Amicus Curiarum

VOLUME 34
ISSUE 2 FEBRUARY 2017

A Publication of the Office of the State Reporter

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http://www.mdcourts.gov/opinions/coa/2017/15a15ag.pdf

ATTORNEY DISCIPLINE – INDEFINITE SUSPENSION

Facts:

Respondent, Richard Allen Moore, II was admitted to the Bar in 1990 and worked as an Assistant State's Attorney for over nineteen years until entering into private practice as a sole practitioner in 2009. In August 2012, Respondent was retained by a client who sought representation for injuries arising from an automobile accident. The client requested, on several occasions, that Respondent contact the other party's insurer. Respondent did not contact the insurer until several months later. Moreover, throughout the course of the representation, the client wrote several emails to the Respondent inquiring about the status of the case and asking Respondent to proceed with settling her claim. The Respondent failed to respond to nearly all of the emails.

Between late February and early March 2013, Respondent accepted an appointment as an Administrative Law Judge and was informed that he must close his practice. The client alleged that Respondent failed to timely inform her of his appointment. In May 2013, Respondent spoke with the client and informed her that he could no longer represent her. The client claimed that Respondent told her he would refer her to another attorney to take over her case. According to Respondent, he was left with the impression that the client wanted to seek her own counsel. The client attempted to call Respondent nine times between July 1, 2013 and September 30, 2013. Respondent never responded and the client filed a complaint with the Attorney Grievance Commission.

During the investigative process, Respondent wrote to Bar Counsel on May 12, 2014 that he informed the client "upon his appointment" that he could no longer represent her. Respondent later testified that to his recollection, he had the conversation terminating representation in late February or early March 2013, and not in May. Further, during the investigation, on August 12,

2014, Respondent represented to Bar Counsel via his attorney that he had been waiting to hear from the client and heard nothing from her.

The Commission charged Respondent with violating MLRPC 1.1, 1.2(a), 1.3, 1.4(a) and (b), 1.16 (a) and (d), 8.1(a) and (b), and 8.4(a), (c), and (d). On April 15, 2016, an evidentiary hearing was held before a judge of the Circuit Court for Prince George's County. The hearing judge found that the record contained clear and convincing evidence to conclude that Respondent had violated each of the Rules with which he was charged. Respondent filed exceptions to the findings of fact and conclusions of law.

Held:

The Court of Appeals concluded that Respondent violated Rules 1.1, 1.2(a), 1.3, 1.4(a) and (b), 1.16 (a) and (d), and 8.4(a) and (d). The Court held that Respondent did not violate Rules 8.1(a) and 8.4(c) because the record lacked clear and convincing evidence that Respondent's misrepresentations to Bar Counsel were made with the requisite knowledge that the representation was false. The Court found that Respondent did not violate Rule 8.1(b) because although the Respondent was late in his responses to inquiries from Bar Counsel, he did not knowingly *fail* to respond to Bar Counsel.

The Court determined that the appropriate sanction was indefinite suspension from the practice of law with the right to reapply for admission after ninety days. In imposing this sanction, the Court balanced aggravating and mitigating factors and recognized that the Respondent's misrepresentation was apparently negligent and not intentional. The Court noted that disbarment is generally an appropriate sanction for dishonest conduct but not always, especially when the misrepresentation involved was negligent.

State of Maryland, et al. v. Jamie Falcon, et al., No. 28, September Term 2016, filed January 20, 2017. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2017/28a16.pdf

ARTICLE II, § 15 OF THE MARYLAND CONSTITUTION – SUSPENSION AND REMOVAL OF OFFICERS – ARTICLE 8 OF THE MARYLAND DECLARATION OF RIGHTS – SEPARATION OF POWERS DOCTRINE – CHAPTER 35 OF THE 2016 LAWS OF MARYLAND – MD. CODE ANN., EDUC. (1978, 2014 REPL. VOL., 2016 SUPP.) § 3-110(b) – SCHOOL BOARD NOMINATING COMMISSION OF ANNE ARUNDEL COUNTY

Facts:

The purpose of the School Board Nominating Commission of Anne Arundel County ("the Nominating Commission") "is to select nominees to be recommended to the Governor as qualified candidates for appointment to the Anne Arundel County Board of Education [("the School Board")]." Md. Code Ann., Educ. (1978, 2014 Repl. Vol., 2016 Supp.) ("ED (2016)") § 3-110(b)(1)(ii). Before 2016, Md. Code Ann., Educ. (1978, 2014 Repl. Vol., 2015 Supp.) ("ED (2015)") § 3-110(b)(2) provided that the Nominating Commission would consist of eleven members, five of whom were to be appointed by the Governor, and six of whom were to be appointed by various specified entities. In 2016, through Chapter 35 of the 2016 Laws of Maryland ("Chapter 35"), the General Assembly amended, among other statutory provisions, ED (2015) § 3-110(b)(2), to increase the number of members of the Nominating Commission from eleven to thirteen, to eliminate the Governor's ability to appoint five members, and to grant appointment authority to various specified entities for the resulting seven new appointments. In other words, the amendment to ED (2015) § 3-110(b)(2) changed the Nominating Commission from a body, some of whose members were appointed by the Governor, and some of whose members were appointed by various specified entities, to a body that is completely comprised of members who are appointed by various specified entities other than the Governor. Through Chapter 35, the General Assembly also ended the terms of the Governor's five appointees to the Nominating Commission early, causing the appointments to terminate as of June 1, 2016.

Four of the five gubernatorial appointees ("the Appointees"), Appellees, filed suit in the Circuit Court for Anne Arundel County ("the circuit court"), contending that the General Assembly removed them from their positions as members of the Nominating Commission in violation of Article II, § 15 of the Maryland Constitution (Suspension and Removal of Officers) and Article 8 of the Maryland Declaration of Rights (Separation of Powers). The circuit court agreed and issued a preliminary injunction against implementation and enforcement of certain portions of Chapter 35, including those portions amending ED (2015) § 3-110(b)(2) to alter the membership and appointment process for members of the Nominating Commission and ending the terms of the current gubernatorial appointees on June 1, 2016. The State of Maryland ("the State") and Governor Lawrence J. Hogan, Jr. ("Governor Hogan"), Appellants, noted an appeal to the Court of Special Appeals, and, while the case was pending in that Court, filed in this Court a petition

for a writ of certiorari. On July 11, 2016, this Court granted the petition. See *State v. Falcon*, 448 Md. 724, 141 A.3d 135 (2016).

Held: Reversed.

The Court of Appeals held that the circuit court erred in issuing the preliminary injunction because Chapter 35 does not violate Article II, § 15 of the Maryland Constitution or Article 8 of the Declaration of Rights, but rather restructures or reconstitutes the Nominating Commission and prospectively changes the appointment process to grant appointment power to specified entities other than the Governor; and that terminating the terms of the gubernatorial appointees as part of the restructuring is permissible.

The Court of Appeals, applying the rationale of *Schisler v. State*, 394 Md. 519, 907 A.2d 175 (2006), concluded that termination of the Appointees' terms was incidental to the General Assembly's restructuring and reconstituting of the Nominating Commission, and that, under *Schisler*, according to a majority of the Court, such action does not rise to the level of a constitutional violation. The Court of Appeals explained that Chapter 35 did not simply terminate or end early the Appointees' terms, but rather, through Chapter 35, the General Assembly made numerous changes to the structure and function of the Nominating Commission that demonstrate that the General Assembly restructured and reconstituted the Nominating Commission.

The Court of Appeals explained that Chapter 35 amended ED (2015) § 3-110(b)(2) by: (1) increasing the number of members of the Nominating Commission from eleven to thirteen, i.e., adding two members; (2) eliminating the Governor's ability to appoint five members; (3) enabling the County Executive of Anne Arundel County to appoint three members instead of one; (4) enabling the Anne Arundel County Council of Parent Teacher Associations to appoint two members instead of one; and (5) enabling one appointment each by the Anne Arundel County Branch of the National Association for the Advancement of Colored People, CASA de Maryland, the Anne Arundel Special Education Citizens' Advisory Committee, and one among a rotating list of the chambers of commerce of Anne Arundel County. Thus, Chapter 35 increased the overall membership of the Nominating Commission, and reorganized and expanded the appointment authority for new members.

The Court of Appeals explained that Chapter 35 also amended ED (2015) § 3-110(b) in other significant ways by: (1) requiring that all members of the Nominating Commission be residents of Anne Arundel County, where no similar provision existed previously; (2) authorizing the members of the Nominating Commission to select their chair from among the members, where previously the Governor designated the chair of the Nominating Commission from among the gubernatorial appointees; (3) providing that the term of the chair of the Nominating Commission would be two years, whereas previously it had been four years; (4) creating an eight-year term limit on membership, where no similar provision existed previously; (5) providing that the School Board is the entity responsible for providing staff to the Nominating Commission, where

previously the Department of Legislative Services was responsible for providing staff to the Nominating Commission; (6) providing that a supermajority vote is required for the Nominating Commission to take action, where no similar provision existed previously; (7) prohibiting proxy voting, where no similar provision existed previously; (8) providing that the Nominating Commission must require School Board applicants to include certain information in their applications, where no similar provision existed previously; and (9) requiring the Nominating Commission to consult the Maryland Judiciary Case Search to verify certain statements made by School Board applicants, where no similar provision existed previously. The Court of Appeals determined that, overall, Chapter 35 changed the manner in which the Nominating Commission functions by altering its responsibilities and duties, as well as reconstituting the membership of the Nominating Commission and changing the appointment process.

The Court of Appeals concluded that, under *Schisler*, that the terms of the Appointees were terminated early does not mean that Chapter 35 runs afoul of Article II, § 15 or the separation of powers doctrine where the early termination is incidental to the restructuring or reconstituting of the Nominating Commission. The Court of Appeals stated that such is the case here—the termination of the Appointees' terms was attendant to a restructuring of the Nominating Commission.

The Court of Appeals determined that Chapter 35—by restructuring the Nominating Commission to provide for appointments by specified entities and not the Governor, and by terminating the Appointees' terms early—also did not violate Article II, § 10 of the Maryland Constitution. The Court of Appeals explained that the Nominating Commission is a legislative creation, and the members of the Nominating Commission are members of the Nominating Commission only because of the enactment of ED (2015) § 3-110(b), and, as such, the General Assembly is authorized to specify the mode of appointment of members of the Nominating Commission, and may prescribe a different mode of appointment—which is exactly what the General Assembly did in this case through Chapter 35.

The Court of Appeals further held that, given that Chapter 35 did not constitute a violation of Article II, § 15 of the Maryland Constitution or Article 8 of the Declaration of Rights, but instead restructured or reconstituted the Nominating Commission, it did not need to reach the issue of whether members of the Nominating Commission are civil officers under Article II, § 15. Stated otherwise, because the Court of Appeals concluded that Article II, § 15 of the Maryland Constitution, which applies to military officers and civil officers, had not been violated, whether members of the Nominating Commission are civil officers in the first instance was not dispositive of the case.

Albert F. Oliveira, et al. v. Jay Sugarman, et al., No. 17, September Term 2016, filed January 20, 2017. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2017/17a16.pdf

CORPORATIONS – DERIVATIVE LAWSUITS – BUSINESS JUDGMENT RULE

CORPORATIONS – SHAREHOLDER DIRECT LAWSUIT AGAINST CORPORATE DIRECTORS

Facts:

On December 19, 2008, iStar's Board of Directors ("the Board") granted over ten million performance-based restricted stock units to certain iStar executives and employees ("the 2008 Awards"). The Board intended for the awards to vest only if iStar common stock achieved specific average closing prices for 20 consecutive days. When the Board granted these awards, iStar did not have enough authorized shares of stock to pay the awards if they vested. Thus, in 2009, the Board sought shareholder approval of an issuance of additional stock units to be used for executive compensation.

On April 23, 2009, Chief Executive Officer ("CEO") Jay Sugarman sent a letter inviting iStar shareholders to the annual shareholders meeting, where shareholders would be asked to vote on the iStar Financial Inc. 2009 Long-Term Incentive Plan" ("the 2009 Plan"). The attached Schedule 14A Proxy Statement ("the 2009 Proxy Statement") further described the 2009 Plan, which authorized the issuance of an additional eight million shares of common stock. The Proxy Statement noted that approval of the 2009 Plan would ensure "the deductibility of compensation recognized by certain participants in the 2009 Plan which may otherwise be limited by Section 162(m) of the Internal Revenue Code." On May 27, 2009, at the annual shareholders' meeting, the shareholders voted to approve the 2009 Plan.

In 2009, iStar did not meet its target share price for 20 consecutive days as required for the 2008 Awards to vest. In 2010, iStar achieved the target price eight trading days too late to vest the 2008 Awards. Following this near miss, the Board modified the 2008 Awards to convert them from performance-based to service-based awards (the "2011 Modification").

On May 23, 2013, Petitioners Albert F. Oliveira and Lena M. Oliveira, trustees for the Oliveira Family Trust, a shareholder of iStar, demanded that the Board "investigate and institute claims on behalf of [iStar] . . . against responsible persons" related to the 2011 Modification. Petitioners demanded that the Board rescind all shares of stock issued under the 2009 Plan to settle the 2008 Awards, or, alternatively, "seek any other appropriate relief on behalf of [iStar] for damages sustained . . . as a result of the Board's misconduct" in modifying the 2008 Awards.

In June 2013, the Board appointed a demand response committee ("the Committee") tasked with investigating Petitioners' demand and making a recommendation to the Board as to the best course of action. In October 2013, the Committee recommended that the Board refuse Petitioners' demand. On November 11, 2013, the Board unanimously voted in accordance with that recommendation. In a letter sent to Petitioners on November 12, 2013, the Board presented several reasons for denying their demand. The Board concluded that it saw "no upside—and much downside—to the action and lawsuit proposed in the [d]emand."

On March 10, 2014, Petitioners filed a complaint in the Circuit Court for Baltimore City. They brought five claims against Respondents: (1) breach of fiduciary duty; (2) unjust enrichment; (3) waste of corporate assets; (4) breach of contract; and (5) promissory estoppel. The first three counts were alleged derivatively, and the last two were brought directly. In their motion to dismiss, Respondents argued that Petitioners had failed to plead facts sufficient to overcome the presumption that the Board had acted with sound business judgment. Following a hearing, the Circuit Court dismissed all of Petitioners' claims.

Petitioners appealed to the Court of Special Appeals. In a reported decision, the Court of Special Appeals affirmed the grant of the motion to dismiss. *Oliveira v. Sugarman*, 226 Md. App. 524 (2014). It held that the Circuit Court correctly applied the business judgment rule to the Board's decision to deny Petitioners' litigation demand, and that Petitioners failed to allege facts overcoming the business judgment rule presumption. *Id.* at 540, 543. It viewed Petitioners' breach of contract and promissory estoppel claims as derivative claims that could not be asserted directly. *Id.* at 552.

Held: Affirmed.

The Court of Appeals held that the modified business judgment rule established by *Boland v. Boland*, 423 Md. 296 (2011), does not apply to a disinterested and independent board of directors' decision to deny a shareholder litigation demand. The *Boland* standard only applies when a board of directors that is not majority disinterested and independent chooses to utilize a special litigation committee ("SLC") to respond to such a demand. The Court distinguished *Boland*, where a tainted board sought to preserve the full presumption of the business judgment rule by using an SLC, from the disinterested and independent board at hand. When a board consisting of a majority of disinterested and independent directors does not delegate its decision-making power to a special litigation committee, the traditional business judgment rule applies. Therefore, as to their first three claims, Petitioners failed to allege facts overcoming the business judgment rule presumption.

As to Petitioners' direct claims for breach of contract and promissory estoppel, the Court of Appeals held that Petitioners failed to state facts supporting either claim. The Court rejected Petitioners' argument that the 2009 Plan constituted a contract between shareholders and the Board. To constitute a contract, the Court explained, the equity compensation plan must include a clear offer and acceptance, as well as language indicating an intent for both parties to be bound.

Furthermore, the Court found that Petitioners had not suffered a harm separate from the corporation as required to support a direct shareholder claim. Petitioners asserted that they suffered harm when the 2008 Awards failed to qualify for a tax deduction under § 162(m) of the Internal Revenue Code, but the Court found that this harm was suffered by the corporation, not the individual shareholders.

The Court also held that Petitioners failed to state a claim for promissory estoppel. It explained that although statements within a shareholder proxy statement may be sufficient to give rise to a direct claim for promissory estoppel, to make out such a claim shareholders must allege that they suffered an injustice distinct from any injury to the corporation that can only be remedied by the enforcement of the promise. Here, Petitioners failed to allege such an injustice. The Court held that, as alleged, neither share dilution nor the casting of an uninformed vote could support Petitioners' promissory estoppel claim.

Jermaul Rondell Robinson v. State of Maryland, No. 37, September Term 2016; *Dexter Williams v. State of Maryland*, No. 39, September Term 2016; *Vernon Harvey Spriggs, III v. State of Maryland*, No. 46, September Term 2016, filed January 20, 2017. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2017/37a16.pdf

ODOR OF MARIJUANA – PROBABLE CAUSE – CARROLL DOCTRINE – SEARCH OF VEHICLE – DECRIMINALIZATION OF POSSESSION OF LESS THAN TEN GRAMS OF MARIJUANA

Facts:

Robinson v. State

In the District Court of Maryland, sitting in Baltimore City, the State, Respondent, charged Jermaul Rondell Robinson, Petitioner, with crimes, including possession of at least ten grams of marijuana. The case was transferred to the Circuit Court for Baltimore City. Robinson moved to suppress evidence that law enforcement had seized from Robinson's vehicle.

The circuit court conducted a hearing, at which an officer of the Baltimore Police Department testified that he saw Robinson leaning against a vehicle and detected an overwhelming smell of fresh marijuana coming from the vehicle. Robinson said that he had been driving the vehicle and that there was marijuana in the vehicle. The officer searched the vehicle and seized sixteen small bags of marijuana.

After the officer's testimony, Robinson's counsel contended that a law enforcement officer lacks probable cause to search a vehicle for marijuana unless the law enforcement officer has reasonable suspicion that the vehicle contains more than ten grams of marijuana. The State argued that nothing had changed as a result of the amendment to the marijuana statute with respect to a law enforcement officer's ability to search a vehicle based on the odor of marijuana.

The circuit court denied the motion to suppress and found Robinson guilty of possession of at least ten grams of marijuana. Robinson appealed, and the Court of Special Appeals affirmed the circuit court's judgment.

Williams v. State

In the District Court of Maryland, sitting in Baltimore City, the State charged Dexter Williams with crimes, including possession of marijuana. The case was transferred to the Circuit Court for Baltimore City. Williams moved to suppress evidence that law enforcement had seized from Robinson's vehicle.

The circuit court conducted a hearing, at which a Baltimore Police Department detective testified that he saw Williams in the driver's seat of a vehicle that was stopped in front of a stop sign. The detective smelled a strong odor of fresh marijuana emanating from the vehicle. The detective asked Williams whether he smoked marijuana, and Williams replied affirmatively. The detective searched Williams's vehicle and found 170 grams of packaged marijuana.

Following the detective's testimony, Williams's counsel contended that probable cause to believe that a person is engaged in conduct that constitutes a civil violation of the law—*e.g.*, possession of less than ten grams of marijuana—does not provide a basis for a warrantless search. The State argued that the General Assembly had specifically indicated that decriminalization of possession of less than ten grams of marijuana would not affect law enforcement officers' authority to seize marijuana.

The circuit court denied the motion to suppress and found Williams guilty of possession of at least ten grams of marijuana. Williams appealed, and the Court of Special Appeals affirmed the circuit court's judgment.

Spriggs v. State

In the Circuit Court for Dorchester County, the State charged Vernon Harvey Spriggs, III, Respondent, with crimes, including possession of marijuana with the intent to distribute. Spriggs moved to suppress evidence that law enforcement had allegedly illegally seized.

The circuit court conducted a hearing, at which a corporal of the Cambridge Police Department testified that he saw Spriggs in a vehicle in a parking lot in front of an abandoned building, and detected a strong odor of fresh marijuana. The corporal believed that he could tell that the odor of marijuana was coming from the general area of the vehicle.

Another corporal testified that he saw Spriggs near the vehicle, and that he detected a strong odor of fresh marijuana as he approached the vehicle. Spriggs told the corporal that "he [Spriggs] had the vehicle" and that he had been the only one in the vehicle. The corporal searched the vehicle and found 142 grams of marijuana.

After the corporals' testimony, Spriggs's counsel contended that the odor of marijuana alone cannot justify a warrantless search. The State contended that, based on prior case law, law enforcement officers have the right to investigate upon detecting the odor of marijuana.

The circuit court denied the motion to suppress and found Spriggs guilty of possession of marijuana with the intent to distribute. Spriggs appealed, and the Court of Special Appeals affirmed the circuit court's judgment.

Held: Affirmed.

The Court of Appeals held that a law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle.

The Court explained that decriminalization is not the same as legalization. Despite the decriminalization of possession of less than ten grams of marijuana, possession of marijuana in any amount remains illegal in Maryland. To be sure, the amended marijuana statute changed the categorization of, and maximum penalty for, possession of less than ten grams of marijuana. Decriminalization notwithstanding, however, the possession of less than ten grams of marijuana—*i.e.*, the possession of any amount of marijuana—remains illegal.

Although not dispositive of whether a law enforcement officer may search a vehicle upon detection of the odor of marijuana, the Court observed that the relevant statutes' plain language and legislative history support the conclusion that the General Assembly did not intend to preclude a search of a vehicle based on the odor of marijuana. In changing the classification of possession of less than ten grams of marijuana from a "misdemeanor" to "a civil offense," the General Assembly made clear that possession of marijuana in any amount is still illegal. Significantly, when decriminalizing possession of less than ten grams of marijuana, the General Assembly added Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol., 2014 Supp.) § 5-601(d)(2), which states that the decriminalization "may not be construed to affect the laws relating to . . . seizure and forfeiture." As to laws relating to seizure, since 2002, Md. Code Ann., Crim. Proc. (2001, 2002 Supp.) § 12-201(a)(1) has stated: "A Schedule I substance listed in § 5-402 of the Criminal Law Article shall be seized and summarily forfeited to the State if the substance is[] possessed, transferred, sold, or offered for sale in violation of the Controlled Dangerous Substances law[.]" (Paragraph break omitted). Under Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol.) § 5-402(d)(1)(vii), marijuana is, and has been, a Schedule I substance subject to seizure and forfeiture.

In other words, the plain language of the relevant statutes demonstrate that the General Assembly expressly indicated that decriminalization of possession of less than ten grams of marijuana does not mean that law enforcement officers can no longer seize marijuana. Indeed, Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol., 2014 Supp.) § 5-601(d)(2) plainly provides that the provisions "making the possession of marijuana a civil offense may not be construed to affect the laws relating to . . . seizure and forfeiture." (Paragraph break omitted). Thus, under the plain language of the statutes, marijuana remains a Schedule I substance that is subject to seizure and forfeiture, notwithstanding the circumstance that possession of less than ten grams of marijuana is now a civil offense. By definition, if law enforcement officers may still seize marijuana, then law enforcement officers may still search for marijuana.

The legislative history of the amended statute also makes clear that the General Assembly did not intend to preclude a search of a vehicle based on the odor of marijuana or to otherwise alter the seizure and forfeiture of marijuana. The General Assembly added the provision that the decriminalization "may not be construed to affect the laws relating to . . . seizure and forfeiture" in response to questions about whether decriminalization would change existing law authorizing police officers to search a car based on a K-9 alert.

Aside from the statute's plain language and legislative history, in its independent assessment of the issue, the Court concluded that a warrantless search of a vehicle is permissible upon detection of the odor of marijuana emanating from the vehicle. The Supreme Court has stated that, for purposes of the Fourth Amendment, probable cause to search exists where a person of reasonable caution would believe "that contraband or evidence of a crime is present." *Florida v. Harris*, ___ U.S. ___, 133 S. Ct. 1050, 1055 (2013) (citations omitted). The Supreme Court's use of the phrase "contraband or evidence of a crime" demonstrates that the terms "contraband" and "evidence of a crime" have different meanings. In the view of the Court of Appeals, "contraband" means goods that are illegal to possess, regardless of whether possession of the goods is a crime. The definition of "contraband" that the Court adopted is warranted by the Supreme Court's conclusion in *Carroll v. United States*, 267 U.S. 132, 158-59 (1925), that a law enforcement officer can search a vehicle based on probable cause to believe that the vehicle's contents are contraband, even if the law enforcement officer cannot arrest the driver.

The conclusion that the terms "contraband" and "evidence of a crime" are not synonymous is supported by the plain meaning of the word "contraband." Significantly, the words "crime" and "criminal" do not appear in the definitions of "contraband" in both Black's Law Dictionary and Merriam-Webster.

The Court of Appeals joined the Court of Special Appeals and courts in other jurisdictions in holding that marijuana remains contraband, despite the decriminalization of possession of small amounts of marijuana, and that, as such, the odor of marijuana constitutes probable cause for the search of a vehicle. The Court of Appeals approvingly cited *Bowling v. State*, 227 Md. App. 460, 476, 134 A.3d 388, 398, *cert. denied*, 448 Md. 724, 141 A.3d 135 (2016), in which the Court of Special Appeals held that, notwithstanding the decriminalization of possession of less than ten grams of marijuana in Maryland, a narcotics dog's alert provides probable cause to search a vehicle; *State v. Barclay*, 398 A.2d 794, 198 (Me. 1979), in which the Supreme Judicial Court of Maine held that marijuana was contraband even though a Maine statute made possession of a small amount of marijuana "a civil violation"; *State v. Smalley*, 225 P.3d 844, 848 (Or. App. 2010), in which the Court of Appeals of Oregon held that marijuana in any amount is contraband, despite an Oregon statute under which possession of less than an ounce of marijuana is a civil violation; *People v. Waxler*, 224 Cal. App. 4th 712, 715 (2014), *as modified on denial of reh'g* (Apr. 3, 2014), *review denied* (June 11, 2014), in which a Court of Appeal of California held that a law enforcement officer has probable cause to search a vehicle where the law enforcement officer smells burnt marijuana and sees burnt marijuana in a pipe in the vehicle, notwithstanding a California statute that made possession of less than an ounce of marijuana punishable only by a fine; *State v. Ortega*, 749 N.W.2d 851, 853-54 (Minn. Ct. App. 2008), *aff'd,* 770 N.W.2d 145 (Minn. 2009), in which the Court of Appeals of Minnesota concluded that the odor of marijuana gave rise to probable cause to search a vehicle, even though possession of a small amount of marijuana was not a crime in the state; and *People v. Zuniga*, 372 P.3d 1052, 1060 (Colo. 2016), in which the Supreme Court of Colorado determined that there was probable cause to search a vehicle where, among other things, a law enforcement officer detected the odor of marijuana, even though possession of up to one ounce of marijuana is legal in Colorado.

The Court of Appeals observed that its holding does not in any way impede the ability of eligible persons to possess and/or use marijuana for medical purposes. Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol., 2016 Supp.) § 5-601(c)(3)(iii)1 and 2A create an affirmative defense to a charge of possession of marijuana for medical marijuana patients and caregivers, respectively. Code of Maryland Regulations 10.62.04.02 and 10.62.04.04 require medical marijuana patients and caregivers, respectively, to apply for registration with the Natalie M. LaPrade Maryland Medical Cannabis Commission, and COMAR 10.62.06.01 and 10.62.06.02 enable medical marijuana patients and caregivers, respectively, to apply for Cannabis Commission-issued identification cards that include the registration numbers that the Cannabis Commission has assigned to the medical marijuana patients and caregivers. Permitting law enforcement officers to conduct a warrantless search of a vehicle based on the odor of marijuana will have no effect upon the statutes and regulations pertaining to medical marijuana.

Applying its holding to the instant cases, the Court concluded that there was probable cause to search the vehicles in question, based on a law enforcement officer having detected an odor of marijuana coming from a vehicle that Petitioner had been driving or in possession of.

Dameron Smallwood v. State of Maryland, No. 22, September Term 2016, filed January 23, 2017. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2017/22a16.pdf

CRIMINAL LAW – POSTCONVICTION RELIEF – PETITION FOR WRIT OF ACTUAL INNOCENCE – ACTUAL INNOCENCE

CRIMINAL LAW – NOT CRIMINALLY RESPONSIBLE – INNOCENCE

Facts:

On October 22, 1984, then fifteen-year-old Dameron Smallwood stabbed a woman ten times, causing her death. At a reverse-waiver hearing, held February 6, 7 and March 8, 1985, several psychiatric experts opined that Mr. Smallwood was not "legally insane" when he stabbed the victim, but that he would be more amenable to treatment in a psychiatric facility. The psychiatric experts variously diagnosed Mr. Smallwood with: (1) an atypical conduct disorder; (2) a mixed personality disorder, (3) major depression, recurrent; and (4) an identity disorder. The circuit court denied Mr. Smallwood's motion to waive back into juvenile court.

On March 13, 1985 Mr. Smallwood entered a plea of not guilty on an agreed statement of facts, was convicted on the same day of first-degree murder and other related offenses, and sentenced to life in prison.

In 2009, Mr. Smallwood was represented by a new attorney, who requested that one of the psychiatrists who had testified at Mr. Smallwood's reverse-waiver hearing reconsider her prior finding that Mr. Smallwood was not "legally insane" at the time of his 1985 reverse-waiver hearing. In 2011, the psychiatrist concluded that Mr. Smallwood was in fact not criminally responsible ("NCR") when he stabbed the victim. The psychiatrist attributed her new opinion to: (1) scientists' better understanding of dissociation and its connection to post-traumatic stress disorder ("PTSD"), (2) the diagnostic nomenclature changes for personality disorders made between the DSM-III, published in 1980, and the DSM-IV-TR, published in 2000, and (3) her post-hoc professional experience since the 1980s. The psychiatrist diagnosed Mr. Smallwood with major depression with dissociative episodes, and PTSD.

On August 29, 2011, Mr. Smallwood filed a Petition for Writ of Actual Innocence pursuant to Criminal Procedure Article ("Crim. Proc.") §8-301. Mr. Smallwood did not deny his guilt, but requested that his conviction be vacated and a new trial ordered because his diagnosis of NCR was newly discovered evidence that created a substantial or significant possibility that his 1985 proceeding could have been different. On November 2, 2012, the Circuit Court for Baltimore County considered Mr. Smallwood's petition, reviewed the psychiatrist's revised opinion, and heard live testimony from the State's clinical psychiatrist expert.

On February 12, 2013, the circuit court denied Mr. Smallwood's petition. The circuit court concluded that a plain reading of Crim. Proc. §8-301 indicates the statute was only intended to apply to convicted defendants who were innocent of the underlying crime for which they were convicted.

The Court of Special Appeals affirmed the circuit court, concluding that the statute requires a convicted defendant to allege he or she is actually innocent of the underlying crime. *See Dameron Smallwood v. State of Maryland*, 227 Md. App. 1, 132 A.3d 342 (2016).

Held: Affirmed.

Crim. Proc. §8-301 is titled "[p]etitions for writ of actual innocence" and under the canons of statutory interpretation, the plain meaning of the term "actual innocence" means the defendant did not commit the crime or offense for which he or she was convicted.

This interpretation of "actual innocence" is also substantiated by the post-conviction statutory scheme within which Crim. Proc. §8-301 was enacted and its legislative history. Crim. Proc. §8-301 filled a statutory gap that existed in postconviction law for convicted persons who could not obtain postconviction relief because they obtained newly discovered evidence that was either non-biological, and thus could not be introduced under Crim. Proc. §8-201, or the evidence was discovered after the one year limitation contained in Maryland Rule 4-331.

Maryland Rule 4-242 governs pleas in criminal matters, and allows a defendant, in addition to pleading not guilty, guilty, or nolo contendre, to also enter a plea of NCR. *Langworthy v. State*, 284 Md. 588, 399 A.2d 578 (1979) and its progeny establish that at trial, the guilt phase and criminal responsibility phase are separate, and that a finding of NCR will not impact a determination that a defendant is guilty of the underlying criminal act. See *Pouncey v. State*, 297 Md. 264, 268, 465 A.2d 475, 478 (2983). Even assuming, *arguendo*, that Mr. Smallwood was deemed NCR at the time of his 1985 reverse-waiver hearing, he was still guilty of stabbing the victim to death. Because the psychiatrist's revised opinion would not impact Mr. Smallwood's finding of guilt, he was not "actually innocent" of the crime for which he was convicted.

Voters Organized for the Integrity of City Elections, et al v. Baltimore City Elections Board, et al., No. 60, September Term 2016, filed January 23, 2017. Opinion by McDonald, J.

Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2017/60a16.pdf

ELECTION LAW – ACTION BY REGISTERED VOTER WITH RESPECT TO ACT OR OMISSION IN VIOLATION OF STATE ELECTION LAW – MOOTNESS

Facts:

Appellants, Voters Organized for the Integrity of City Elections ("VOICE") and its founder, Hassan Giordano, initiated this action just weeks before the 2016 general election in the apparent hope of compelling Appellees, the State Board of Elections and the Baltimore City Board of Elections , to establish a special system for "inmate voting" in Baltimore City for the 2016 general election. Their complaint sought relief on behalf of individuals who were detained pretrial or were incarcerated as a result of a misdemeanor conviction, who were eligible to vote, and who wished either to register to vote or, if already registered, to cast a ballot in the 2016 general election.

The complaint was based on Maryland Code, Election Law Article ("EL") § 12-201 *et seq*., which creates a cause of action for a registered voter to seek judicial relief for an act or omission by election officials inconsistent with the election law that may affect the outcome of an election. The complaint was also brought under the Declaratory Judgments Act.

The Circuit Court for Baltimore City first discussed the issue of whether VOICE had proper standing to bring their claims. Mr. Giordano clearly had standing, as a registered voter, to raise a claim under EL § 12-201. (However, it was unclear whether he or VOICE had standing to raise a claim under the Declaratory Judgments Act.) The Circuit Court denied their request for a broadly worded, temporary restraining order on the ground that they had filed their complaint too late. Alternatively, the Circuit Court concluded that, even if it overlooked the procedural default, they had failed to show, by the "clear and convincing evidence" standard in the statute, any act or omission by the election boards that threatened to change the outcome of the election.

The expedited appeal of the Circuit Court's decision was argued before the Court of Appeals on November 7, 2016 – the day before the 2016 general election. The Court dismissed the appeal as moot that same day and indicated that the case would be remanded to the Circuit Court to consider any further request for a declaratory judgment in accordance with the opinion to be issued by the Court.

Held:

The case was moot by the time it was argued at the Court of Appeals. The Court noted that once the case was filed, both the parties and the Circuit Court cooperated in advancing this litigation expeditiously. But, by the time the appeal was argued before the Court of Appeals the early voting period was over and the general election was just hours away. Those time restrictions made any ruling by the Court ineffective as a practical matter. An appeal is moot if, as a result of time or circumstances, "any judgment or decree the court might enter would be without effect." *Hayman v. St. Martin's Evangelical Lutheran Church*, 227 Md. 338, 343 (1962). Even though the Court may express an opinion about issues in a moot case, the appeal is typically dismissed. *Mercy Hospital Inc. v. Jackson*, 306 Md. 556, 562 (1986).

Here, the appeal was argued merely hours before the general election. It would have been impossible for any order from the Court to be enforceable. Further, Election Day is the busiest time for the state and local election boards. Any order from this Court would have overburdened the elections boards on their busiest work day- making it harder, not easier, for Marylanders to vote.

In the event that the case continued in the Circuit Court on remand with respect to the original request for a declaratory judgment, the Court outlined some considerations for the Circuit Court to assess the standing of the plaintiffs, as well as certain legal propositions that might be included in any declaratory judgment (assuming there was a plaintiff with standing).

Linda H. Lamone, et al. v. Ian Schlakman, et al., No. 50, September Term 2016, filed February 1, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/50a16.pdf

ELECTION LAW – TIME FOR PROCEEDINGS

Facts:

Appellees were among the candidates in the 2016 General Election vying for a seat representing Councilmanic District Twelve on the Baltimore City Council. Appellees challenged the decisions by the Baltimore City Board of Elections to certify Mr. Sparaco as an eligible candidate and by the State Board of Elections to include him as a candidate for the District Twelve seat on the 2016 General Election ballot on the basis that Mr. Sparaco allegedly failed to comply with statutory filing requirements in a timely manner. Appellees filed a federal action challenging the Boards' determination. The federal court dismissed Appellee's action. Appellees then filed an action in the Circuit Court for Anne Arundel County, seeking a temporary restraining order directing Appellants to remove Mr. Sparaco's name from ballots. The Circuit Court granted the temporary restraining order.

Held:

We hold that the temporary restraining order was granted in error because Appellees' state court challenges to the Boards' actions were untimely and are barred by laches.

ELEC. LAW § 12-202(b)(1) requires a challenge to be made within "10 days after the act or omission or the date the act or omission became known to the petitioner[.]" Notwithstanding the equitable nature of Appellees' claims, we may gauge their delay against the statutory limitations period because courts sitting in equity will apply statutory time limitations in determining, at least as an outside limit, whether laches has run. A statutory limitations period, such as that provided by ELEC. LAW § 12-202(b)(1), provides a benchmark for the application of laches against which this Court can assess whether the Appellees' delay in filing was unreasonable and whether it prejudiced the interests of Appellants.

We granted certiorari in this matter and hold that the temporary restraining order was granted in error. Appellees' state court challenges to the Boards' actions were untimely and are barred by laches. Appellees have not explained this delay, nor explained why they did not institute a parallel action in the Circuit Court within the time limits mandated by ELEC. LAW § 12-202(b). Moreover, where the federal court dismissed Appellees' action because Appellee's counsel was not admitted to practice before that court, the savings provision under Maryland Rule 2-101(b)

did not apply to toll Appellees' obligation to file in the appropriate circuit court, as instructed by ELEC. LAW § 12-202(b)(1).

Appellees have not demonstrated any basis for relief on the merits under any theory of action or avenue for relief. The plain language of ELEC. LAW § 5-703(d)(1) provides that a candidate for public office seeking nomination by petition must file a Certificate of Candidacy no later than five p.m. on the first Monday in August in the year of the general election. The City Board's certification of Mr. Sparaco as a qualified candidate, and the State Board's listing of his candidacy, complied with the provisions of the Election Law Article.

Kor-Ko Ltd. and John E. Rothamel v. Maryland Department of the Environment, No. 23, September Term 2016, filed January 25, 2017. Opinion by Harrell, J.

Greene, McDonald, and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2017/23a16.pdf

MARYLAND DEPARTMENT OF THE ENVIRONMENT – REGULATORY INTERPRETATION – COMAR 26.11.15.06 – WHERE TO MEASURE AIR QUALITY AMBIENT IMPACTS FOR CREMATORIUM CONSTRUCTION PERMIT

Facts:

The Maryland Department of the Environment ("MDE") issued a construction permit to Maryland Crematory, LLC (MC) to build a human remains incinerator, predicted to emit various toxins, including arsenic, chromium, dioxins, and mercury. Kor-Ko, Ltd. (a company located within the same building in a commercial office/industrial park as the proposed incinerator) and its vice-president, John Rothamel ("Kor-Ko"), sought to overturn the permit issuance, arguing that the MDE failed to satisfy its regulatory duty to ensure that the incinerator would not endanger unreasonably human health, because the MDE modeled for screening purposes toxin concentration levels at the boundary of the commercial park, not at the building housing MC's and Kor-Ko's businesses.

Kor-Ko argued successfully its position to the Circuit Court for Anne Arundel County, which remanded the matter to the MDE to consider MC's business's potential toxic impact on the health of people who work in adjacent buildings within the commercial park. The MDE appealed this decision. The Court of Special Appeals reversed in an unreported opinion. Kor-Ko petitioned for a writ of certiorari, which the Court of Appeals granted, to consider whether the MDE failed to protect human health from unreasonable danger by misinterpreting the regulatory terms "premises" and "ambient air," concluding that its air toxics regulations do not apply within the commercial park, and failing to consider the health of tenants and workers in the commercial park.

Held: Affirmed.

The MDE has a regulatory duty to ensure that "total allowable emissions from the premises of each toxic air pollutant discharged by the new installation or source will not unreasonably endanger human health." Code of Maryland Regulations 26.11.15.06A(1). The MDE's interpretation of the term "premises" (COMAR 26.11.15.06A(1)) to mean the entire commercial park, as applied via its decision to model for screening purposes toxins for health effects at the boundary of the commercial park, was permissible for three reasons. First, the MDE's

interpretation accords with a dictionary definition of "premises." Second, the regulatory context in which "premises" appears uses the term "premises" interchangeably with "property line." Finally, and most importantly, the MDE concluded that the screening levels it established for determining safe exposure levels of toxins were conservative enough to protect the health of people within the commercial park. The Court, accordingly, ratified the MDE's interpretation of "premises," finding its interpretation and application of the term neither arbitrary nor capricious.

Having determined the answer to Kor-Ko's overriding inquiry about the MDE's duty to protect human health from unreasonable danger, the Court declined to consider fully the MDE's interpretation of "ambient air" (COMAR 26.11.15.06). It noted, however, that, given the State environmental statute's prohibition of contested case administrative hearings regarding this kind of permit application and the MDE's scant (but sufficient legally) reasoning in the record as to why it chose to screen toxins at the boundary of the commercial park, reaching a conclusion on the "ambient air" analysis, if such a determination were necessary in this case, would have taxed the Court's capacity to perform properly its duty of appellate review.

Maryland Board of Physicians, et al. v. Mark Geier, Personal Representative of Anne Geier, et al., No. 11, September Term 2016, filed January 23, 2017. Opinion by Hotten, J.

Adkins, J., dissents.
McDonald, J., concurs and dissents.

http://www.mdcourts.gov/opinions/coa/2017/11a16.pdf

APPEAL AND ERROR – AFFECTING COLLATERAL MATTERS AND PROCEEDINGS – COLLATERAL ORDER DOCTRINE

PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY – EXECUTIVE PRIVILEGE – DELIBERATIVE PROCESS PRIVILEGE

Facts:

On April 27, 2011, the Board of Physicians summarily suspended Dr. Mark Geier from the practice of medicine based on complaints it received that Dr. Geier was using improper and dangerous methods to treat autistic children. On September 15, 2011, the Board amended its charges to include allegations that Dr. Geier prescribed medication to family members while his license was suspended. On January 15, 2012, in connection with the allegation that Dr. Geier continued to prescribe medicine following his suspension, the Board also publicized a cease-and-desist-order that accused Dr. Geier of practicing medicine while his license was suspended, and included the specific medications Dr. Geier allegedly prescribed, the family members who were prescribed those medications, and the medical conditions the medications treated.

On December 12, 2012, Dr. Geier and his family members filed a civil lawsuit against the Board, alleging that in publicizing their confidential medical information, the Board: (1) deprived them of their constitutional right to privacy; (2) violated the Maryland Confidentiality of Medical Records Act, Md. Code (1982, 2009 Repl. Vol.) §§4-301, et seq. of the Health General Article; and (3) invaded their privacy by giving unreasonable publicity to private facts.

The Board moved to dismiss the complaint, asserting that Dr. Geier and his family failed to state a claim upon which relief could be granted, and that the Board had absolute quasi-judicial immunity from the lawsuit. The circuit court granted the Board's motion on the Confidentiality of Medical Records Act claim, but allowed the other two allegations to proceed.

During discovery, Dr. Geier and his family sought information regarding the specific circumstances surrounding the Board's disclosure of their confidential medical information, including the Board's confidential documents and testimony. The Board consistently asserted their absolute quasi-judicial and deliberative process (executive) privileges against the discovery of certain materials and refused to disclose certain documents and testimony sought by Dr. Geier

and his family. Dr. Geier and his family filed multiple motions to compel and motions for discovery sanctions against the Board for its failure to disclose the sought materials.

On November 13, 2014, the circuit court granted Dr. Geier and his family's fifth motion for sanctions, and subsequently ordered a default judgment on liability against the Board. The Board appealed the order to the Court of Special Appeals, which the Court of Special Appeals held was not properly before the Court because it was not a final judgment. The Court of Special Appeals concluded, however, the circuit court erred in failing to properly consider the Board's claim of executive privilege and remanded the case to the circuit court. *See Md. Bd. of Physicians v. Geier*, 225 Md. App. 114, 123 A.3d 601 (2015).

On remand, Dr. Geier and his family sought a hearing on their sixth motion for sanctions, which had been filed August 8, 2014. The sixth motion for sanctions arose due to the Board's refusal to disclose audiotapes of its confidential Board deliberations. On November 2, 2015, Dr. Geier and his family also served their sixth request for production of documents. The Board filed a motion for a protective order against the request, and subsequently filed a motion for reconsideration of default judgment on liability and a motion for summary judgment.

On March 24, 2016, the circuit court considered the motions, and subsequently denied the Board's motions for summary judgment, for reconsideration of the default judgment on liability, and for a protective order against Dr. Geier's sixth request for documents. The circuit court concluded the Board did not have a common law absolute quasi-judicial immunity, and it had waived it deliberative process (executive) privilege by failing to assert any privilege in its initial response to Dr. Geier and his family's request for the audiotapes. The circuit court also granted Dr. Geier and his family's sixth motion for sanctions, based on the Board's failure to disclose audio recordings of their confidential meetings.

Held:

Motion to Dismiss granted in part and denied in part. Order of the Circuit Court for Montgomery County granting Respondents' sixth motion for sanctions reversed, and case remanded for further proceedings.

The Court of Appeals held that the Board's appeal regarding the denial of its motion for reconsideration of order on default liability was not properly appealable because it did not satisfy the four-part collateral order doctrine test. The Court also held the Board's appeal regarding the denial of its motion for a protective order against the sixth request for documents was not properly appealable because our holding in *Dawkins v. Balt. City Police Dep't*, 376 Md. 53, 827 A.2d 115 (2003) prevents interlocutory orders overruling quasi-judicial immunity claims by agencies from being appealed under the collateral order doctrine. *See Dawkins*, 376 Md. at 65, 827 A.2d at 122. The Court further held that the Board's appeal of the order granting the sixth motion for sanctions is properly appealable because it satisfies the four-part collateral order doctrine test.

The Court reversed the Circuit Court for Montgomery's County's grant of the sixth motion for sanctions because Dr. Geier and his family sought discovery of the Board's recorded confidential meetings, which the Board argued were protected by its deliberative process (executive) privilege. In *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980), we held a balancing test must be utilized when the deliberative process (executive) privilege is invoked, which requires the Court to "weigh[] the need for confidentiality against the litigant's need for disclosure and the impact of nondisclosure upon the fair administration of justice." 287 Md. at 563, 414 A.2d at 925. The Court concluded that preventing the disclosure of the Board's audiotapes of confidential meetings allows the Board to undertake its core public protection function of overseeing the licensing of physicians and ensuring only medical professionals who hold a license to practice medicine in the State of Maryland. The Court also reasoned the Dr. Geier and his family had not provided any reasons for requiring disclosure of the audiotapes in litigation of their claims. The Court also did not find that nondisclosure of the audiotapes would impact the "fair administration of justice" because Dr. Geier and his family failed to articulate any specific necessity for the tapes' disclosure.

Maryland Insurance Administration v. State Farm Mutual Automobile Insurance Company et al., No. 41, September Term 2016, filed January 23, 2017. Opinion by Watts, J.

Barbera, C.J., Greene and McDonald, JJ., dissent

http://www.mdcourts.gov/opinions/coa/2017/41a16.pdf

MOTOR VEHICLE INSURANCE – PERSONAL INJURY PROTECTION COVERAGE – OWNED BUT UNINSURED EXCLUSION – MARYLAND CODE ANN., INS. (1997, 2011 REPL. VOL., 2016 SUPP.) § 19-505

Facts:

On November 14, 2011, Alhassan Bundu-Conteh ("Bundu-Conteh"), Respondent, was rear-ended by a motor vehicle while driving his taxicab. Bundu-Conteh sustained personal injuries. At the time of the accident, Bundu-Conteh owned two vehicles: a 1997 Jeep Grand Cherokee ("the Jeep") and a 2006 Ford Crown Victoria taxicab ("the taxicab"). The Jeep was insured under a liability and no-fault policy with State Farm Mutual Automobile Insurance Company ("State Farm"), Respondent, which included personal injury protection ("PIP") coverage. The taxicab was insured by Amalgamated Insurance Company ("Amalgamated") and carried liability-only coverage, which does not include PIP coverage.

Following the accident, Bundu-Conteh submitted a PIP claim to State Farm for the injuries that he sustained. State Farm denied Bundu-Conteh's PIP claim, relying on a policy exclusion ("the third exclusion") for no-fault coverage that denies coverage for the insured "or any resident relative while occupying a motor vehicle owned by [the insured] or any resident relative and which is not insured under the liability coverage of this policy[.]" Bundu-Conteh filed a complaint with the Maryland Insurance Administration ("the MIA"), Petitioner. The MIA concluded that State Farm's denial of Bundu-Conteh's PIP claim violated IN §§ 4-113, 19-505, 19-513, and 27-303. State Farm subsequently appealed the MIA's determination and requested a hearing with the Maryland Insurance Commissioner ("the Commissioner"). The Commissioner concluded that State Farm's denial of coverage to Bundu-Conteh violated IN §§ 19-505 and 19-513. The Commissioner also determined that the third exclusion is not a permissible exclusion under IN § 19-505(c).

State Farm filed in the Circuit Court for Baltimore City ("the circuit court") a petition for judicial review. The circuit court subsequently issued a Memorandum and Order reversing the Commissioner's Final Order. The MIA noted an appeal to the Court of Special Appeals, which affirmed the circuit court's judgment. *See Md. Ins. Admin. v. State Farm Mut. Auto. Ins. Co.*, 228 Md. App. 126, 137 A.3d 310 (2016). The MIA thereafter filed in this Court a petition for a writ of *certiorari,* which the Court of Appeals granted on September 2, 2016. See *Md. Ins. Admin. v. State Farm Mut. Auto. Ins.*, 450 Md. 102, 146 A.3d 463 (2016).

Held: Affirmed.

The Court of Appeals held that an insurer of a personal motor vehicle liability insurance policy, which includes PIP coverage, is not responsible, as a result of the application of the personal motor vehicle liability insurance policy's owned but not insured exclusion, for PIP coverage for injuries that the insured sustained while driving a taxicab owned by the insured but not covered by the personal motor vehicle liability insurance policy. Applying this principle to the instant case, the Court of Appeals held that the third exclusion in State Farm's policy applies and that State Farm is not responsible for PIP coverage for injuries that the insured sustained while driving the taxicab, which was owned by the insured, but not insured with State Farm.

The Court of Appeals concluded that a taxicab is a "motor vehicle" for purposes of the owned but uninsured exclusion from PIP coverage set forth in IN § 19-505(c)(1)(ii) and the payment of benefits under IN § 19-513(d)(1)(i). The Court of Appeals observed that broad application of the statutorily provided definition of "motor vehicle" in IN § 19-501(b), and specifically IN § 19-501(b)(2)(ii)'s exclusion of a taxicab as a "motor vehicle," potentially renders other sections of Subtitle 5 of Title 19 of the Insurance Article illogical. The Court of Appeals determined that when the definition of "motor vehicle" in IN § 19-501(b) is applied to other provisions of the Insurance Article—namely, IN §§ 19-505 and 19-513—it produces an unreasonable and indeed illogical result. The Court of Appeals observed that, were the Court to exclude taxicabs from classification as "motor vehicles" for purposes of IN §§ 19-505 and 19-513, any passenger who is injured while riding in a taxicab and who personally carries PIP coverage through his or her own motor vehicle liability insurance policy would be unable to make a claim for PIP coverage. The Court of Appeals determined that this was a result that the General Assembly could not have intended.

The Court of Appeals held that an "uninsured motor vehicle" for purposes of IN § 19-505(c)(1)(ii) means uninsured for PIP coverage, such that a motor vehicle, including a taxicab, that is not insured for PIP coverage is an "uninsured motor vehicle" for purposes of IN § 19-505(c)(1)(ii). Considering the plain language of IN § 19-505, the Court concluded that the provision relates solely to PIP coverage. The Court of Appeals observed that, because IN § 19-505 concerns only PIP coverage, it is reasonable to read the plain language of "uninsured" to mean uninsured for purposes of PIP—i.e., not insured for PIP coverage. The Court of Appeals was not persuaded that "uninsured motor vehicle" in IN § 19-505(c)(1)(ii) means not insured under the relevant motor vehicle liability insurance policy or a vehicle without any insurance at all—i.e., uninsured for any purpose.

The Court of Appeals observed that the legislative history of IN § 19-505(c)(1)(ii) evinced the General Assembly's intent to address the Court's decision in *Pa. Nat'l Mut. Cas. Ins. Co. v. Gartelman*, 288 Md. 151, 416 A.2d 734 (1980), in which the Court of Appeals held that an insurer could not deny uninsured motorist ("UM") coverage for an insured's wife who was injured while driving the insured's uninsured moped, as such an exclusion was not permitted under the Insurance Article. The Court of Appeals concluded that the enactment of IN § 19-

505(c)(1)(ii) evinced the General Assembly's intent to address the Court's decision in *Gartelman*. The Court of Appeals observed, however, that, were the Court to interpret "uninsured" to mean a vehicle without any insurance at all, as was the case in *Gartelman*, the outcome that the General Assembly sought to mitigate would be effectively the same—*i.e.*, an insurer would be required to pay an insured's UM coverage for an accident occurring while the insured, or a resident relative, drove a motor vehicle owned by the insured but not covered under the insurer's policy.

The Court of Appeals explained that the Court's reading of "uninsured motor vehicle" in IN § 19-505(c)(1)(ii) to mean uninsured for PIP coverage is consistent with the manner in which Maryland courts have interpreted the owned but uninsured exclusion as it relates to uninsured/underinsured motorist ("UM/UIM") coverage to mean uninsured for UM/UIM coverage under the applicable policy, and not to mean uninsured altogether. Looking to the legislative history of PIP and UM/UIM coverage, the Court observed that the owned but uninsured exclusions for PIP and UM/UIM coverage closely mirror one another, and were enacted as part of the same legislation. Thus, the Court of Appeals determined that analogizing to the owned but uninsured exclusion for UM/UIM coverage is instructive.

Having concluded that "uninsured motor vehicle" for purposes of the owned but uninsured exclusion set forth in IN § 19-505(c)(1)(ii) means uninsured for PIP coverage, the Court of Appeals held that the third exclusion of the State Farm policy was authorized and applicable. The Court of Appeals concluded that the third exclusion in the State Farm policy was unambiguous, and clearly precluded coverage of Bundu-Conteh's PIP claim. The Court of Appeals determined that the third exclusion was authorized by the General Assembly as the language of the third exclusion substantively mirrored the owned but uninsured exclusion under IN § 19-505(c)(1)(ii), and thus was valid. As it pertains to the instant case, the Court of Appeals observed that Bundu-Conteh was the named insured, he was occupying a motor vehicle (the taxicab) owned by him when he was injured, and the taxicab was not insured for PIP coverage and, as such, was "uninsured" within the meaning of IN § 19-505(c)(1)(ii). Thus, the Court of Appeals concluded that State Farm properly denied Bundu-Conteh's PIP claim, as Bundu-Conteh was not entitled to PIP coverage and benefits for the injuries that he sustained while driving the taxicab.

National Union Fire Insurance Company of Pittsburgh, PA v. Fund for Animals, Inc., No. 18, September Term 2016, filed January 27, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/18a16.pdf

INSURANCE LITIGATION – UNTIMELY NOTICE – ACTUAL PREJUDICE

Facts:

The Fund for Animals, Inc. ("FFA") was insured under a liability policy issued by its insurer, National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). This case involves three actions: (1) the Endangered Species Act case ("ESA Case"), where FFA and other plaintiffs sued Ringling Brothers and its owner, Feld Entertainment, Inc. ("Feld") for the mistreatment of elephants; (2) the RICO Case, where Feld sued FFA and the other plaintiffs from the ESA Case for paying a witness to testify in order to establish standing to sue Feld in the ESA Case and concealing those payments during discovery; and (3) the Coverage Case, where FFA sued National Union for not providing coverage to FFA when it was sued by Feld in the RICO Case.

An insured breaches an insurance contract when the insured does not provide timely notice of a claim against it to the insurer in accordance with the insurance contract. Under Maryland law, § 19-110, an insurer may disclaim coverage where the insured breaches the insurance policy, so long as the insurer can establish by a preponderance of the evidence that the breach results in actual prejudice to the insurer.

Held: Affirmed.

The actual prejudice must be a consequence of the breach. The actual prejudice element requires that the harm be more than possible, hypothetical, speculative, or conjectural. This Court has found actual prejudice in instances where the insured's breach has: precluded the insurer from establishing a legitimate jury issue or presenting potentially outcome-determinative evidence, hampered the insurer from presenting a credible defense, or impeded an insurer's right to involvement or participation in the litigation.

The RICO Case was stayed pending the outcome the ESA Case. The stay was lifted after judgment was granted in favor of the defendant, Feld, in the ESA Case. The judge in the ESA Case made several adverse findings against the plaintiffs and FFA. The findings in the ESA Case were adverse to FFA and could have been used against it in the RICO case; thus, prejudicing FFA's insurer, National Union. However, although notice of the RICO claim was late under the policy, National Union, at best, could have "monitored" the ESA Case and could not have intervened in, impacted, or influenced the ESA Case. Moreover, National Union was

notified of the RICO Case before settlement, mediation, or a trial had taken place in the RICO action. Therefore, late notification of the RICO Case was not prejudicial to National Union. Accordingly, as a matter of law, National Union was not prejudiced in investigating, settling, or defending the RICO claim as a result of any delay in receiving notice of claims brought against the insured because National Union had no right to intervene in the ESA Case or affect its outcome.

Afshin Attar, et al. v. DMS Tollgate, LLC, et al., No. 12, September Term 2016, filed January 23, 2017. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2017/12a16.pdf

ZONING AND PLANNING – FINDINGS, REASONS, CONCLUSIONS, MINUTES OR RECORDS

ZONING AND PLANNING – PRESUMPTIONS AND BURDENS OF PROOF

Facts:

In October 2012, William and Mary Groff, the property owners, and Respondent, DMS Tollgate, LLC (collectively "Applicants") applied for a Petition for a Special Exception pursuant to the Baltimore County Zoning Regulations ("BCZR"), to operate a fuel service station with a convenience store. The petition requested that Tollgate be permitted to construct a Wawa on an 8.51 acre property known as 10609 Reisterstown Road ("the property"). The property is zoned as BL-AS, or Business Local with Automotive Services. The property is bordered by Reisterstown Road, Groff Lane, and the Gwynns Falls stream.

The Office of Administrative Hearings ("OAH") conducted a hearing. Applicants were present, and Afshin Attar, Ashkan Rahmanattar, Malik Imran, and Perry S. Crowl (collectively "Protestants") attended in opposition. Witnesses for the Protestants testified at the hearing as to how the proposed Wawa would cause traffic congestion, a harmful environmental impact, and a detrimental effect upon the economic stability of the neighborhood. In its Opinion and Order dated October 31, 2013, OAH found that "these are impacts that are inherent in the operation of a gasoline/convenience store[,]" and granted the Petition with conditions.

The Protestants appealed to the Board of Appeals for Baltimore County ("the Board"), which granted the Special Exception following a *de novo* evidentiary hearing with the same conditions as those imposed by the Administrative Law Judge.

The circuit court affirmed the decision of the Board on December 19, 2014. Thereafter, the Protestants appealed to the Court of Special Appeals. In an unreported opinion, the Court of Special Appeals affirmed. Thereafter, a Petition for Writ of Certiorari was filed by the Protestants.

Held:

The Court of Appeals looked to its decision in *Alviani v. Dixon*, 365 Md. 95, 775 A.2d 1234 (2001) and held that the description of the neighborhood impacted by the special exception must be precise enough to enable a party or appellate court to comprehend the area that the Board

considered. Precision is determined through a review of the evidence in the record describing the impact on the surrounding properties, as referenced within the Board's opinion. In the case at bar, the Board's opinion referenced ample evidence of record for the Court of Appeals to appreciate the area considered by the Board.

The Protestants further contended that the Court of Appeals requires a delineation of the neighborhood in rezoning matters, and accordingly, this same requirement should be extended to apply in special exception cases. The Court of Appeals noted that a special exception is presumed to be in the interest of the general welfare, and therefore a special exception enjoys a presumption of validity. *Schultz v. Pritts*, 291 Md. 1, 11, 432 A.2d 1319, 1325 (1981). Conversely, in the rezoning context, there is a strong presumption in favor of the original zoning, and a heavy burden upon the party seeking a rezoning. *Border v. Grooms*, 267 Md. 100, 110, 297 A.2d 81, 86 (1972). Given these conflicting presumptions, our requirement for a precise definition of the neighborhood within rezoning matters does not extend to special exception cases.

The Protestants argued that the Board of Appeals erred when it assigned the burden of proof to the Protestants and concluded that the Protestants' evidence did "not rebut the presumption of validity of the Special Exception use in this case." The Court of Appeals disagreed. While an applicant for a special exception bears both the burden of persuasion and of production, the concurrent presumption in favor of a special exception applicant is not a mutually exclusive evidentiary burden. In the case at bar, the Protestants did not set forth sufficient evidence to indicate that the proposed fuel service station would have any adverse effects above and beyond those inherently associated with such use under the *Schultz* standard. 291 Md. at 11, 432 A.2d at 1325. The Board simply stated that, in light of the Applicants having presented sufficient evidence demonstrating compliance with BCZR § 502.1 and the general presumption of validity enjoyed by special exception uses, the evidence as a whole did not warrant denial of the petition for the special exception

The Protestants next argued that they presented evidence generating a genuine question of fact as to whether the special exception will create congested roads per BCZR § 502.1(B), and that it will have detrimental environmental and economic impacts per BCZR § 502.1(A). Pursuant to the *Schultz* special exception test, the Protestants did not present "facts and circumstances [pertaining to congestion in the roads, streets, or alleys] that show that the particular use proposed at the particular location proposed would have any adverse effects *above and beyond those inherently associated with such a special exception use*[.]" 291 Md. at 15, 432 A.2d at 1327 (emphasis added). Thus, the Protestants did not sufficiently rebut the presumption of validity under *Schultz*.

The Protestants provided evidence that the Gwynns Falls floodplain may be impacted by the construction of the Wawa. Tollgate was not prevented by the BCZR from proceeding with the request for the Special Exception before receiving approval for the proposed floodplain relocation. The Board did not render, nor was it required to make, a factual conclusion on this issue, and the Court of Appeals could not arrive at such a conclusion. Thus, there was no error from the Board for the Court of Appeals to review on this issue.

Lastly, Protestants argued that the Wawa will negatively impact the economic stability of the neighborhood, as the addition of a sixth gas station in the area may result in one of the five existing gas stations going out of business. The Court of Appeals recognized its holding in *Kreatchman v. Ramsburg*, which stated that "prevention of competition is not a proper element of zoning." 224 Md. 209, 219, 167 A.2d 345, 351 (1961) (citations omitted). The economic effects of zoning should be considered only as they affect the general welfare. *Id.* at 222, 167 A.2d at 352. The speculative testimony provided by the Protestants as to the increase in supply in excess of demand within the fuel service station market failed to rebut the presumption of validity under *Schultz*.

COURT OF SPECIAL APPEALS

Schneider Electric Buildings Critical Systems, Inc. v. Western Surety Company, No. 20, September Term 2015, filed November 30, 2016. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2016/0020s15.pdf

CONTRACT LAW – ARBITRABILITY – PERFORMANCE BONDS

Facts:

Schneider Electric Buildings Critical Systems, Inc., appellant, entered into a "Master Subcontract Agreement" ("MSA") with a subcontractor, National Control Services, Inc. ("NCS"), the purpose of which was to enable Schneider Electric, "from time to time," to "engage the services of [NCS] to provide labor, material, equipment and services . . . in connection with construction projects," and its terms were to cover all future subcontracts between them. The MSA included, among its terms, a mandatory arbitration clause. Approximately one year after the MSA was formalized, Schneider Electric was awarded a subcontract to provide its services for the construction of a medical research facility at Aberdeen Proving Ground in Harford County, Maryland. Several months later, Schneider Electric, pursuant to the MSA, hired NCS as a subcontractor for that same construction project.

The subcontract between Schneider Electric and NCS provided, among other things, that NCS would be paid periodically, "in installments as the Work progresses"; and furthermore, that subcontract required NCS to furnish a performance bond, designating Schneider Electric as the obligee, for 100 per cent of the "Subcontract value," that is, $2,050,000. NCS obtained that performance bond from Western Surety Company, appellee. The bond, patterned after American Institute of Architects ("AIA") form A312, bound Western Surety and NCS to Schneider Electric "for the performance of the Construction Contract," which was incorporated by reference into the performance bond; and furthermore, the term "Construction Contract" was defined to include the subcontract between Schneider Electric and NCS, which, in turn, included the MSA, with its mandatory arbitration clause.

Subsequently, a payment dispute arose between Schneider Electric and NCS, and NCS ultimately ceased work on the project, prior to its completion. Schneider Electric filed a demand for arbitration, with the American Arbitration Association, naming NCS as the sole respondent and claiming damages in the amount of $1,473,100 as well as attorneys' fees, interest, and costs,

and later amended that demand, to include Western Surety as a co-respondent. According to Schneider Electric, the incorporation by reference provision in the performance bond thereby bound Western Surety to the arbitration clause in the MSA. Disagreeing with that contention, Western Surety filed a petition, in the Circuit Court for Howard County, seeking both a stay of arbitration and a declaratory judgment that it was not bound by the arbitration provision and that its "suretyship defenses" against Schneider Electric must be litigated in a court proceeding.

The parties eventually agreed to a transfer of the case to the Circuit Court for Harford County, which ultimately granted partial summary judgment in favor of Western Surety, granting Western Surety's request for a stay of arbitration. Schneider Electric then filed an interlocutory appeal, as permitted under the Maryland Uniform Arbitration Act. Meanwhile, during the pendency of the appeal, arbitration continued between Schneider Electric and NCS, and the arbitrator ultimately ruled in favor of Schneider Electric, awarding it a total of $1,653,924.21 in damages, attorneys' fees, arbitrator's fees, and costs that Schneider Electric had incurred.

Held: Affirmed.

The Court of Special Appeals first addressed a motion to dismiss on the grounds of mootness, in light of the arbitral award in favor of Schneider Electric, and held that, because it remained an open question whether an action by Schneider Electric to collect from Western Surety, under the performance bond, must be referred to arbitration, the appeal was not moot.

On the merits, the Court of Special Appeals first determined that the issue before it, whether the incorporation by reference provision in the performance bond, without more, evinced an intent by Western Surety to be bound by the arbitration clause in the MSA, was a question of Maryland contract law, not the federal common law of arbitrability. The appellate Court then held that, under Maryland contract law, the performance bond's incorporation by reference of the MSA did not evince an intent, by Western Surety, to be bound by the MSA's arbitration clause, but rather, simply defined the extent of the surety's obligation to ensure that its principal, NCS, completed the work it was contractually obligated to "perform" for Schneider Electric. Furthermore, the A312 performance bond included a provision, evincing an intent to litigate any disputes arising under the bond.

In re: Miscellaneous 4281, No. 724, September Term 2016, filed December 2, 2016. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2016/0724s16.pdf

GRAND JURY – SUBPOENAS – SELF-INCRIMINATION

Facts:

Prince George's County moved to quash a grand jury subpoena *duces tecum* that requested, *inter alia*, production of witness statements and an internal report that the County Fire Department created while investigating allegations that two volunteer firefighters assaulted two career firefighters. In the Circuit Court for Prince George's County, the County Attorney argued that the report and statements must be suppressed because the firefighters' supervisors had coerced the statements under threat of removal from office. The circuit court granted the County's motion, and the State appealed the suppression order.

Held: Reversed.

The main issue on appeal was whether the grand jury's subpoena of documentary evidence containing statements that a public employer coerced from its employees violates the Fifth Amendment privilege against self-incrimination. In *Garrity v. New Jersey*, the Supreme Court held that a public employer may compel its employees to cooperate with internal affairs investigations, but that the government may not later use those coerced, self-incriminating statements against the speaker in a "criminal proceeding." 385 U.S. 493, 500 (1967). To decide the issue presented in this case, the Court of Special Appeals explored the grand jury's historical structure and function and determined that a grand jury is not a criminal proceeding or criminal case within the meaning of *Garrity* or the Fifth Amendment more broadly. The Court ruled that there is no constitutional injury when the government compels from its employees statements against the employees' self-interest unless and until the government uses those statements in a "criminal proceeding." Thus, a grand jury's subpoena of internal affairs documents containing previously-coerced statements does not violate the Fifth Amendment's Self-Incrimination Clause.

In the event that the grand jury returns an indictment, the Court explained, the individual firefighters may assert their Fifth Amendment privilege at the motion to suppress stage prior to trial. The circuit court's order quashing the subpoena was reversed as error.

Paul Howard, Jr. v. State of Maryland, No. 747, September Term 2015, filed January 31, 2017. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2017/0747s15.pdf

PRETRIAL MOTION TO INSPECT PRIVATE RESIDENCE WHERE THE CRIMES WERE COMMITTED THAT IS NOT IN THE POSSESSION OR CONTROL OF THE STATE – RULE 4-263 AND RULE 4-264 DISCOVERY IN CRIMINAL CASES – DUE PROCESS RIGHT TO PRETRIAL DISCOVERY OF RELEVANT AND MATERIAL EVIDENCE NECESSARY TO PRESENT A DEFENSE – THRESHOLD SHOWING OF NEED FOR DISCOVERY- RIGHT OF PRIVACY OF OWNER OR OCCUPIER OF RESIDENCE.

Facts:

The defendant entered the house of an elderly woman by trickery, attacking her, stealing money, and taking steps (ultimately unsuccessful) to prevent her from seeking help. Several months after the defendant was criminally charged, defense counsel filed a motion to inspect the victim's house, which was in the possession and control of the victim and her son. The State opposed the motion, and the circuit court denied it on the ground that it lacked authority to grant it. The defendant was convicted, and appealed on several grounds, including that the circuit court had erred in denying his motion to inspect the house.

Held: Affirmed.

In a criminal case in the circuit court, pre-trial discovery may be obtained when permitted by the common law, by statute, by court rule, or when constitutionally necessary. *Cole v. State*, 378 Md. 42, 57-58 (2003). Under Maryland common law, courts in criminal cases do not have the inherent authority to order pretrial discovery. Rule 4-263, which confers the right to pretrial discovery between parties to a circuit court criminal case, only requires the State to produce material that is in its possession or control. Accordingly, that rule did not apply. Rule 4-264 provides that a person, not necessarily a party, may be ordered to produce material, including "tangible things," for inspection before trial. That rule was not invoked and would not apply in any event because the house is not a "tangible thing" within the meaning of the rule. Thus, the court only could order the victim and her son to open the house for inspection by the defense before trial if necessary to protect a constitutional right of the defendant.

Even assuming there is a constitutionally protected due process right to obtain before trial relevant and material evidence necessary to present a defense, the court only could order the requested inspection upon a showing of need and, if that showing was made, upon a further showing that the need outweighed the privacy rights of the victim and her son. The defense did

not make the required threshold showing of need, however, and therefore the court did not err in denying the motion.

Nicole Pilkington v. Roman Pilkington, II, No. 2766, September Term 2015, filed November 29, 2016. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2016/2766s15.pdf

FAMILY LAW – UNIFORM CHILD CUSTODY AND JURISDICTION ACT

Facts:

The appellee, Roman Pilkington, II, met the appellant, Nicole Pilkington, a German national, while he was stationed with the Army in Germany, where they married and reared two children. They moved together to Colorado, but later divorced. The Colorado order of divorce and custody granted primary physical custody of their son, R.P., to Ms. Pilkington; granted visitation of R.P. to Mr. Pilkington; and required court approval for either party to relocate R.P., unless the parties agreed to the relocation. Ms. Pilkington received full custody of her daughter, B.P., who was not Mr. Pilkington's biological child.

In early 2014, Ms. Pilkington unilaterally relocated to Germany with both children. Over a year later, Mr. Pilkington brought the children to Maryland for a two-month vacation. However, Mr. Pilkington kept the children in Maryland and filed ex parte petitions for emergency custody of the two children in the Circuit Court for Harford County, pursuant to Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), §§ 9.5-204, 303, and 304, provisions of Maryland's Uniform Child Custody and Jurisdiction Act ("Maryland UCCJEA"). After a hearing on Mr. Pilkington's emergency petition, the court ordered that Mr. Pilkington return both children to their mother in Germany until the court could conduct a full trial. When it came time for trial, however, Ms. Pilkington had broken off all communication and did not return with the children for trial. The circuit court heard argument from Mr. Pilkington and then granted sole legal and primary physical custody of R.P. to Mr. Pilkington. Ms. Pilkington appealed from the order granting custody of R.P. to Mr. Pilkington.

Held: Vacated and remanded.

The Court of Special Appeals observed that when a parent or guardian brings an action in Maryland for the custody or visitation of a child and another state has previously issued an operable custody order, the Maryland UCCJEA limits the circumstances in which a Maryland court may assert jurisdiction to modify that existing custody order. The Court held that the circuit court exceeded the jurisdictional restraints imposed under the Maryland UCCJEA by entering an order that modified the Colorado order when Maryland was not the child's home state and there was no other jurisdictional basis to modify that order under FL § 9.5-203.

Although the Maryland UCCJEA was adopted to deter the unilateral removal of children from the jurisdiction, the Act imposes limits on a trial court's traditional subject matter jurisdiction to issue orders affecting a resident-parent's custody rights. Those restrictions limit a Maryland court's authority to affect custody rights of a child when Maryland does not qualify as the child's "home state" within the meaning of the Maryland UCCJEA—the state in which the child has lived for the six months prior to the filing of the custody action at issue. The Court ruled that the Maryland UCCJEA considers foreign countries to be "states" for the purpose of determining "home state" jurisdiction, and that a jurisdiction can gain "home state" status even if the child is brought to the state in violation of a valid custody order. Consequently, the Court held that Maryland is not the "home state" of a child where the child resided with one parent in Germany for nearly 19 months prior to residing with the other parent in Maryland for three months.

The Court held, however, that the circuit court had authority under Subtitle 3 of the Maryland UCCJEA to enforce the already-existing Colorado order, which Ms. Pilkington had likely violated. Accordingly, the Court vacated the circuit court's order modifying the Colorado order, and remanded the case with instructions that the circuit court limit its order to its enforcement authority contained within Subtitle 3 of the Maryland UCCJEA (giving Maryland courts authority to: enforce foreign custody orders, FL § 9.5-303; temporarily enforce visitation rights, FL § 9.5-304, and; enforce a judgment as if a Maryland court issued the initial order under FL § 9.5-306 after parents or guardians register the foreign state's custody determinations in Maryland under FL § 9.5-305.)

Piney Orchard Community Association, et al. v. Maryland Department of the Environment, et al., No. 1124, September Term 2015, filed December 1, 2016. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2016/1124s15.pdf

ZONING AND LAND USE – SEPARATE ROLES OF THE MARYLAND DEPARTMENT OF THE ENVIRONMENT AND COUNTIES

Facts:

On November 24, 2014, the Maryland Department of the Environment ("MDE" or "the Department") issued a refuse disposal system permit to Tolson and Associates, LLC ("Tolson"). The Tolson Rubble Landfill permit ("the permit") authorized Tolson to construct and operate the Tolson Rubble Landfill ("Tolson Landfill") located on Capital Raceway Road in Anne Arundel County, Maryland.

A rubble landfill site, like the one Tolson proposed to build, is a "sanitary" landfill that accepts only trees, land clearing, construction, or demolition debris and requires a permit from MDE. See EN § 9-210(c)(2). Once an application is submitted, MDE begins a complex review that proceeds in three "phases." At the completion of each phase, the applicant must submit a report, which MDE's Solid Waste Management Program must approve before the next phase begins. Phase 1 of this process primarily entails a preliminary review of the application and the site itself and an opportunity for public comment. See COMAR 26.04.07.13-.18; EN § 9-210(a).

Tolson applied for the Refuse Disposal Permit on July 31, 2002. Pursuant to the requirements of EN §9-210(a)(3), the County evaluated the site and determined that it complied with local zoning and land use laws. A letter from the County confirmed that "Tolson and Associates, L.L.C. proposed Rubble Landfill in the Crofton Area of Anne Arundel County meets all applicable zoning requirements and conforms to the current Solid Waste Management Plan."

On December 19, 2014, Piney Orchard Community Association, et al. ("Piney Orchard") filed a petition for judicial review in the Circuit Court for Anne Arundel County. Piney Orchard challenged MDE's decision to grant the permit to Tolson on the grounds that MDE did not comply with EN § 9 210(a)(3)(i). Piney Orchard argued that the County's letter was not valid because it did not confirm that the site complied with county zoning in 2014, when MDE issued the permit. Additionally, Piney Orchard pointed to two local zoning laws to support its claim that the site failed to comply with County zoning and land use laws, and that this lack of compliance rendered the County's letter invalid.

The circuit court affirmed MDE's decision to grant the permit on the grounds that MDE fully complied with § 9 210(a)(3)(i). Further, it found that the two local zoning laws raised by Piney Orchard did not apply to the Tolson site. Piney Orchard timely noted an appeal to this Court.

Held: Affirmed.

The Court concluded that EN § 9-210(a)(3) does not require MDE to obtain a written statement from the County within a certain proximity of time to the date it approves the permit. Further, the letter does not become invalid because a particular period of time has passed or local zoning laws have changed since MDE received the County's written statement.

Pursuant to EN § 9-210(a), after MDE reports the findings of its preliminary Phase 1, it must cease processing an application until the County has completed its review site and "provided to the Department a written statement that the refuse disposal system . . . [m]eets all applicable county zoning and land use requirements . . . ." EN § 9 210(a)(3)(i). The plain language of EN § 9-210 makes clear that the three required steps must be followed in a defined sequence. EN § 9-210(a) and (b). Indeed, under § 9-210(b), after the first two requirements of § 9 210(a) are met, MDE must stop processing the application until it receives the County's written statement.

The Court agreed with the circuit court that § 9-210 does not require a second or "follow up" statement from the County, nor does it require MDE to do any fact-finding on its own. Instead, MDE must follow a particular sequence of steps, during which the written statement of compliance from the County is required only once -- near the end of Phase 1. See EN § 9-210(a)(3)(i). Based on the plain language of the statute, MDE's sole obligation related to ensuring a site's compliance with local zoning laws is to stop processing an application until it receives a written statement from the County confirming that the site meets all applicable county zoning and land use laws.

The Court held that the circuit court did not err in finding that MDE met the requirements of EN § 9-210(a)(3)(i) when it received the County's written statement during Phase 1 of the application process. MDE therefore had a substantial basis for approving the Tolson permit.

The Court agreed with the circuit court that, not only would subsequent changes to local zoning and land use laws fail to render a County's written statement invalid, but the two county zoning laws raised by Piney Orchard before the circuit court did not apply to the Tolson site. The Court's holding that MDE's only role under EN § 9-210(a)(3)(i) in determining a site's compliance with local zoning and land use laws is to receive a written statement from the County resolved the issue of whether a change to local zoning laws could invalidate the County's written statement. Further, the circuit court did not err when it found that, even if subsequent changes to local zoning laws could invalidate the County's written statement to MDE, the two bills that Piney Orchard raised did not apply to the Tolson site.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated January 12, 2017, the following attorney has been disbarred by consent:

JONATHAN KENNETH FRIEDLANDER

*

By an Order of the Court of Appeals dated January 12, 2017, the following attorney has been placed on inactive status by consent:

ROBERT G. LIPMAN

*

By an Order of the Court of Appeals dated January 13, 2017, the following attorney has been indefinitely suspended:

BRANDON DAVID ROSS

*

JUDICIAL APPOINTMENTS

*

On December 7, 2016, the Governor announced the appointment of **JOHN STANLEY NUGENT** to the Circuit Court for Baltimore City. Judge Nugent was sworn in on January 1, 2017 and fills a new judgeship created by the General Assembly.

*

On December 7, 2016, the Governor announced the appointment of **JENNIFER BRIDGET SCHIFFER** to the Circuit Court for Baltimore City. Judge Schiffer was sworn in on January 3, 2017 and fills the vacancy created by the retirement of the Hon. John. A. Howard.

*

On December 7, 2016, the Governor announced the appointment of **WILLIAM ROBERT GREER, JR.** to the Circuit Court for Charles County. Judge Greer was sworn in on January 6, 2017 and fills a new judgeship created by the General Assembly.

*

On December 7, 2016, the Governor announced the appointment of **PAUL W. ISHAK** to the Circuit Court for Harford County. Judge Ishak was sworn in on January 4, 2017 and fills a new judgeship created by the General Assembly.

*

On December 7, 2016, the Governor announced the appointment of **WILLIAM ANTOINE SNODDY** to the Circuit Court for Prince George's County. Judge Snoddy was sworn in on January 13, 2017 and fills the vacancy created by the elevation of the Hon. Melanie M. Shaw Geter to the Court of Special Appeals.

*

On December 21, 2016, the Governor announced the appointment of **SHERRI DEBRA KOCH** to the District Court of Maryland – Montgomery County. Judge Koch was sworn in on January 11, 2017 and fills the vacancy created by the retirement of the Hon. William G. Simmons.

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On December 21, 2016, the Governor announced the appointment of **MARINA LOLLEY SABETT** to the District Court of Maryland – Montgomery County. Judge Sabett was sworn in on January 20, 2017 and fills the vacancy created by the elevation of the Hon. Jeannie E. Cho to the Circuit Court for Montgomery County.

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The full text of Court of Special Appeals unreported opinions can be found online:

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

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