical approach to induce withdrawal of the expert from the case. The Court thus commented on the order in *Hornage* for the limited purpose of comparing it with that in *Holthus* and illustrating what it otherwise would perceive to be an incorrect

application of the trial court's responsibilities as set forth in *Wrobleski*. Unlike the order in *Holthus*, the trial court in *Hornage* did not control tightly the scope of the desired inquiry consistent with what was allowed by *Wrobleski*. The order directed Dr. Falik to produce all income tax records from the previous three years, without limiting the records to those related to forensic services. Such an order more closely approximates a "wholesale rummaging" through Dr. Falik's personal finances and is impermissible. Furthermore, the order did not contain a sufficient confidentiality provisions. The production of limited financial documents, from a contemporary and finite period of time, that reflect payments made to the witness in connection with medical-legal services is permitted because, if the inquiring party does not have access to such records, yet is permitted to inquire orally into the witness's income stream, the inquiring party will not be able to cross-examine effectively the expert witness. If an inquiring party's counsel is not allowed to view the records that purportedly support the expert's answers to the permitted questions, then it must accept the expert's answer without the opportunity to verify.

The Court concluded also that *Wrobleski* did not establish clearly that the party seeking discovery must make a prima facie showing that the witness offered as an expert is a "professional witness" before it may demand the financial information allowed in *Wrobleski*. If an individual is testifying as a non-treating medical expert, he or she, in the vast majority of cases, presumably is being paid to do so. If a physician is paid to testify about someone who is not that physicians's patient under treatment, that witness is surely a "professional witness."

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Robert Bailey v. State of Maryland, No. 10 September Term 2009, filed January 14, 2010. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2010/10a09.pdf

CRIMINAL LAW & PROCEDURE - ARREST - PROBABLE CAUSE SUPPORTING WARRANTLESS ARREST

The odor of a lawful substance that is allegedly associated with contraband will not furnish probable cause supporting a warrantless arrest when, based on the totality of the circumstances, there is no concrete reason to associate the odor of the lawful substance with criminal activity or contraband.

Facts: On the night of August 16, 2006, Officer Rodney Lewis of the Prince Georges County Police Department was patrolling the 6800 block of Hawthorn Street in Landover, an area known for drug activity. Officer Lewis observed Robert Bailey, petitioner, at 11:35 P.M. standing alone in the shadows of a house at 6890 Hawthorne Street. Officer Lewis asked petitioner if he lived at the home to which petitioner did not respond. After repeating the question and again receiving no answer, Officer Lewis and another officer approached petitioner. Officer Lewis noticed a strong smell of ether emanating from petitioner's body. Upon smelling the odor of ether, Officer Lewis grabbed petitioner's hands, placed them on the top of his head, and conducted a search. During the search Officer Lewis found a glass vial, which filed tests confirmed contained PCP. Officer Lewis also noted petitioner's eyes appeared glossy. Petitioner was subsequently taken into custody and charged with possession of a controlled dangerous substance.

Petitioner moved to suppress the physical evidence gathered from the search, asserting they were the fruit of an illegal search and seizure under the Fourth Amendment as well as Maryland Declaration of Rights. At the suppression hearing, the trial court found Officer Lewis had reasonable articulable suspicion to stop and question petitioner based on the smell of the ether, petitioner's failure to respond to Officer Lewis' questions, and petitioner's presence in a "high crime drug area with a number of complaints from citizens." The suppression court also held that Officer Lewis conducted a valid pat-down of petitioner for "officer safety" and that, based upon the totality of the circumstances, the search and seizure was valid. At trial, petitioner was convicted of possession of a controlled dangerous substance and sentenced to four years in prison, all but two years suspended, with three years of supervised probation upon the release. The Court of Special Appeals determined Officer

Lewis had a reasonable, articulable suspicion to conduct an investigatory stop based upon the odor of ether, the petitioner's glossy eyes, the petitioner's presence "in the shadows" in a high drug crime area, and the petitioner's failure to respond to Officer Lewis's inquires. The court further held that Officer Lewis had probable cause to arrest petitioner and hence search him.

Held: Reversed and Remanded. Officer Lewis' initial encounter with petitioner was not an investigative stop, but rather a "consensual encounter" which does not implicate the Fourth Amendment. When Officer Lewis grabbed petitioner's hands, his conduct amounts to a seizure of the petitioner for purposes of the Fourth Amendment. This seizure is of petitioner was neitehr an investigatory stop nor a protective frisk pursuant to *Terry*. A Terry frisk is limited to a pat-down of the outer clothing "not to discover evidence of a crime, but rather to protect the police officer and bystanders from harm" by checking for weapons. The removal of the vile from the petitioner's pocket and field test of the liquid contained in the vile constituted a general exploratory search exceeding the permissible scope of a protective *Terry* frisk.

Officer Lewis's conduct constituted an unambiguous show of force and the totality of the circumstances demonstrate that the encounter constituted a de facto arrest. The search taken was only valid if the arrest was valid. A valid arrest must be supported by probable cause. The totality of the circumstances does not support the conclusion that Officer Lewis had probable cause to arrest the petitioner. Essentially, the petitioner was standing next to a house in a residential area, not doing anything in particular, with the odor of ether emanating from his person, when he failed to respond to police questioning for reasons unknown to the officer. Without more, the facts do not support a basis for probably cause to arrest. Although ether is associated with PCP, the chemical is not contraband by itself and does not provide a concrete reason to associate the odor with criminal activity or contraband.

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Evelyn Susan Workman v. State of Maryland, No. 2, September Term 2009, filed 16 April 2010, Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/2a09.pdf

CRIMINAL PROCEDURE - INDIGENCY - APPOINTMENT OF COUNSEL - WHERE THE LOCAL OFFICE OF THE PUBLIC DEFENDER ("OPD") DECLINES REPRESENTATION TO A CRIMINAL DEFENDANT ERRONEOUSLY, BECAUSE OF THE LOCAL OPD'S FAILURE TO CONSIDER PROPERLY THE STATUTORILY-MANDATED CRITERIA FOR DETERMINING INDIGENCY, AND WHERE A COURT FINDS, UPON ITS SUBSEQUENT MANDATORY INDEPENDENT REVIEW, THAT THE INDIVIDUAL QUALIFIES FOR REPRESENTATION, THE TRIAL COURT MAY APPOINT AN ATTORNEY FROM THE LOCAL OPD TO REPRESENT THE INDIGENT INDIVIDUAL UNLESS AN ACTUAL AND UNWAIVED OR UNWAIVABLE CONFLICT OF INTEREST WOULD RESULT THEREBY.

Facts: Evelyn Susan Workman was arrested and charged in the District Court of Maryland, sitting in Cecil County, with possession of marijuana, driving under the influence, and other vehicle-related offenses. Upon Workman's prayer for a jury trial, the case was transferred to the Circuit Court.

During a status conference and scheduling hearing held on 18 December 2006, Workman informed the Circuit Court that she was not represented by counsel and that she was unable to afford privately-retained counsel. She advised the court that relatively recently she applied for representation by the local OPD in a separate case, but that she was informed, by letter dated 13 January 2006, that the local OPD determined that she failed to meet the requirements for its services because her income exceeded 110% of the Federal Poverty Guidelines, the limit to qualify for representation by the OPD according to COMAR 14.06.03.05A and D(2). Workman acknowledged that she had not reapplied for representation in the present case, but maintained that her financial circumstances remained unchanged from those upon which the local OPD contemporaneously determined her ineligibility.

Upon Workman's request for counsel, the Circuit Court proceeded to conduct an indigency hearing, during which it made an independent inquiry into Workman's financial situation to determine whether Workman qualified for appointed counsel. Prior to examining the specific details of Workman's ability to compensate private counsel, the trial court described its perception of the local OPD's indigency evaluation process and its relation to the statutory provisions governing such determinations, noting that, in its opinion, the local OPD's use of the 110% of the Federal Poverty Guidelines standard was

erroneous.

Following its explanation, the court turned to examine Workman's financial condition and her ability to compensate private counsel, utilizing the factors to be considered in determining indigency contained in Maryland Code, Article 27A, § 7, and COMAR 14.06.03.05A, rather than applying the maximum net annual income rule contained in COMAR 14.06.03.05A and D(2), the standard used by the local OPD. During the indigency colloquy conducted by the court, Workman testified that: (1) her entire income consisted of $1036 per month in Social Security total disability benefits as the result of her recurring depression and bipolar disorder; (2) she possessed no savings or other assets and lived on a month-to-month basis; (3) her expenses consisted of $250 per month for rent and water, $20 per month for trash pickup, $100-$150 per month for electricity, $110 per month for heat, $250 per month for food, and $40 per month for homeowners' fees; and, (4) she had cut off her phone service and did not own a vehicle, relying instead on transportation provided by neighbors or a mental health counseling service. Based on the $2,000 fee quotation for representation Workman received from the private attorney with whom she consulted, and Workman's dearth of disposable income, which apparently amounted at most to somewhere between $216 and $256 per month, the Circuit Court determined that Workman clearly could not afford a private attorney and, therefore, was entitled to representation at public expense as an indigent defendant in a qualifying criminal case.

Upon concluding that Workman qualified as indigent and was entitled to representation, the trial court described the lack of options it believed it confronted regarding the appointment of counsel on Workman's behalf, and its conclusion that, absent the State filing for a writ of mandamus to compel the local OPD to represent Workman, the criminal case against Workman should be dismissed. In its discussion, the court noted that it had been informed previously that the members of the local bar association were unwilling to volunteer their services gratis in criminal cases, and that the Board of County Commissioners claimed to be without funds to pay for public defender fees.

Following the Circuit Court's indigency hearing, the local OPD indeed refused to appoint counsel for Workman and the State did not file a mandamus action to compel the local OPD to appoint counsel on Workman's behalf. Accordingly, because of its perception that there was no attorney that could take the case, the Circuit Court dismissed, with prejudice, the charges against Workman.

The State challenged the dismissal of the charges in an appeal noted to the Court of Special Appeals. Adopting the State's position, the intermediate appellate court, in an unreported opinion, vacated the Circuit Court's judgment. Although it agreed with the Circuit Court's conclusion that the lower court did not have the authority to compel the local OPD to represent a defendant after the local OPD denies eligibility, the Court of Special Appeals disapproved the option, namely, dismissal with prejudice of the charges, that the trial court chose in order to remedy what the court perceived to be an inappropriate and erroneous decision by the local OPD to deny representation. According to the intermediate appellate court, dismissal of the criminal charges against Workman in response to the local OPD's erroneous eligibility determination constituted an inappropriate exercise of "judicial circumvention."

The Court of Appeals granted Workman's timely-filed petition for writ of certiorari to consider whether the Court of Special Appeals erred in upsetting the dismissal, with prejudice, of the charges against her, following the local OPD's continued refusal to represent the defendant and the State's failure to file a mandamus action to compel the local OPD to appoint counsel on Workman's behalf.

Held: Affirmed. Noting that the Circuit Court should have appointed the local OPD to represent Workman upon determining that the defendant was indigent and entitled to the appointment of counsel despite the local OPD's denial of eligibility, the Court of Appeals held that the Circuit Court's entry of dismissal, with prejudice, of the charges against Workman constituted an inappropriate judicial response to the situation with which it was confronted.

Considering the Circuit Court's power to appoint directly the local OPD to represent Workman, following the local OPD's erroneous denial of eligibility, the Court noted that its decision in *Office of Public Defender v. State*, No. 9, Sept. Term 2009 (__ _____ 2010) ("*OPD*"), controlled the present case. The Court observed that, in *OPD*, it held that, where the trial court determines that the local OPD denied representation erroneously, due to the local OPD's failure to consider the statutorily-mandated indigency factors contained in Art. 27A, § 7, and COMAR 14.06.03.05A, to a defendant in a criminal case whom the court finds qualifies as indigent according to those factors, the trial court possesses the authority, pursuant to its role as "ultimate protector" of the defendant's Constitutional right to counsel and the provisions of Art. 27A, § 6(f), to appoint an attorney from the local OPD to represent the indigent individual,

unless an actual and unwaived or unwaivable conflict of interest would result thereby.

Turning to Workman's case, the Court found that, under *OPD*, the Circuit Court's fundamental premise, namely, that it was without authority to appoint directly an attorney from the local to represent Workman, and that its only alternative to dismissal, with prejudice, of the charges was to attempt to leverage the State into seeking, within 30 days, a writ of mandamus compelling the local OPD to serve as counsel for Workman, was flawed. Rather, the Court held, upon finding that the local OPD denied representation erroneously to Workman, and determining that Workman qualified as indigent under the statutory indigency factors, the Circuit Court possessed, under Art. 27A, § 6(f), the authority (and, in fact, the duty) to appoint an attorney from the local OPD to represent Workman on the charges brought against her. As such, the Court found that the Circuit Court erred when it required the State to seek a mandamus order against the local OPD and dismissed the criminal charges against Workman upon its failure to do so.

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Jose Henriquez v. Ana Henriquez, Case No. 81, September Term 2009. Opinion filed April 13, 2010 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2010/81a09.pdf

FAMILY LAW - COUNSEL FEES - NON-PROFIT LEGAL SERVICES ORGANIZATION

Facts: Ana and Jose Henriquez were married in El Salvador on April 18, 1998 and had two children during the marriage, Ana, born in 1998, and Jessica, born in 2000; Mrs. Henriquez had another child born in 1994. In 2005, Mrs. Henriquez filed a Complaint for Absolute Divorce in the Circuit Court for Montgomery County, requesting "sole legal and physical custody" of the children, "temporary and permanent child support," as well as "reasonable counsel fees and costs." During the custody, visitation, and child support phase of the proceedings, counsel for Mrs. Henriquez introduced an itemized bill entitled "Attorney's Fees for Custody, Visitation, and Support Issues Only," documenting legal work on her behalf undertaken by the House of Ruth Domestic Violence Legal Clinic, a non-profit legal services organization, amounting to 58.34 hours, at $200 per hour, for a total of $11,668. Counsel for Mr. Henriquez objected to the introduction of the bill for attorneys' fees, because the House of Ruth agreed to represent Mrs. Henriquez on a pro bono basis. The trial judge awarded Mrs. Henriquez sole physical custody of the children and ordered Mr. Henriquez to pay child support and also awarded attorneys' fees in the amount of $5,000 to the House of Ruth for legal work on Mrs. Henriquez's behalf regarding custody, visitation, and support issues, pursuant to Section 12-103 of the Family Law Article, Maryland Code (1984, 2006 Repl. Vol.), governing fee shifting in child custody matters. The Court of Special Appeals affirmed, holding that Section 12-103 contains "no *per se* bar to awarding attorney's fees to a party who is represented by a non-profit organization that provides the party with free legal representation."

Before this Court, Mr. Henriquez argued that the award of attorneys' fees was improper as a matter of law, contending that Section 12-103 authorizes an award of attorneys' fees only when a party actually incurs expenses for legal representation, defining "attorney's fees" as "the charge to a client for services performed for the client," quoting Black's Law Dictionary 148 (9th ed. 2009). Mrs. Henriquez countered that the word "incurred" does not even appear anywhere in the language of Section 12-103, and that nothing in the mandatory factors set forth in Section 12-103 "requires a court to consider the status of the legal services provided or whether a party actually

incurred legal fees."

Held: The Court of Appeals affirmed and determined that the plain meaning of Section 12-103 permitted the award of attorneys' fees, because "counsel fees" are limited only to that which "are just and proper under all the circumstances." The Court further noted that the only other statutory mandate that restricts a court's award of attorneys' fees is contained in Section 12-103(b), which enumerates considerations a court must weigh before awarding fees, to include (1) the financial status of each party, (2) the needs of each party, and (3) whether there was substantial justification for bringing or defending the proceeding. Regarding Mr. Henriquez's reliance upon Black's Law Dictionary for the definition of "attorney's fees," the Court emphasized that a "dictionary definition is not dispositive of the meaning of a statutory term," and that other dictionaries have no mention of a "charge to a client," such as Ballentine's Law Dictionary, which defines "attorney's fee" as "[a]n allowance made by the court as costs in addition to the ordinary statutory costs."

Finally, the Court concluded that the Circuit Court properly awarded attorneys' fees directly to the House of Ruth, construing Section 12-103 in *pari materia* with Sections 7-107, 8-214, and 11-110 of the Family Law Article, governing fee shifting in divorce proceedings, property disposition matters, and alimony proceedings, respectively, and all permitting an award of fees directly to an attorney. To do otherwise, noted the Court, would foster the illogical result of permitting an award of fees directly to an attorney when a party prevails in a divorce proceeding on fault grounds, or when a party obtains a monetary award and could then pay the attorney, or when a party receives alimony, but not permitting an award of fees directly to an attorney in a determination of physical custody of children, in which each party "has equal constitutional rights to parent," and at stake is the "best interests" of the children. The Court also reviewed cases from sister jurisdictions that interpreted statutory provisions analogous to Section 12-103 and similarly permitted an award of attorneys' fees directly to the legal services organization, rather than the litigant.

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COURT OF SPECIAL APPEALS

Tri-County Unlimited, Inc.. v. Kids First Swimming School, Inc., et al., No. 0004, September Term, 2009, filed March 31, 2010. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2010/4s09.pdf

BUSINESS & CORPORATE LAW - CORPORATIONS - FORMATION - CORPORATE EXISTENCE, POWERS & PURPOSE - EXISTENCE

BUSINESS & CORPORATE LAW - CORPORATIONS - FORMATION - CORPORATE EXISTENCE, POWERS & PURPOSE - POWERS - LITIGATION

Facts: Appellant, Tri-County Unlimited, Inc. ("Tri-County"), brought suit in the Circuit Court for Howard County against appellees, Kids First Swim School, Inc. and Gary Roth ("appellees"), alleging that it was owed for labor and materials expended in fulfilling its contractual obligations to build a swimming pool. Appellees filed an answer and a counterclaim.

On the scheduled trial date, appellees filed a motion to dismiss, alleging that Tri-County's corporate charter was forfeited at the time it filed the suit. Appellees argued that a corporation cannot file a lawsuit while its charter is forfeited. During argument on the motion, Tri-County did not dispute that its charter was forfeited when it filed suit, but argued that its right to sue was restored retroactively because its charter had been revived. The court entered judgment in favor of appellees, granted the motion and dismissed Tri-County's complaint without prejudice. As a result of the ruling, appellees dismissed their counterclaim.

Held: The Court of Special Appeals affirmed. The subsequent revival of a corporate charter cannot save a lawsuit filed by a corporation at a time when its charter was forfeited. In reaching this conclusion, the Court first noted that a corporation's powers are inoperative, null and void when its charter is forfeited. However, if and when a corporation revives its charter, its rights are restored as if they had never been lost. Tri-County argued that the revival of a corporate charter restores all rights except those divested during the period of forfeiture, and the right to sue is not divested during forfeiture. The Court acknowledged that a corporation has the right to initiate a lawsuit once its charter is revived, but disagreed with Tri-County's contention that the revival of the

charter retroactively restores the right to sue. In so doing, the Court made explicit that a complaint filed by a defunct corporation is a nullity as a matter of law.

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Prince George's County, Maryland, et al. v. Keith Longtin – No. 1818, September Term, 2007, filed January 27, 2010. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2010/1818s07.pdf

CIVIL LAW - LOCAL GOVERNMENT TORT CLAIMS ACT - APPLICATION TO CONSTITUTIONAL TORTS

CONSTITUTIONAL LAW - VIOLATIONS OF CONSTITUTIONAL RIGHTS - PATTERN AND PRACTICE CLAIMS

CIVIL PROCEDURE - SUA SPONTE REVISION OF JUDGMENT

Facts: On October 5, 1999, the Prince George's County Police Department took Longtin into a police station interrogation room and began questioning him about the recent death of his wife, Donna Zinetti, who was raped and murdered while jogging near her home. Over the next day and a half, Longtin was questioned on a rotating basis by at least six different officers and slept only 50 minutes during that 38-hour period. Although all of the detectives testified at trial that Longtin did not ask for a lawyer, Longtin testified that he told officers that he wanted to talk to a lawyer and his cell phone records showed that he tried to call two different lawyers from the interrogation room. The officers took Longtin's belt, wallet, shoelaces and cell phone and, according to Longtin, threatened him with violence when he indicated he wanted to leave, and, at one point, handcuffed him to the wall. Appellant was asked "what if" questions about the murder, such as: "[W]hat if you had done this murder? [W]hat do you think would have happened?" He was shown photographs of his dead wife. Longtin admitted to the officers that he had a verbal and physical altercation with his wife on October 3, 1999, 14 hours before her body was found, about an alleged extra-marital affair. Longtin said that he pushed Zinetti down and then went into the kitchen, got a knife and ran after her when she left to go jogging, but insisted that he did not kill her.

On October 7, 1999, Longtin was formally arrested and charged with murdering his wife. A Statement of Probable Cause completed by the police stated that Longtin "volunteered" to come in and talk to police about his wife's death, and that Longtin admitted to "being involved in this case"and gave details about this case that had not been related to the media and only the perpetrator would have known. The statement failed to mention Longtin's insistence that he did not murder his wife. Longtin was incarcerated in the Prince George's County Detention Center.

The police told Longtin's attorney that Longtin faced a "double life" sentence.

The police took DNA samples from Longtin to compare with those left by the perpetrator of the crime. On January 14, 2000, Meredith Monroe of the Maryland Police Crime Laboratory spoke to Detective Ronald Herndon and told him that Longtin had been excluded as a possible donor of the DNA taken from the victim. This exculpatory information was not shared with the State's Attorney or Longtin's counsel. No steps were taken to release appellee. Herndon also told Monroe that he would provide her with DNA from Antonio Oesby, who had become a suspect in Zinetti's murder, but waited two more months before requesting testing. On June 12, 2000, Detective Herndon advised the State's Attorney's Office that the DNA found on Zinetti matched Oesby, at which time Longtin was released after eight months of incarceration.

On October 31, 2000, Longtin's lawyer sent to then-Prince George's County Executive Wayne Curry a notice of claim, stating that appellant suffered injuries and his constitutional rights were violated by the Prince George[']s] County Police Department. The claim was forwarded to the County's Office of Law, which received it on November 6, 2000. On October 22, 2001, Longtin filed suit in the Circuit Court for Prince George's County against Prince George's County, its then-Chief of Police, and 5 members of the Criminal Investigation Division (CID) of the County Police Department. The complaint alleged that the defendants' actions violated Articles 21 and 24 of the Maryland Declaration of Rights, constituted false imprisonment, false arrest and malicious prosecution, intentionally inflicted emotional distress, invaded his privacy and portrayed him in a false light, intentionally misrepresented material facts, amounted to negligence, and resulted in negligent detention. The complaint also asserted that the individual defendants had engaged in a pattern or practice of "unconstitutional and unlawful detention and interrogation" and "excessive force and brutality," which the County had tolerated, encouraged and instigated by allegedly failing to "properly train, prosecute, supervise and discipline its officers." Longtin also sought specific injunctive relief prohibiting improper police interrogations and a declaratory judgment that such interrogations were unconstitutional. In addition, he alleged a civil conspiracy by which the defendants "agreed and jointly acted in . . . unconstitutional and unlawful conduct." In 12 of the 13 counts, the complaint sought $10 million in compensatory damages and $50 million in punitive damages.

After some claims fell out and certain individuals were dropped as parties, the trial began in August of 2006. The case was submitted to the jury on eight counts. On August 31, 2006, the jury returned a verdict in Longtin's favor on all eight counts. It awarded $5.2 million in compensatory damages against the County and a total of $900,000 punitive damages against individual defendants. After trial, the circuit court revised the judgment and reduced the amounts of the punitive damage awards.

Held: Affirmed.

A. The Court rejected the appellants' contentions that (1) all but one of Longtin's successful claims were barred by the notice requirements of the Local Government Tort Claims Act ("LGTCA"), Md. Code (1973, 2006 Repl. Vol.), Courts and Judicial Proceedings Article (C&JP), § 5-304(b), and (2) the approximately $5 million compensatory damage award could not stand because it exceeded the monetary caps of the LGTCA, as provided by C&JP § 5-303. The Court examined the applicability of the LGTCA to state constitutional torts and noted that the Court of Appeals has consistently said that the LGTCA and the Maryland Tort Claims Act (MTCA), Md. Code (1984, 2009 Repl. Vol.), §§ 12-101 of the State Government Article, *et seq.*, do not exclude State constitutional torts from their coverage. The Court of Appeals, however, has never decided whether the restrictions of those statutes that would defeat all or partial recovery apply in every respect to State constitutional torts. The Court of Special Appeals then discussed other state courts' decisions that tort claims act notice of claim requirements are inapplicable to actions for violations of a state constitutional right.

Finally, the Court declined to conclusively decide the applicability of LGTCA procedural requirements to State constitutional torts and held that in this case good cause existed, pursuant to C&JP § 5-304(d), to excuse timely compliance with the notice of claim requirements. Longtin was charged with first-degree murder with the possibility of a double life sentence, agents of the County lied and withheld exculpatory DNA evidence in order to keep him incarcerated, and Longtin was not released or made aware of the exculpatory evidence until two months after the statutory notice period expired. Therefore, an ordinary prudent person in Longtin's position could not have given notice within 180 days of his arrest, as required by the LGTCA, and thus good cause existed to excuse the untimeliness.

B. The Court of Special Appeals further held that the damage caps of the LGTCA did not apply to this case because, in 1999 and 2000, during the period of Longtin's interrogation,

arrest, incarceration and release, Prince George's County possessed no immunity, statutory or otherwise, from constitutional torts. In 2001, the General Assembly passed legislation to clarify that the monetary limits on the liability of a local government under the LGTCA apply to claims against local governments. Although the bill purported to apply to "any claim for damages under [the LGTCA] in a case pending on the effective date of this Act and arising from events occurring on or after July 1, 1987," in *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604 (2002), the Court of Appeals invalidated two statutes that retroactively abrogated plaintiffs' "rights to particular sums of money" as well as their "causes of action in pending cases." Moreover, pre- and post-*Dua* cases recognize that the retroactive grant of governmental immunity "might transgress a vested right." Here, where Longtin had a fully accrued cause of action for complete recovery for constitutional violations that were not previously subject to an assertion of either all or partial local government immunity, the 2001 legislation could not retroactively apply to limit damages.

C. The Court of Special Appeals held that a cause of action for an unconstitutional pattern or practice can be brought against a local government under Article 24 of the Maryland Constitution. The Court examined federal laws providing remedies for "pattern and practice" violations of individuals' constitutional rights and concluded that, given the expansive reach of Maryland's constitutional tort remedy, it is unlikely that Article 24 contains any exemption from liability for an unconstitutional pattern or practice. The Court further held that the evidence in this case was sufficient to support Longtin's pattern and practice claims.

D. The Court of Special Appeals held that the circuit court did not deprive Longtin of due process when it *sua sponte* reduced the punitive damages awards post-trial without first providing notice or an opportunity to be heard on the issue and when it was not raised by the appellants or discussed at any post-trial hearings. Although due process may sometimes apply to *sua sponte* judicial actions, the timely filing of appellants' post-trial motions robbed the judgment of its finality and invested in the court the broad and well-established authority to revise its judgment *sua sponte.* Although it would have been a wise practice to notify the parties and give them opportunity to prepare and present argument on the issue, as was done in *Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672 (2007), such a procedure is not constitutionally required. Moreover, although the punitive damages reduction was not mentioned in appellants' post-trial filings, the key component of malice was an omnipresent issue in

the case and appellants' counsel argued at length against the punitive damage award in his closing argument.

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Olusegun Hakeem Ogundipe v. State of Maryland, No. 1247, September Term, 2008. Opinion filed on March 25, 2010 by Kenney, J. (retired, specially assigned).

http://mdcourts.gov/opinions/cosa/2010/1247s08.pdf

CRIMINAL LAW – JURY VERDICT - JURY VERDICT SHEETS

Facts: Appellant was convicted by the jury of first degree murder, attempted first degree murder, two counts of first degree assault, and other crimes. The jury announced its verdict in open court, no juror objected to the verdict when hearkened by the clerk of the court, and all of the jurors individually agreed to the verdict when polled. Days after the court entered judgment reflecting the jury's verdict, defense counsel was made aware that the verdict sheet reflected that the jury had answered "yes" to questions asking whether appellant was guilty of the charges of murder, attempted murder, and two counts of assault in the first degree, but, rather than skipping questions related to the same charges in the second degree as instructed, the verdict sheet indicated that the jury answered "no" as to whether appellant was guilty of those crimes.

On appeal, appellant argued that the circuit court erred by accepting an inconsistent verdict and by failing to disclose the verdict sheet to appellant.

Held: A verdict sheet facilitates the jury's deliberations but it is not the jury's verdict. Therefore, the verdict was not inconsistent and the circuit court committed no error. A verdict sheet is not a "communication" from the jury to a judge that is required to be disclosed to the parties under Rule 4-326(d).

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Floyd Reynaldo Nash v. State of Maryland, No. 1619, September Term, 2008, filed March 26, 2010. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2010/1619s08.pdf

CRIMINAL LAW - POSSESSION OF A FIREARM AFTER A CONVICTION OF A CRIME OF VIOLENCE - STIPULATION - BIFURCATING ELEMENTS OF A CRIME - *CARTER v. STATE* - INVITED ERROR

Facts: On March 14, 2008, appellant was indicted in the Circuit Court for Charles County on the charge of unlawful possession of a regulated firearm by a person previously convicted of a crime of violence. The parties entered into an agreement that would prevent disclosure of the previous conviction to the jury. The court instructed the jury that the charge was "possession of a firearm under certain circumstances." The court indicated that the jury would be deciding only the issue of possession of the firearm, and the court would determine if the "certain circumstances" existed. Appellant made no objection to this instruction, and defense counsel agreed that he was satisfied with the court's instructions. The jury found appellant guilty of "possession of a firearm under certain circumstances." After the jury returned its verdict, the court referred to the stipulation, stating "we'll stipulate he was a convicted felon, right?" The State responded in the affirmative and introduced into evidence docket entries showing two prior convictions for robbery.

Held: Judgment affirmed. In *Carter v. State*, 374 Md. 693, 722 (2003) the Court of Appeals set forth the proper procedure to follow when a defendant is charged with the crime of possession of a regulated firearm by a person with a prior conviction of a crime of violence. The Court upheld the trial court's ruling denying the defendant's request to bifurcate the elements of the offense and have the jury decide only the possession issue, holding that "the proper course is to require a trial judge, when the defendant elects a jury trial, to allow the State to present evidence of all elements of a criminal-in-possession charge." Although the Court's holding was that the State should be permitted to present all elements of the charge to the jury, its reasoning made clear that bifurcating the elements of the offense, *i.e.*, having the jury consider solely the issue of possession of the firearm, with the issue of the prior conviction to be determined at a later time, was not appropriate. Thus, even if the parties agree, the court should not bifurcate the elements of the offense.

Appellant is not entitled, however, to reversal of his conviction on this ground. A defendant should not be able to take advantage of an error that he invited or requested the trial court

to make. Defense counsel clearly participated in the request to submit evidence of his prior convictions after the jury decided the issue of possession. He, along with the State, requested that the court proceed as it did. Under these circumstances, and where there is no dispute that appellant had the requisite prior convictions, the invited error doctrine precludes appellant from taking advantage of this error.

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In Re: Shirley B., Jordan B., Davon B. and Cedric B., No. 1533, September Term, 2009, filed April 27, 2010. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2010/1533s09.pdf

FAMILY LAW - CHILD IN NEED OF ASSISTANCE - PERMANENCY PLAN - REASONABLE EFFORTS.

Facts: Gloria B. and Ronald T. are the biological parents of Shirley B. (born May 6, 1997), Davon B. (born December 22, 1999), Jordan B. (born April 11, 2001), and Cedric B. (born August 30, 2004). In August 2005, the Prince George's County Department of Social Services (the "Department") received a report that the four children "were not being properly supervised," were living in "unsanitary conditions," and were not attending school regularly.

The Department began to provide services to Ms. B. and her children, which included referring Ms. B. for a psychological evaluation. The doctor that evaluated Ms. B. noted that Ms. B.'s "cognitive limitations are capable of impinging upon her ability to sustain adequate care for her children over time without external support and intervention." The court found each of the children to be a Child In Need of Assistance ("CINA").

The court held permanency plan review hearings approximately every six months. The Department set forth the many services that it had provided to Ms. B. and the children. At a hearing on December 2, 2008, the social worker assigned to Ms. B.'s case testified that the "primary barrier" for Ms. B. to achieve reunification with her children was her "cognitive limitations." To address these concerns, the Department had referred Ms. B. to three different organizations, but the availability of services was contingent upon available funding. The court rejected the argument that the Department had not made reasonable efforts toward reunification, but it found that it was in the children's best interests for the permanency plan to remain reunification with Ms. B.

On June 25, 2009, the circuit court held another permanency plan review hearing. At the hearing, the social worker assigned to Ms. B.'s case testified regarding the efforts to assist Ms. B. with her medical problems, noting that the Department scheduled the appointments and transported Ms. B. because she "was unable to navigate the bus system on her own." Evidence regarding the special needs of the children, as well as the problems they were still experiencing due to the trauma they experienced when they were living with Ms. B., was introduced into evidence. The social worker testified that, in order for there to be any possibility for

Ms. B. to reunify with her children, it was crucial that she receive services from certain organizations, to provide Ms. B. with vocational training, "supportive services for everyday life," including specialized parenting classes, and services for individuals with intellectual and developmental disabilities. She indicated that these were the only remaining options for services for Ms. B. regarding parenting. Those services, however, were not available to Ms. B. at that time due to funding limitations. At the conclusion of the hearing, the court ordered that the permanency plan be changed from reunification to adoption.

Held: Judgment affirmed. The circuit court's finding that the Department made reasonable efforts to achieve the permanency plan of reunification between Ms. B. and her four children was not clearly erroneous. The Department made numerous attempts to obtain services for Ms. B. Although the Department was unable to obtain services that might have helped Ms. B., it was not from lack of effort by the Department. The Department certainly must make good faith efforts to provide services to achieve reunification, taking into consideration the cognitive limitations of a parent. It cannot provide services, however, if they are not available. What constitutes "reasonable efforts" must be determined in light of the resources available to the Department. Under the circumstances here, the court's finding that the Department made reasonable efforts to achieve the permanency plan of reunification was not clearly erroneous.

Given the abusive conditions to which the children were subjected while in Ms. B.'s care, the 28 months that the Department had been working to find services to assist Ms. B. to care safely for her four children, who all have special needs, the unavailability of services that potentially could help, and the uncertainty whether such services even exist, we find no abuse of discretion by the circuit court in changing the permanency plan for each of the children from reunification to adoption.

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Taylor Electric Co., Inc. v. First Mariner Bank, No. 2280, September Term, 2008, decided March 29, 2010. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2010/2280s08.pdf

FINANCIAL INSTITUTIONS - MORTGAGES - *Western Nat'l Bank v. Nat'l Union Bank*, 91 Md. 613, 621 (1900) (holding: "An equitable mortgage results from different forms of transactions in which there *is present an intent of the parties* to make a mortgage, to which intent, for some reason, legal expression is not given in the form of an effective mortgage; but *in all such cases the intent to create a mortgage is the essential feature of the transaction*.") *See also Lubin v. Klein*, 232 Md. 369, 371 (1963); *Pence v. Norwest Bank Minnesota*, 363 Md. 267, 280 (2001).

Facts: On May 24, 2006, appellee entered into a loan agreement with a construction company, which provided that appellee agreed to loan the construction company $811,000 and the latter agreed to give appellee a first-priority deed of trust on real estate in Prince Geroge's County. On the same day, the owner and president of the construction company executed a deed of trust in favor of appellee. The title company, Buyer's Title, sent the deed of trust to the Circuit Court for Prince George's County the next day for recording. The circuit court first rejected the deed because, in the interim, the property taxes had become due; a second time, it was rejected on September 6, 2006; and, finally, the clerk recorded the deed of trust on November 22, 2006 on the third attempt.

On December 13, 2006, appellant filed a petition for a mechanic's lien against the construction company. Because there was no description on the deed recorded, in the interim, Buyer's Title sent another copy of the deed of trust to the circuit court with an attachment, Exhibit A, containing a description of the property. Along the bottom of each page of the deed of trust, recorded on February 2, 2007, was the following: "This Deed of Trust is being re-recorded to include the Legal Description."

On March 5, 2007, the circuit court granted appellant's petition for a mechanic's lien against the property; appellant thereafter filed a complaint for declaratory relief, seeking to establish priority over appellee's deed of trust. Contending that appellee's initial deed of trust filed on November 22, 2006 was invalid because it lacked a property description, appellant filed its Motion for Summary Judgment. Appellee filed a cross-motion for summary judgment. The circuit court granted summary judgment in favor of appellee, finding that, although the original mortgage that was recorded lacked a description of the secured property, the defect was cured on February 2, 2007, prior to the grant of the

mechanic's lien and that the doctrine of *lis pendens* did not apply.

Held: Appellee, as a *bona fide* lender for value, acquired its interest as a mortgagee of the property well before the filing of the petition for a mechanic's lien, notwithstanding its failure to include a description in the original deed; thus, it did not take its interest subject to appellant's mechanic's lien and appellant's mechanic's lien did not acquire priority over appellee's interest. Accordingly, the doctrine of *lis pendens* did not apply to give appellant a priority over appellant's secured interest. Judgment affirmed.

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Prime Rate Premium Finance Corporation, Inc. v. Maryland Insurance Administration, No. 02800, September term, 2008, filed March 31, 2010. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2010/2800s08.pdf

INSURANCE - PREMIUM FINANCE AGREEMENTS: RETURN OF UNEARNED PREMIUM: MD. CODE § 23-405(B) OF THE INSURANCE ARTICLE: INCORPORATION OF DEBTS DUE UNDER SEPARATE PREMIUM FINANCE AGREEMENT(S) BETWEEN PARTIES

Facts: Prime Rate is a premium finance company registered to do business in Maryland with the MIA. On October 25, 2007, Prime Rate submitted a revised premium finance agreement to the MIA for approval. Paragraph sixteen of the proposed agreement read, in pertinent part: "the ABOVE NAMED insured . . . (16) [a]grees that any refunds may be applied against any prior debts owed [Prime Rate]." The MIA requested that paragraph sixteen be deleted in its entirety. The parties were able to resolve all issues with regard to the proposed agreement except for paragraph sixteen. On May 16, 2008, the MIA disapproved the proposed agreement. On June 16, 2008, Prime Rate requested a hearing. On September 10, 2008, the Commissioner issued a Final Order and statement of reasons in support of the order and upheld the MIA's rejection of the proposed agreement. The Commissioner found that the refund contemplated by IA § 23-405 is mandatory and that the statute would be "weakened considerably" if the premium finance company could "reduce (potentially to zero) the refund to collect a debt arising under some other and separate financing agreement." To conclude, the Commissioner found that "the General Assembly's intent in § 23-405(6)(1) is unambiguous, and the MIA was obliged to honor that intent." On January 22, 2009, the Circuit Court for Baltimore City affirmed the MIA Final Order. The appellant has timely appealed.

Held: The Court of Special Appeals affirmed the judgment of the Circuit Court for Baltimore City. The Court held that the Insurance Commissioner did not err in disapproving Prime Rate's proposed premium finance agreement for the reasons stated in the Insurance Commissioner's Final Order. The plain language of the statute supports the appellee's interpretation of the statute. We assume that "the premium finance agreement" must refer to a single agreement and fail to see how the legislature could have intended that the premium finance company have the right to set off unearned premiums with prior debts owed under separate agreements and thus defeat the statutory instruction that the company "shall return" unearned premiums to the policy holder. The MIA is required to approve any changes to a company's premium finance agreement, which indicates that the legislature intended to protect consumers, and also negates the appellant's argument for freedom of contract.

Statutory history also supports the Commissioner's finding that return of the unearned premium is mandatory. Although there may be situations in which the premium finance company is compelled to pay an insured's premium to a third party because of bankruptcy or garnishment proceedings, this fact should not be used to eviscerate the expressed will of the General Assembly.

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Shannon M. Wilson v. Shady Grove Adventist Hospital et al., No. 2588, September Term, 2008, decided on March 31, 2010. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2010/2588s08.pdf

LABOR & EMPLOYMENT - ACCIDENTAL PERSONAL INJURY - Md. Code Ann., Labor and Employment Article. § 9-101(b) "Accidental personal injury" means: (1) an accidental injury that arises out of and in the course of employment.

Continental Group v. Coppage, 58 Md. App. 184, 192-93 (1984) "the concept or standard of proximate cause . . . seemed to be broader in workmen's compensation cases.". . . "[t]he 'bottom line' is this: the evidence must, at a minimum, establish beyond mere conjecture or guess that the injury ***could have*** caused the consequence and that ***there was no other intervening cause***. If that thought is effectively conveyed to the jury, the omission to include the words 'probable' or 'reasonably probable' is not fatal." (Emphasis added).

Facts: Appellant, a former Psychiatric technician at Shady Grove Hospital, suffered a compensable work-related injury to his right knee in July 2006. Thereafter, he underwent two knee surgeries and had to wear a brace that immobilized his right leg. He claimed that, as a result of the treatment of his right knee, he developed pain in his left knee. His physician ordered an MRI and appellant sought approval of the MRI from the WCC. The WCC held a hearing, considered the testimony of two physicians, and ultimately found that the left knee injury was causally related to the work-related injury to the right knee. Appellees appealed to the circuit court, where the parties presented the same evidence to a jury.

Appellant asked the circuit court to instruct the jury as follows: "In workers' compensation cases, proximate cause means that the accident ***could have*** caused the injury and ***no other efficient cause intervened between the accident and the injury***." The trial judge, in refusing to grant the instruction, responded: ". . . that language was written for you and for me and for law professors to sort of think about all this. But in the requested instruction, if I give it, I have to define the word proximate, I have to define the word accident. I have to define the word efficient. I have to define the word intervening. Because they're going to say, 'what is proximate cause,' or 'what is an accident,' or 'what is efficient,' or 'what does intervene mean?'" The case was submitted to the jury and the jury returned a verdict in favor of appellees. Appellant appealed to the Court of Special Appeals,

asserting that the trial court erred in improperly instructing the jury on proximate cause in a workers' compensation case.

Held: Because the Workers' Compensation Commission's decision is presumed to be *prima facie* correct, the jury was not properly apprized that the burden, which was on appellee to prove that the WCC decision should be reversed because (1) the 2006 *right knee* injury *could not* have caused the *left knee* condition or (2) that there was another intervening cause, L.E. § 9-745(b); thus, the trial court's refusal to grant the instruction as to causation, which was at the heart of the only issue submitted to the jury, prejudiced appellant.

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Cochran v. Griffith Energy Services, No. 19, September Term, 2009, filed March 31, 2010. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2010/19s09.pdf

POST-JUDGMENT INTEREST - ACQUIESCENCE RULE - TENDER OF JUDGMENT.

Facts: Plaintiffs obtained judgment against defendant for negligence and breach of contract arising out of defendant's oil spill at the plaintiffs' home. Three days after judgment was entered, the defendant wrote to the plaintiffs stating that it wanted to pay the judgment and requesting information necessary to issue the payment check. The plaintiffs did not respond. Later, the plaintiffs noted an appeal, asserting that the trial court had erred in not allowing them to pursue certain statutory claims and to seek "lost business opportunity" damages, and challenging the imposition of sanctions for a discovery violation. The defendant again wrote to the plaintiffs stating its intention to pay the judgment and requesting the information with which to write the check. That letter received no response. The plaintiffs' appeal was unsuccessful. Thereafter, the defendant again wrote to the plaintiffs seeking to pay the judgment. Again the plaintiffs did not respond.

The plaintiffs eventually responded to a fourth communication, insisting that the defendant pay the judgment with post-judgment interest to that date. The defendant refused to pay that amount of post-judgment interest, and instead paid into court the full amount of the judgment, with an amount of interest equal to a date on which the defendant contended post-judgment interest had stopped accruing. The defendant moved the court to decide the disputed issue of post-judgment interest.

The plaintiffs argued among other things that the tenders were not effective to halt the accrual of post-judgment interest, and that they would have forfeited their appeal under the acquiescence rule had they accepted payment of the judgment. The circuit court concluded that the defendant had made a valid tender of the judgment three days after the judgment was entered, that post-judgment interest stopped accruing that day, and that the acquiescence rule did not apply.

Held: Judgment affirmed. The communication made three days post-judgment was a valid and effective tender of the judgment, which ceased the accrual of post-judgment interest as of that date. In addition, the plaintiffs would not have forfeited their appeal under the acquiescence rule by accepting the tender. Their legal theories on appeal, if accepted or if rejected, would

not have disturbed the judgment already entered—they could have resulted only in an increase in the judgment over an established and undisputed minimum. The acquiescence rule does not apply in such circumstances because its purpose is to prevent the successful plaintiff from taking a position on appeal that is inconsistent with an acceptance of the judgment below, which was not the case here.

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ATTORNEY DISCIPLINE

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

ERIN HUTCHINSON-SMITH
*

By an Order of the Court of Appeals dated April 20, 2010, the following attorney has been suspended for sixty (60) days by consent, effective immediately, from the further practice of law in this State:

C. TRENT THOMAS
*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals as of April 22, 2010:

LESLIE DANA SILVERMAN
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