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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Jude Ambe, AG No. 6, September Term 2011, filed February 22, 2012. Opinion by Cathell, Dale R. (Retired, Specially Assigned)

Harrell and Barbera, JJ., concur and dissent.

<http://mdcourts.gov/opinions/coa/2012/6a11ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS

Facts:

Jude Ambe, a member of the bar of the State of New York and of the federal bar, opened an office in Maryland in the summer of 2009 to practice immigration law. Initially, his letterhead and/or business cards only indicated that he was practicing “Immigration Law.” There were no disclaimers on any of his business or advertizing documents that he was not licensed to practice law in the state of Maryland. Sometime in the next six or seven months he, or an employee in his office, wrote letters to insurance companies in behalf of four of his immigration clients seeking settlement of their tort claims. In at least one such case a small settlement was realized. At no time did he enter his appearance in any court proceedings in Maryland nor did he serve as a screener for attorneys licensed to practice in Maryland. When contacted by Bar Counsel his position was that he thought he could correspond by letter as to the tort issues in behalf of persons he was representing in immigration matters.

It took several contacts with Bar Counsel for Ambe to finally correct his documents to the satisfaction of Bar Counsel. However, in writing to the four clients notifying them that he could not represent them in the tort matters, Ambe, or Ambe’s representative, utilized a prior incorrect letterhead.

Bar Counsel filed a complaint alleging several violations of the Maryland Rules of Professional Conduct and a violation of Business, Occupations, and Professions Article 10-601 (a) (which led to allegations of a violation of MRPC 8.4(b) because a violation of BOP 10-601 is a criminal offense). All of the alleged violations of the Rules and of BOP 10-601 were directly related to Ambe’s unauthorized practice of law.

Held:

The Court accepted the findings of the hearing judge that most of the alleged violations had, in fact, occurred, and moved on to the issue of sanctions. For comparison purposes the Court primarily addressed three cases: *AGC v. Brown*, 353 Md. 271 (1999), *AGC v. Harris-Smith*, 356 Md. 72 (1999), and *AGC v. Barneys*, 370 Md. 566 (2002).

In *Barneys* the attorney while applying for admission to the Maryland Bar actually entered his appearance in five court cases, made a misrepresentation to a bail bondsman in respect to protecting that bondman's interests when he had no power or right to protect that interest, had also not indicated on the appropriate documents that he was not licensed to practice law in Maryland and lied to Bar Counsel about the number of Maryland clients he was representing. *Barneys* was disbarred. In *Brown* the attorney entered into a Maryland law partnership with a lawyer (Winter) he knew was not licensed to practice in Maryland. The appropriate documentation of the law firm contained no disclaimer language indicating that Mr. Wilder was not licensed to practice in Maryland. *Brown* then assisted Winter in practicing in Maryland, permitting Winter to appear before a Maryland Administrative body in behalf of Maryland clients, and affixing a signature block for Winter in Maryland court pleadings. Additionally, *Brown* had previously been sanctioned by the federal court and paid a sanction of \$14,000. There was also another grievance matter in Maryland involving *Brown* and *Brown* had been previously suspended in the District of Columbia and previously been suspended in Maryland relating to other issues. *Brown* was suspended indefinitely with the right to reapply after one year. In *Harris-Smith*, the attorney was not admitted in Maryland but, nonetheless, entered into a partnership with a Maryland attorney and later into another partnership which included Maryland lawyers. The period of time involved exceeded five years. In both instances the office location was in Maryland. While she attempted to limit her practice to bankruptcy matters only, she operated as a screener for the firm. Initially, four complaints were filed against her by clients and later Bar Counsel filed a complaint alleging the unauthorized practice of law. As in the other cases the appropriate documentation contained no disclaimer as to the fact that *Harris-Smith* was not licensed to practice law in Maryland. Her name was included in the firms' advertisements and other papers as to the general practice of law without any disclaimer as to her limitations. *Harris-Smith* was suspended for thirty days.

In considering the sanction in *Ambe*, and comparing the conduct in the *Barneys*, *Brown*, and *Harris-Smith* cases, the Court determined that a reprimand was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Darlene H. Smith, AG No. 10, September Term 2011, filed March 19, 2012. Opinion by McDonald, J.

<http://mdcourts.gov/opinions/coa/2012/10a11ag.pdf>

ATTORNEY DISCIPLINE – APPROPRIATE SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission charged Darlene H. Smith with violating several provisions of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), including MLRPC 5.5(a) (unauthorized practice of law), 8.4(a) (misconduct involving violation of the rules), 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (misconduct prejudicial to the administration of justice).

Ms. Smith was admitted to practice law in Maryland in June 1997. She was also admitted to practice before the United States District Court for the District of Columbia, though she was not licensed to practice in the District of Columbia. While a member of the Maryland bar, she practiced law at a number of firms in the District of Columbia and in Maryland. In 2009, Ms. Smith applied for admission to the bar for the District of Columbia. In response to an inquiry by the Admission Committee regarding D.C. Rule 49 (concerning the unauthorized practice of law), Ms. Smith fabricated and submitted exhibits with her bar application that included material misrepresentations of her compliance with D.C. Rule 49. Subsequently, after she consulted with the general counsel of her firm, Ms. Smith wrote the Admission Committee a letter in which she admitted altering the documents.

Pursuant to Maryland Rule 16-752, the case was referred to Judge Philip T. Caroom of the Circuit Court for Anne Arundel County to conduct an evidentiary hearing and make findings of fact and conclusions of law. Judge Caroom found violations of MLRPC 8.4(a), 8.4(c), and 8.4(d). No exceptions were filed.

Held:

Ms. Smith violated MLRPC 8.4(a), 8.4(c), and 8.4(d) by fabricating evidence designed to mislead the D.C. bar examiners, and the appropriate sanction is disbarment.

The Court agreed with Judge Caroom's conclusions and accepted his findings of fact. The Court explained that an applicant's fabrication of evidence designed to mislead a bar examiner is prejudicial to the administration of the laws governing the practice of law. An attorney who permits false or fraudulent documents to be executed and filed on the public record or falsely certifies or signs documents violates MLRPC 8.4(c) and (d). Under MLRPC 8.4(a), it is professional misconduct for a lawyer to violate the MLRPC.

The Court explained that the appropriate sanction is ordinarily disbarment when an attorney submits fabricated evidence to cover up a violation of disciplinary rules. The Court did not find persuasive as mitigation that Ms. Smith had no prior pattern of misconduct, had not appeared in court actions in violation of the District of Columbia rules, had resigned from her firm, had cooperated, and was very embarrassed. The Court emphasized the carefully contrived effort that went into the misrepresentation, the materiality of the misrepresentation to the inquiry of the Admission Committee, and the fact that Ms. Smith was an experienced member of the bar.

Leon Dulyx a/k/a Leon Duylx v. State of Maryland, No. 54, September Term 2011, filed March 21, 2012. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2012/54a11.pdf>

EVIDENCE – HEARSAY – FORMER TESTIMONY EXCEPTION

Facts:

On May 24, 2008, two armed men robbed the GameStop video game store at 2436 North Charles Street in Baltimore City. On their way out, the robbers abducted 18-year-old DeAndre McIntyre and dragged him into the back seat of a gray Honda Accord. The robbers joined McIntyre in the back seat, while a third man (Leon Dulyx, Petitioner) drove the Honda away from the scene. McIntyre was later forced out of the car at gunpoint. Several days later, Detective Kenneth Richard interviewed McIntyre and presented him with a photographic array of six images, including an image of Petitioner. McIntyre initially was unsure if any of the photos resembled the driver, since from the back seat he only saw the driver's light-brown facial complexion and braided hair, but he then selected Petitioner's image. Petitioner was arrested and later charged with armed robbery. McIntyre later recanted his identification of Petitioner, but, two weeks later, he withdrew his recantation.

Petitioner moved to suppress the photographic identification on due process grounds. While examining McIntyre at the hearing on the motion, Petitioner's counsel asked for specific descriptive details about the armed robbers. The suppression court cut off the questioning, stating "No depositions. Focus right on the suppression." The suppression court also admonished Petitioner's counsel, stating "it's fair to respect the State's objection [as to scope] and go to the photos." The remainder of the examination related solely to McIntyre's selection of Petitioner's photo. Petitioner did not ask about McIntyre's previous recantation of the identification or his subsequent withdrawal of that recantation. Petitioner's motion to suppress the identification was denied.

At Petitioner's trial McIntyre failed to appear. The court declared McIntyre unavailable and admitted his suppression hearing testimony into evidence as "former testimony" pursuant to Maryland Rule 5-804(b)(1). None of the other witnesses provided direct eyewitness testimony linking Petitioner to the robbery and abduction. The jury found Petitioner guilty.

Petitioner appealed the judgments of conviction to the Court of Special Appeals, arguing that the Circuit Court erred under Maryland Rule 5-804(b)(1) and the Sixth Amendment's Confrontation Clause in allowing the State to introduce McIntyre's suppression hearing testimony at trial. The Court of Special Appeals affirmed the judgments. Petitioner filed a petition for writ of certiorari, which this Court granted.

Held: Reversed.

Reversed and remanded for a new trial. The Court of Appeals held that McIntyre's suppression hearing testimony was inadmissible under the hearsay "former testimony" by an unavailable witness, because Petitioner was not given a "full and fair opportunity" to cross-examine the witness as required by the Maryland Rule 5-804(b)(1). Rule 5-804(b)(1) allows for the admission of a prior statement made under oath by an unavailable witness so long as the party against whom the statement is offered had an "opportunity" and "similar motive" to develop the testimony of the witness when the prior statement was made, by direct, cross- or redirect examination.

The factual circumstances gave rise to a number of potential infirmities in McIntyre's testimony. The suppression court, however, foreclosed defense counsel from asking questions about those infirmities. The court's exhortations, "no depositions. Focus right on the suppression" and "it's fair to respect the State's objection and go to the photos", communicated a restriction on the universe of questions available to Petitioner. The court's restrictions prevented Petitioner's counsel from having a "full and fair opportunity" to cross-examine McIntyre. The suppression court's restrictions on Petitioner's examination of McIntyre also effectively prevented Petitioner from questioning McIntyre about his attempted recantation.

The trial court's error in admitting McIntyre's testimony was not harmless. The Court of Appeals, applying the harmless error rule set forth in *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976), held that only McIntyre observed the driver of the getaway vehicle, and only his suppression hearing testimony, wrongly admitted at trial, provided the jury with a direct link between Petitioner and the robbery and abduction.

Elliot McClain v. State of Maryland, No. 17, September Term 2010, filed March 21, 2012. Opinion by Barbera, J.

Bell, C.J., dissents.

<http://mdcourts.gov/opinions/coa/2012/17a10.pdf>

EVIDENCE – HEARSAY – HEARSAY EXCEPTIONS – PRIOR STATEMENTS BY WITNESSES – PRIOR INCONSISTENT STATEMENTS

CRIMINAL PROCEDURE – TRIAL – TRIAL AND SENTENCING – JURY REVIEW OF EVIDENCE

Facts:

In the early morning hours of June 1, 2004, Tidell Harris (“victim”) was shot and killed outside Sooner’s Bar. The next day, in an unrelated drug arrest, the arrestee, Kerwayne Stanton, informed police that he had witnessed Harris’s shooting the previous night. Based on the information Stanton supplied, police prepared two photographic arrays in which Stanton identified Kevin Fletcher and Elliot McClain, Petitioner, as the two gunman who shot Harris. Upon questioning, Fletcher gave a recorded statement in which he implicated himself and McClain in the shooting of the victim. Several months later, police conducted an audiotape interview of Sheila Billings, a server at Sooner’s Bar, where the two suspects and victim spent time on the evening in question around the time of the murder. According to Billings, on the night of the murder, a girl ran into the bar and said that the victim had been shot outside. In her interview, Billings stated that Petitioner had left the bar before the girl came in.

When Billings took the stand at trial, she initially contradicted her recorded interview, stating that Petitioner was still in the bar at the time the girl came in. The State then proceeded to show Billings the transcript of her initial interview to “refresh her recollection.” Defense counsel’s objection to allowing Billings to see the transcript was overruled by the trial court judge. Billings then proceeded to confirm her initial statement, and the tapes of that statement, along with the recorded statements of Fletcher and Stanton, were then sent to the jury room at the beginning of the jury’s deliberations.

The jury found Petitioner guilty of first degree murder, conspiracy to commit murder, and related handgun offenses. He appealed and the Court of Special Appeals affirmed the convictions. Petitioner then petitioned the Court of Appeals for a writ of certiorari, which was granted. He argued that the trial court erred in admitting Billings’s taped statement into evidence under the theory that the statement did not qualify under Maryland Rule 5-802.1(a) as a prior inconsistent statement. He also argued that the court improperly sent to the jury room the audiotaped statements of Billings, Fletcher, and Stanton.

Held: Affirmed.

The Court of Appeals held that the Circuit Court properly allowed the State to admit into evidence the interview transcript used to refresh Billings's recollection of her initial testimony. The Court further held that the Circuit Court properly allowed into the jury room the audiotaped interviews of Billings as well as those of Fletcher and Stanton.

Pursuant to Maryland Rule 802.1(a) a court may admit into evidence audiotaped testimony as a prior inconsistent statement. Even though Billings's prior interview was later confirmed on the stand, the initial confusion could have influenced the jury sufficiently so as to trigger the inconsistent testimony hearsay exception. When a jury is presented with such conflicting testimony from a single witness as existed in this case, courts cannot speculate as to which side of the contradiction the jury will assign greater credibility. It follows that, in this case, the trial court's allowance of the prior statement into evidence provided an additional source from which the credibility of the inconsistent portions of Billings's testimony could be considered. Thus, for the purposes of Maryland Rule 5-802.1(a), Billings's prior statement to police was inconsistent with her initial testimony at trial. The Court need not expressly state on the record the reasoning underlying the Court's admission of the prior testimony under Rule 802.1(a) in order to uphold the admitting into evidence of the testimony. In this case, however, the trial court record indicated an implicit finding by the court of an inconsistency.

The Court further held that the Circuit Court did not err in sending into the jury room the audiotaped statements of Billings, Fletcher and Stanton. The Court reasoned that it did not consider the audiotaped statements "depositions" for the purpose of Maryland Rule 4-326(b), because those statements did not meet the procedural requirements for a deposition as laid out in Maryland Rule 4-261. Furthermore, the Court decided that, under *Adams v. State*, 415 Md. 585, 601 (2010), "[e]xhibits admitted into evidence may go to the jury room absent some specific reason, *i.e.*, good cause, to exclude them." The determination of whether to withhold admitted evidence from the jury for "good cause" is left to the discretion of the trial court and will only be overturned on appeal if the trial court abused that discretion. Because, from the record, it was clear that the trial court considered and reasonably rejected the arguments concerning potential "good cause" for withholding the tapes from the jury, the Court held that the trial court did not abuse its discretion in this matter.

Charles Robert Phillips v. State of Maryland, No. 58, September Term 2011, filed March 15, 2012. Opinion by Wilner., Alan M. (Retired, Specially Assigned).

<http://mdcourts.gov/opinions/coa/2012/58a11.pdf>

CRIMINAL LAW – INTERROGATION – *MIRANDA* WARNINGS

Facts:

Petitioner was arrested on suspicion of involvement in a murder that occurred six days earlier and was taken to a police station for questioning. He was given *Miranda* warnings and agreed to talk with the detective. He was reluctant to talk about the murder, however, so the detective engaged in general conversation and was establishing a rapport with the defendant. After about 45 minutes, another officer barged into the interrogation room and accused, whereupon petitioner asked for counsel. The interrogating detective responded that he could not speak further with petitioner regarding the case but continued some general conversation, including stating that he wanted to hear petitioner's side of the story. He told petitioner that all he had to do was reaffirm that he didn't want counsel. At that point, petitioner agreed to talk and gave a recorded statement, which was admitted into evidence. Petitioner was convicted. The Court of Special Appeals affirmed the conviction.

Held: Reversed.

Under *Edwards v. Arizona*, 451 U.S. 477 (1981), when, in a custodial interrogation, a suspect exercises his right to consult with counsel before enduring further questioning, all interrogation must stop. Under *Rhode Island v. Innis*, 446 U.S. 291 (1980), interrogation may involve more than direct questioning and includes words or actions by the police that they should know are reasonably likely to elicit an incriminating response. Informing a suspect who has asked for counsel that the police would like to hear his side of the story but can't do so unless the suspect waives counsel suffices to constitute the equivalent of a prohibited interrogation. Such a statement suggests to the suspect that the police are trying to be fair and that continued dialog may be helpful, which is rarely the case. The judgment was reversed.

Anthony Grandison v. State of Maryland, No. 117, September Term, 2010, filed February 22, 2012. Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2012/117a10.pdf>

CRIMINAL LAW – RIGHT TO COUNSEL – WAIVER – EVIDENCE – CORRECTING ILLEGAL SENTENCE – CAPITAL SENTENCING

Facts:

Anthony Grandison was convicted in the 1980s of first-degree murder, for hiring a hitman to kill two people, and was sentenced to death. Grandison made various appeals in both state and federal court throughout the 1990s, including a direct appeal, petition for postconviction relief, and a petition for habeas corpus. Most were denied, but a motion for postconviction relief was granted in 1992, and the court ordered a new capital sentencing proceeding. In that proceeding, Grandison was again sentenced to death. Grandison's appeals continued in 1999, when he filed several motions in the Circuit Court for Somerset County, including a motion for a new trial, a motion to correct an illegal sentence, and a pro se motion to open postconviction proceedings. The Circuit Court denied the motions, and the Court of Appeals affirmed the denial in a 2006 opinion.

After that opinion, Grandison filed various motions, which the Circuit Court condensed into four avenues of relief: a motion to reopen postconviction proceedings; a motion to correct an illegal sentence; a motion for a new resentencing hearing; and a motion for a new trial. The Circuit Court denied all the motions. These denials eventually became Questions 2-8 in his appeal to the Court of Appeals.

In February 2007, Grandison was represented by attorneys Gary Proctor and Michael Lawlor, each appointed by the Public Defender. That month, Grandison filed an ex parte motion to withdraw his counsel of record, and he later wrote to the Circuit Court expressing a desire to continue without those attorneys. After a hearing, the Circuit Court allowed Grandison to discharge the attorneys. Another 2008 hearing ensued, in which Grandison made a motion for an evidentiary hearing, which was denied. The court did not hear the other pending motions, instead allowing Grandison additional time to find counsel. When he could not, he filed a pro se motion for appointment of counsel in December 2008. At a hearing on that motion, the Court gave Grandison another 120 days to find counsel. When the deadline passed and Grandison had not secured counsel, the Circuit Court denied his motion to appoint counsel and proceeded on the merits of his motions. This denial of appointed counsel became Question 1 in his appeal to the Court of Appeals.

Held: Affirmed.

Grandison raised nine questions on appeal. On the first, the Court held that Grandison did not have a right to counsel in the collateral motions—the four avenues of relief sought in Circuit Court. The right to counsel does not extend to such motions, either through the Sixth Amendment, the Maryland Declaration of Rights, the Maryland Code, the Maryland Rules, or Maryland case law. Furthermore, the office of the public defender was not required to appoint counsel to represent Grandison throughout collateral, discretionary proceedings extending beyond his trial, especially when Grandison had already fired previously appointed counsel. The Circuit Court has inherent authority as the ultimate protector of a defendant’s rights, but that authority does not transform into an affirmative duty to obtain counsel for a defendant in collateral proceedings, especially when that defendant has already fired appointed counsel.

On Questions 2-4, Grandison sought to reopen his postconviction proceeding, so that the Circuit Court could consider whether the state used a racial motivation in exercising peremptory juror strikes; whether the U.S. Supreme Court’s opinion in *Crawford v. Washington* applied retroactively to cover evidence admitted at Grandison’s trial; and whether Grandison was harmed by the Circuit Court’s premarking of indicators on a sentencing form. The Court held that Grandison had waived his right both to press the claim on juror strikes, and to press his claim on the sentencing form, by not raising them previously. The Court also determined that *Crawford* does not apply retroactively in Maryland.

On Question 5, The Court held that Grandison had previously litigated the admissibility of a particular piece of state’s evidence and that he could not raise the issue again. The Court ruled on Question 6 that Grandison also had a previous opportunity to appeal the reasonable doubt jury instruction, and that he had thus waived the claim. For Question 7, Grandison moved to correct an illegal sentence because the legal status of the death penalty in Maryland is in doubt. The Court held that a motion to correct an illegal sentence is an improper vehicle for such a claim, and affirmed the Circuit Court’s denial of his motion. On the remaining procedural questions raised, the Court held that Grandison had a previous opportunity to raise those issues as well, and could not raise them again.

Ricky Shamar Washington v. State of Maryland, No. 45, September Term 2011, filed March 23, 2012. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2012/45a11.pdf>

CRIMINAL PROCEDURE – VOIR DIRE – WITNESS OCCUPATION QUESTION

Facts:

Based on events occurring on or around October 26, 2007, Petitioner was charged with first degree rape and related offenses. He elected a jury trial to be conducted in the Circuit Court for Harford County. During voir dire of the jury panel, Petitioner requested that the following question be posed by the court: “Would any of you be more or less likely to believe a witness solely by virtue of the witness having served in the military or being employed by the military?” The trial judge denied Petitioner’s request to ask this question. At trial, during cross-examination of the victim, testimony was produced regarding the victim’s former service in the U.S. army and her employment at the time of trial as a civilian at Aberdeen Proving Ground. The State also called as a witness a friend and former co-worker of the victim who had been employed as a civilian at Aberdeen Proving Ground at the time of the incident. Testimony was elicited that this witness and the victim had worked together in the Human Resources Office. At the conclusion of all of the evidence, the jury found Petitioner guilty of first degree rape and related offenses.

Petitioner noted an appeal to the Court of Special Appeals, contending, *inter alia*, that the trial court had abused its discretion in declining to present Petitioner’s proposed voir dire question to the jury panel. In an unreported opinion, the intermediate appellate court concluded that the trial judge had not abused her discretion.

Held: Affirmed.

A potential juror may not give more credence to the testimony of a witness simply because of that witness’s occupation. It is only mandatory for the trial judge to pose the witness occupation voir dire question when it is directly related to the facts and circumstances of the case and a witness will be testifying in his or her official capacity. Otherwise, it is within the sound discretion of the trial judge to determine whether to ask the question to the venire. In this case, there were no witnesses who testified in an official capacity, and the civilian occupations at Aberdeen Proving Ground of several witnesses called by the State were not relevant to the witnesses’ credibility or to the facts before the jury. Thus, the witness occupation voir dire question was not mandatory, and the trial judge did not abuse her discretion in refusing to present it.

Peter Paul Toland, Jr. v. Akiko Futagi, No. 83, September Term 2011, filed March 28, 2012. Opinion by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2012/83a11.pdf>

FAMILY LAW – CHILD CUSTODY – MARYLAND UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Background:

The Maryland Uniform Child Custody Jurisdiction and Enforcement Act, Sections 9.5-101 to 9.5-318 of the Family Law Article (1984, 2006 Repl. Vol.), which is implicated in child custody disputes involving Maryland and another state or country, prescribes that a Maryland court has jurisdiction to entertain a child custody complaint if Maryland is the home state of the child. Alternatively, where another state or country has declined to exercise jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, the Maryland Uniform Child Custody Jurisdiction and Enforcement Act provides that a Maryland court may exercise “vacuum jurisdiction.” A Maryland court need not apply the ordinary jurisdiction limitations in a situation in which the child custody laws of a foreign country violate the “fundamental principles of human rights.”

Facts:

Appellant Peter Paul Toland, Jr. filed a Complaint To Establish Custody in the Circuit Court for Montgomery County, alleging that he was entitled, as the sole surviving parent, to custody of his nine-year-old daughter, Erika, who presently lives with her maternal grandmother, Appellee Akiko Futagi in Japan, after having lived in Japan since her birth. Mr. Toland then learned that when the child’s mother and Mr. Toland’s ex-wife died, a Japanese decree awarded Ms. Futagi guardianship of the child, without notice to him. When Mr. Toland learned of the guardianship decree, he then amended his complaint and alleged that Maryland was the appropriate forum to determine custody because Japan was not the child’s home state, as the child’s presence in that country was as a result of Ms. Futagi’s “unjustifiable conduct,” and that Japan’s child custody law, which did not require notice to the biological father prior to awarding a grandparent guardianship, violated the “fundamental principles of human rights.” Ms. Futagi moved to dismiss, arguing that the Circuit Court did not have jurisdiction under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act.

Mr. Toland and Ms. Futagi provided expert testimony that agreed that the guardianship awarded to Ms. Futagi did not equate to custody and did not inhibit Mr. Toland’s ability to seek custody of his daughter in a Japanese court. Following a hearing, the Circuit Court concluded that Japan was the home state of Erika and that under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act, a Maryland court could not exercise jurisdiction over the child custody

dispute. Judge Steven G. Salant of the Circuit Court for Montgomery County observed that a violation of a parent's fundamental right to the custody, control and care of the child equates to a violation of the "fundamental principles of human rights," so to allow for an exception to the jurisdiction limitations of the Act. The guardianship decree in this case, however, did not sever Mr. Toland's right to custody of the child and therefore this exception did not apply. In addition, Judge Salant found that the Japanese child custody laws were comparable to the best interests of the child standard in Maryland. Therefore, because the exception to the international application of the Act did not apply, the Judge Salant declined to exercise jurisdiction and granted Ms. Futagi's motion to dismiss. Mr. Toland appealed; prior to any proceedings in the Court of Special Appeals, the Court of Appeals granted certiorari to consider whether the Circuit Court violated his constitutional rights to the care, custody and control of his daughter and whether that court misapplied the Maryland Uniform Child Custody Jurisdiction and Enforcement Act.

Held: Affirmed.

The Court of Appeals affirmed the decision Circuit Court for Montgomery County, determining that the dismissal of Mr. Toland's Complaint to Establish Custody did not violate his constitutional due process rights and the lower could properly decline to exercise jurisdiction under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act.

The Court initially observed that the due process clauses of the Fourteenth Amendment to the United States Constitution as well as Article 24 of the Maryland Declaration of Rights required a state action. In this case, as Ms. Futagi did not seek to register or enforce the guardianship decree in the Circuit Court, the Court concluded that there was not state action and therefore no due process violation.

The Court then addressed the application of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act. As the child has never lived in or visited Maryland, the Court determined that Maryland is not the home state, and because Japan had not declined to exercise jurisdiction, the Court determined that the Circuit Court properly declined to exercise "vacuum jurisdiction."

Finally, the Court addressed Mr. Toland's argument that the Japanese guardianship decree violated his due process right as a parent. The Court observed that guardianship is separate and distinct from custody, which is a natural conception, whereas the former is a product of court decree. Appointment of a guardian does not terminate the custodial rights of the parent, and therefore the Court agreed with the Circuit Court that the Japanese guardianship decree in this case, which did not inhibit Mr. Toland's ability to seek custody of his daughter in Japan, did not sever Mr. Toland's custodial rights and did not implicate "fundamental principles of human rights." Accordingly, the Court of Appeals affirmed the Circuit Court's dismissal of Mr. Toland's complaint.

Potomac Abatement, Inc., et al. v. Edy Sanchez, No. 56, September Term 2011, filed February 21, 2012. Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2012/56a11.pdf>

WORKERS' COMPENSATION – NEW CLAIMS WHILE APPEAL PENDING

Under Section 9-736(b) of the Labor and Employment Article, the Workers' Compensation Commission retains jurisdiction to hear new issues while other issues in the same claim are pending on appeal, so long as no evidence was taken or decision made on the new issues in the hearing from which the appeal was taken. Section 9-742 was not intended to reduce the Commission's ongoing jurisdiction to grant relief, notwithstanding the appeal.

Facts:

A claimant filed for benefits with the Workers' Compensation Commission while previous orders, in the same claim, were pending on appeal in the courts. The Commission decided that it lacked jurisdiction to consider the claimant's new requests because of the pending appeals. The Circuit Court for Baltimore County agreed, holding that the Commission did not retain jurisdiction pending an appeal because the issues raised in the new filings did not fit within the jurisdictional provisions of Section 9-742 of the Labor and Employment Article. The Court of Special Appeals reversed, holding that the Commission had jurisdiction over Respondent's new issues under Section 9-736(b).

Held: Affirmed.

The Court of Appeals affirmed the ruling of the Court of Special Appeals. Under Section 9-736(b), the Workers' Compensation Commission retains jurisdiction to hear new issues while other issues in the same claim are pending on appeal, so long as no evidence was taken or decision made on the new issues in the hearing from which the appeal was taken. Section 9-742 was not intended to reduce the Commission's ongoing jurisdiction to grant relief, notwithstanding the appeal.

Kimberly Jones v. State of Maryland, et al., No. 37, September Term 2011, filed February 22, 2012. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2012/37a11.pdf>

NEGLIGENCE – DUTY – PUBLIC DUTY DOCTRINE

NEGLIGENCE – STANDARD OF CARE – EXPERT TESTIMONY

NEGLIGENCE – BREACH – SUFFICIENCY OF THE EVIDENCE

Facts:

Two Prince George’s County Sheriff’s Deputies attempted to serve an arrest warrant on an individual named Lamarr Wallace at an apartment in which they assumed he resided in Greenbelt, Maryland. The deputies knocked on the apartment’s door and, when it was opened, one deputy swung his leg into the doorway, as he was trained to do, blocking the door from being closed. At that point the true resident of the apartment, Kimberly Jones, informed the officers that Mr. Wallace did not live there, and was not there at the time. The deputies suspected that Ms. Jones was lying and forced their way into the apartment, breaking Ms. Jones’s glass patio door and striking Ms. Jones in the process. Ms. Jones struggled against the intrusion and tried to escape. In the ensuing fracas, Ms. Jones was sprayed with pepper spray, struck with a police baton, and had a clump of hair pulled from her scalp. Eventually, the deputies subdued and arrested Ms. Jones in the parking lot of the apartment building, and charged her with resisting arrest and assault on a police officer. The charges were nol prossed because neither deputy appeared at Ms. Jones’s trial; however, Ms. Jones lost her job as a counselor at a local youth shelter because the charges appeared on her annual criminal background check.

Ms. Jones filed a twelve-count complaint in the Circuit Court for Prince George’s County naming the two deputies and their employer, the State of Maryland, as defendants. The complaint alleged, among other things, that the State negligently trained the deputies in Fourth Amendment arrest procedure. Specifically, the complaint alleged that the State owed a duty to train its police in constitutional arrest procedures, and it breached that duty when it instructed the deputies that “they may forcibly enter a person’s home without a search warrant in order to serve an arrest warrant for someone who does not live there.”

At the close of evidence and after the jury returned its verdict, the State, in motions for judgment and judgment notwithstanding the verdict, argued that Ms. Jones’s claim failed on three fronts: first, the duty the State owed to train its officers was a public duty, and thus, shielded the State from bearing negligence liability by the “public duty doctrine”; second, Ms. Jones failed to establish the proper standard of care in her professional negligence claim because she introduced

no expert testimony clarifying the proper, applicable professional standards; and third, the deputies' training was consistent with Fourth Amendment doctrine, so Ms. Jones provided insufficient evidence of a breach of the State's duty. The Circuit Court denied the motions and entered a \$200,000 judgment against the State.

The Court of Special Appeals reversed the judgment, holding that the Circuit Court should have granted the State's motions. The intermediate appellate court agreed with the State's second argument, noting that Ms. Jones introduced insufficient evidence to prove her negligence claim because she had failed to introduce testimony, "expert or otherwise, indicating that the training and supervision of Deputies Falby and Henderson was deficient." Having decided that expert testimony issue, the court declined to reach the public duty and breach issues.

Held: Reversed.

The Court of Appeals held that the Circuit Court properly denied the State's motions for judgment and judgment notwithstanding the verdict. The Court first held that the public duty doctrine did not bar Ms. Jones's claim. The Court explained that the public duty doctrine only operates when police fail to protect an individual from the harm of another individual. Because Ms. Jones did not allege a failure to protect, and alleged that the police harmed her directly, the public duty doctrine did not apply.

The Court further held that expert testimony was not necessary for Ms. Jones's claim. Noting that expert testimony is generally required to clarify the standard of care owed by a professional in a professional negligence claim, the Court noted that the standard of care in Ms. Jones's claim was the Fourth Amendment. Because of the unique nature of Ms. Jones's claim, the only expert clarification that was necessary was the trial court's jury instruction explaining the applicable Fourth Amendment law.

Finally, the Court held that testimony offered by the two deputies at trial provided sufficient evidence of a breach. The Court first noted that breach, in this case, meant training inconsistent with the Fourth Amendment rules enunciated by the Supreme Court in *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981). Under those cases, an arrest warrant suffices to arrest an individual in the individual's home, but a search warrant is needed to arrest an individual in the home of a third party. The Court found sufficient evidence that the deputies' training was inconsistent with these rules, noting that one deputy testified that he could enter a home, third-party or otherwise, on the authority of an arrest warrant so long as the address of the home was listed on the warrant.

District of Columbia v. Wayne Singleton et al., No. 77, September Term 2011, filed 20 March 2012. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2012/77a11.pdf>

TORTS – NEGLIGENCE – SINGLE MOTOR-VEHICLE ACCIDENT – RES IPSA LOQUITUR – DEFENDANT’S EXCLUSIVE CONTROL OF INSTRUMENTALITY:

TORTS – NEGLIGENCE – SINGLE MOTOR-VEHICLE ACCIDENT – RES IPSA LOQUITUR – FACTS SURROUNDING ACCIDENT EQUALLY ACCESSIBLE TO BOTH PARTIES:

Facts:

Respondents—Wayne Singleton and his eight-year-old son, Jaron—were passengers on a bus, returning from a recreational day trip to Six Flags Amusement Park in Prince George’s County, along with other D.C. residents. Petitioner, the District of Columbia (the District), owned the bus. The bus was heading westbound on Route 50 in Prince George’s County when it left the travel-portion of the road. Respondents suffered cuts and bruises and sought medical treatment. Because Singleton was asleep when the bus left the road and Jaron was not paying attention, Respondents were unable to state the cause of the accident. Respondents sued the District in the Circuit Court for Prince George’s County, claiming negligence. Respondents were the only witnesses to testify (other than a medical doctor) in their case-in-chief. They failed to supplement their evidence with reasonably available witnesses, such as the bus driver, witnessing motorists who stopped to render assistance, or the other bus passengers. The District moved for judgment at the end of Respondents’ case-in-chief, arguing that Respondents failed to make a prima facie case of the District’s vicarious negligence. Respondents countered that, under the res ipsa loquitur doctrine, the circumstantial evidence of the accident permitted the jury to draw an inference of the District’s negligence. The Circuit Court judge granted the District’s motion. Respondents appealed to the Court of Special Appeals. In an unpublished opinion, the Court of Special Appeals reversed the Circuit Court. That court concluded that a single-vehicle accident where the vehicle leaves the road equates to a prima facie case of negligence. The District petitioned the Court of Appeals for certiorari, which was granted.

Held: Reversed.

To satisfy the exclusive-control requirement of res ipsa loquitur, the evidence adduced must demonstrate that no third-party or other intervening force contributed to the accident more probably than the defendant’s negligence. Due to Respondents’ limited ability to identify the cause of the bus leaving the road and their decision not to call other available and potentially probative witnesses as to causation (or offer a reason on the record why those witnesses were not called), Respondents failed to eliminate other potential causes of the accident. At best, the

Respondents proved that the District's bus driver's negligence was as likely the reason for the accident as other causes, which warranted the grant of a motion for judgment. Moreover, Respondents' failure to produce reasonably available and likely probative witnesses, where substantive and direct evidence was otherwise lacking, infers that the facts regarding the happening of the accident were equally accessible to both parties. Res ipsa loquitur should not be available in such cases.

Tyrone L. Smith v. State, No. 76, September Term 2011, filed March 21, 2012.
Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2012/76a11.pdf>

TRANSPORTATION; BURDEN OF PROOF

Facts:

In January 2009, Tyrone Smith was stopped by Westminster city police, and routine police checks revealed that he did not have a current driver's license. The Circuit Court for Carroll County found him guilty of driving without a license and sentenced him to 60 days in a county detention center. Smith appealed to the Court of Special Appeals, claiming that the evidence against him was insufficient to sustain a conviction. In an unreported opinion, the Court of Special Appeals affirmed his conviction.

Held: Affirmed.

Smith asked the Court to interpret Section 16-101(a) of the Transportation Article. That section prohibits individuals from driving motor vehicles in Maryland unless either (1) they are licensed in Maryland; (2) they are expressly exempt from the licensing requirement; or (3) they are otherwise specifically authorized to drive in Maryland. Smith argued that the State must prove all three of those elements as part of its case-in-chief against a defendant who is charged with driving without a license under that section. The Court disagreed and held that parts (2) and (3) are affirmative defenses that a defendant must raise. In its reasoning, the Court held that parts (2) and (3) are not part of the enacting clause of the statute, nor are they so incorporated within the definition of the offense that they constitute a part of it.

COURT OF SPECIAL APPEALS

Falls Road Community Association, Inc., et al. v. Baltimore County, Maryland, et al., No. 2133, Sept. Term 2010, filed March 1, 2012. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2012/2133s10.pdf>

MANDAMUS – ADMINISTRATIVE EXHAUSTION – DECLARATORY JUDGMENT

Facts:

Oregon, LLC, leased from The Baltimore County Department of Recreation and Parks a 2.63 acre parcel of land located on the grounds of a county park. A series of decisions by the County Board of Zoning Appeals granted a special exception to operate a restaurant on the premises, subject to various conditions, some of which the County and Oregon incorporated as terms of their lease agreement. In 2006, the Director of the Department of Recreation and Parks notified Oregon in writing that the property’s parking lot surface violated the Americans with Disabilities Act, declaring Oregon in default under the lease and demanding that Oregon “pave the parking lot” at its own expense, which Oregon did. At some point prior to this action, Oregon installed several large squares of fabric over the outdoor seating area, each with an electric fan and lights, hanging from metal structures that were bolted into the ground. Appellants complained about these conditions to various County officials and the County attorney, who informed appellants that the County would take no action. Appellants then filed suit, seeking writs of *mandamus* and declaratory judgments. The trial court entered summary judgment against appellants on the issue of *mandamus*, and after trial, denied appellant’s request for declaratory judgments.

Held: Affirmed.

The Court of Special Appeals affirmed. Relief by *mandamus* is appropriate where a tribunal refuses to exercise the judgment and discretion imposed upon it by statute, or where the tribunal refuses to adhere to compulsory rules of administrative procedure, including the enforcement of zoning regulations. Because the complainants in this case could bring administrative enforcement actions but failed to do so, both *mandamus* and declaratory relief were foreclosed. Appellants’ requests that the court declare various laws and regulations “enforceable” would not terminate the uncertainty or controversy giving rise to the proceeding as required by statute. Appellants did not explain why it would be necessary or proper to order a private party to remove paving installed when the county threatened to hold the party in violation of its lease. Appellants’ request for “further relief” in the pleadings cannot be construed as a request for an injunction ordering the county to remove the paving. The County was not obligated by law to enforce the terms of its lease with Oregon. Appellants abandoned their arguments that the

outdoor seating area coverings violated any zoning conditions, that the court misinterpreted the zoning regulation dealing with impermeable surfaces, and that appellants were privy to the lease.

Vincent Salvatore Serio v. Baystate Properties, LLC, Case No. 1441, September Term, 2009, filed March 8, 2012. Opinion by Kenney, J.

<http://mdcourts.gov/opinions/cosa/2012/1441s09.pdf>

MOTION TO WITHDRAW APPEARANCE AS COUNSEL – OPPORTUNITY TO SECURE NEW COUNSEL

PIERCING THE CORPORATE VEIL – PARAMOUNT EQUITY

Facts:

On December 14, 2006, Timothy Wenzel, Managing Member of Baystate Properties, LLC (“Baystate”), entered into a contract (“the Agreement”) with Vincent Serio, as Managing Member of Serio Investments, LLC, to build houses on two which were owned by Serio individually. Serio Investments was to “provide an escrow account . . . from which [Baystate] will receive payments according to the agreed upon draw schedule” for its work. Upon the sale of the improved lots to a third party, Baystate would be paid an additional \$25,000 for each house.

As work progressed, Wenzel drafted multiple addenda to the Agreement. Each addendum, when first presented by Wenzel, referenced Serio personally, but Serio revised those references and both parties signed the addenda, with Serio signing as the Managing Member of Serio Investments. In June of 2007, Wenzel and Serio, on behalf of Baystate and Serio Investments respectively, executed a written waiver by Baystate and Serio Investments of any claims for personal liability under the Agreement.

One lot sold on June 29, 2007 for \$380,000.00. The other lot was sold on October 11, 2007, but, because the buyers subsequently defaulted on a mortgage, Serio received only approximately \$20,000.00 on the sale. According to Baystate, none of the proceeds from the sale of the lots were deposited into the Serio Investments account.

On October 29, 2007, Baystate filed a complaint against Serio and Serio Investments in the Circuit Court for Baltimore County for money owed on the lots, and an action in the District Court for Baltimore County to recover for work done on an unimproved lot adjacent to the lots. On March 4, 2009, the court consolidated these cases along with claims brought by subcontractors against Baystate. On July 21, 2009, Serio Investments filed for bankruptcy under Chapter 7, staying all creditor actions against the LLC.

Serio engaged attorney Shanell Harleston to represent both Serio and Serio Investments in the litigation. On May 12, 2009, Harleston contacted Serio by letter to inform him of her intent to withdraw as his attorney in the Baystate litigation. Subsequently, Harleston filed, under

Maryland Rule 2-132, a Motion to Withdraw Appearance as Counsel. Because the clerk's office did not correctly docket that motion, it was not ruled on until the day of the trial.

Prior to the beginning of the trial, the circuit court granted Harleston's motion to withdraw as counsel over Serio's opposition. The court then denied Serio's request for a brief continuance. At the conclusion of the bench trial, the court did not find fraud but, to enforce a paramount equity, held Serio personally liable for the obligations of Serio Investments.

Held:

The circuit court did not abuse its discretion in granting counsel's motion to withdraw her appearance as counsel and denying the client's request for a continuance so that he could engage new counsel. Rule 2-132 does not mandate a 15-day continuance after an attorney's appearance is stricken, pursuant to counsel's motion to withdraw, to permit a client without an attorney of record to secure new counsel. Counsel's withdrawal did not cause, under the Rule, "undue delay, prejudice, or injustice." Although the motion to withdraw was granted on the same day as trial, counsel had sent a Rule 2-132 letter to the client more than two months before trial informing him of her need to withdraw. Counsel filed the actual motion more than one month before trial. By the client's own admission, he was long aware of the trial date and fully understood counsel's intent to withdraw, but he did not seek to engage new counsel until shortly before trial.

The circuit court abused its discretion in "piercing the corporate veil" based solely on "paramount equity," and thus finding defendant personally liable for the debts of a limited liability company ("the Company") of which defendant was the sole owner. "Maryland is more restrictive than other jurisdictions in allowing a plaintiff to pierce a corporation's veil," *Residential Warranty v. Bancroft Homes Greenspring Valley, Inc.*, 126 Md. App. 294, 309 (1999), to the extent that neither appellate court has "found an equitable interest more important than the state's interest in limited shareholder liability." *Id.* at 307 n.13. The facts of the case did not establish the "exceptional circumstances" required to pierce the corporate veil, *Hildreth v. Tidewater*, 378 Md. 724, 736 (2006), where, *inter alia*: (1) there was no evidence that the entity doing business with the Company ("the Contractor") entered into the contract with the Company depending on defendant to fund the Company's contracts from his personal account or that the Contractor took reasonable steps to assure the availability of adequate funding; (2) the Contractor was aware that the new property on which houses were being constructed was in defendant's name prior to entering the contract; (3) there was no evidence that the Contractor ever challenged or questioned the Company's failure to establish the funded escrow account which the contract required; (4) addendums to the contract clearly established that the Company was the Contractor's contractual partner and that defendant was not to be held liable for any obligation of the Company; (5) all payments made to the Contractor under contract were either with checks issued from the Company's corporate account, signed by defendant as the "Managing Member," or with cashier checks funded by the Company; and (6) the transfers of money by defendant to the Company were supported by Confessed Judgment Promissory Notes indicating the payments were loans and not a simple commingling of funds.

Michael A. DiNapoli, et al. v. Kent Island, LLC, et al., No. 2506, September Term 2010, filed March 1, 2012, Opinion by Watts, J.

<http://mdcourts.gov/opinions/cosa/2012/2506s10.pdf>

CIVIL PROCEDURE – VENUE – *FORUM NON CONVENIENS* – MOTIONS TO TRANSFER – CONVENIENCE OF PARTIES – INTERESTS OF JUSTICE – APPEALABILITY – SUBJECT MATTER JURISDICTION – REMEDY

Facts:

This case involves Kent Island, LLC’s (“Kent Island”) attempt to develop property known as “The Cloisters on Kent Island” in Stevensville, Queen Anne’s County, Maryland, as a subdivision of condominium units. Kent Island has been involved with litigation regarding the property for numerous years, in a case beginning in 2005 (“2005 Kent Island Case”), involving County Commissioners of Queen Anne’s County and Queen Anne’s County Sanitary Commission, both appellees in this case. While an appeal was pending in the 2005 Kent Island Case, the parties entered into a settlement agreement. On March 10, 2009, a judge of the Circuit Court for Anne Arundel County signed a document titled the “Consent Order,” which embodied the settlement agreement and was jointly submitted to the court by Kent Island, County Commissioners of Queen Anne’s County, and Queen Anne’s County Sanitary Commission, to resolve the litigation.

On December 17, 2009, in a new action, appellants, Michael A. DiNapoli, Janet DiNapoli, Leland C. Brendsel, B. Diane Brendsel, Daniel T. Hopkins, Richard M. Markman, and Queen Anne’s Conservation Association, Inc. filed an action for declaratory relief and for writs of mandamus in the Circuit Court for Queen Anne’s County against appellees, Kent Island, LLC, County Commissioners of Queen Anne’s County, Queen Anne’s County Sanitary Commission, and Queen Anne’s County Planning Commission. Appellants sought a determination that the Consent Order dated March 10, 2009, is null and void. The Circuit Court for Queen Anne’s County granted a motion to transfer filed by Kent Island, which asked the court to transfer the case to the Circuit Court for Anne Arundel County on the grounds of improper venue and/or *forum non conveniens*. After the transfer, the Circuit Court for Anne Arundel County denied appellants’ request for recusal, and then granted summary judgment in favor of appellees.

Held: Vacated.

The Court of Special Appeals vacated the judgment of the Circuit Court for Anne Arundel County with instructions for the Circuit Court for Anne Arundel County to transfer the case to the Circuit Court for Queen Anne’s County for a new trial.

Venue refers to the place, among courts with jurisdiction, where an action will be litigated. Md. Code Ann., Cts. & Jud. Proc. § 6-201(a) provides that “a civil action shall be brought in a county

where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation.” A determination of proper venue pursuant to § 6-201(a) is made as of the time the action is filed.

The trial court abused its discretion by improperly transferring a case to another county when, at the time the plaintiffs brought the civil action, venue was appropriate only in the county where the trial court was located, as that was the county where each defendant resided and carried on regular business.

Nothing in the venue statutes, Md. Code Ann., Cts. & Jud. Proc. §§ 6-201, 6-202, and 6-203, indicates that the location of prior litigation involving a party is a factor that governs, or is dispositive of, venue.

Maryland Rule 2-327(c) provides that “[o]n motion of any party, the court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice.” The rule requires venue under Md. Code Ann., Cts. & Jud. Proc. § 6-201. A motion to transfer pursuant to this rule may be granted only when the balance between two factors—convenience of the parties and witnesses and the interests of justice—weighs strongly in favor of the moving party. The convenience factor consists of the convenience of the parties and witnesses. The interests of justice factor requires a court to weigh both private and public interests.

A party fails to meet its burden of demonstrating that transfer of the action is warranted under Maryland 2-327(c) where the party fails to present any evidence that (1) the convenience factor weighs in favor of transfer and (2) transfer of the case would better serve the interests of justice.

Subject matter jurisdiction refers to the fundamental power of a court to decide a dispute, by virtue of the nature of the dispute. In Maryland, the circuit courts are trial courts of general jurisdiction, and are the highest common-law and equity courts of record exercising original jurisdiction within the State. The circuit courts have jurisdiction over declaratory judgment and mandamus actions.

That an action involves review of a settlement agreement, memorialized in a consent order signed by a judge from a circuit court, does not deprive a different circuit court of general jurisdiction to review the order. Circuit courts regularly review, modify, and enforce orders, settlement agreements, and decisions from other circuit courts.

If a trial court grants a motion under either Maryland Rule 2-327(b) or (c) and transfers an action to another county, that ruling is an immediately appealable final judgment, whereas the denial of such a motion is not.

A party has the choice to appeal the grant of a motion to transfer either within thirty days after entry of the transfer order or within thirty days after the transferee court’s final judgment.

Tuan Pingeran Hajireen v. State of Maryland, No. 232, September Term 2011, filed March 2, 2012. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2012/0232s11.pdf>

BOLSTERING – EVIDENCE – FAILURE TO ELECTRONICALLY RECORD SUSPECT INTERVIEW – IMPEACHMENT – JURY INSTRUCTIONS ON MISSING EVIDENCE – REHABILITATION

Facts:

Appellant was charged with sexual offense in the third degree. The victim, J.M., who was eight years old at the time of the incident, testified that appellant asked her to sit on his lap and then placed one of his hands under her shirt on her stomach and the other hand in her pants, underneath her underwear. J.M. testified that appellant put his finger inside her.

During cross-examination of J.M., defense counsel questioned her extensively about whether she told anyone that appellant put his finger inside her. J.M. testified that she told her mother, the police, and a social worker, Ms. Daryl Leach. Defense counsel’s questioning of Ms. M. and the police officer, however, indicated that she did not so state.

The prosecutor moved to admit a DVD recording of the interview between J.M. and Ms. Leach. Defense counsel objected, but the court admitted the DVD in which J.M. stated, consistent with her trial testimony, that appellant told her to sit on his lap, and he then put his hand in her pants, under her underwear. J.M. also stated, however, that appellant did not put his hands inside of her.

Held: Reversed.

As a general rule, prior out-of-court statements by a witness that are consistent with the witness’s trial testimony are not admissible to bolster the credibility of a witness. Md. Rules 5-802.1 and 5-616(c)(2) provide exceptions to this general rule, but the rules apply only in specific circumstances.

A prior consistent statement is admissible pursuant to Rule 5-802.1(b) only if it was made prior to the alleged fabrication or improper motive. Here, defense counsel argued that J.M. made up the allegations of sexual abuse when she told her mother. J.M.’s subsequent statements to a social worker were not made prior to the time she alleged, but unexplained, bias originated. Because her statements were not made “pre-motive,” they were not admissible pursuant to Rule 5-802.1.

There are three prerequisites to admission of a prior statement as rehabilitation pursuant to Rule 5-616(c)(2): (1) the witness' credibility must have been attacked; (2) the prior statement is consistent with the trial testimony; and (3) the prior statement detracts from the impeachment. Here, the victim's credibility was attacked, and some of her statements were consistent with the trial testimony.

To be admissible as rehabilitation, however, a prior consistent statement must be more than a repetition of the trial testimony; the statement must, under the circumstances in which it was given, "detract from" or "rebut logically" the impeachment. A prior consistent statement must show some rebutting force beyond the mere fact that the witness had repeated on a prior occasion the statement consistent with his trial testimony. Here, J.M.'s statements to the social worker did not detract from the impeachment beyond the fact that she previously had repeated many of the details consistent with her trial testimony.

The trial court did not abuse its discretion in declining to give a missing evidence instruction when the police attempted to record the interview of appellant, but no recording was obtained. A missing evidence instruction, advising the jury that it could infer that the missing evidence would be unfavorable to the State, is not warranted in a situation where evidence was not destroyed, but rather, it was never created.

Exxon Mobil Corporation v. Paul D. Ford, et. al., No. 1804, September Term 2009, filed March 6, 2012. Per Curiam on Motion for Reconsideration.

<http://mdcourts.gov/opinions/cosa/2012/1804s09pc.pdf>

COURT OF SPECIAL APPEALS – IN BANC REVIEW – IMPACT OF DISQUALIFICATION ON COMPUTATION OF MAJORITY

Facts:

On February 9, 2012, the Court of Special Appeals, following an *in banc* rehearing, affirmed in part and reversed in part the judgment of the Circuit Court for Baltimore County, reducing the lower court’s damage award in a toxic tort case by more than half. The Court was divided 5-4 on most issues, and authored five separate opinions. Because of three recusals and one vacancy, only nine members of the Court participated in the *in banc* decision.

Appellees filed a motion for reconsideration, asserting that the Court’s ruling violated Md. Code (1973, 2006 Repl. Vol.), Courts and Judicial Proceedings Article (CJP), §1-403(c), which governs the Court’s *in banc* procedure. Specifically, appellees contended that CJP §1-403(c) required a decision from a majority of the thirteen members of the “entire” court, not a majority of the nine members who participated in the *in banc* rehearing.

Held:

The Court held its *in banc* ruling was proper under CJP §1-403(c), concluding that CJP §1-403(c) must be read in harmony with other applicable law including constitutional provisions concerning judicial vacancies and the Maryland Code of Judicial Conduct.

The Court turned to out-of-state authorities treating vacancies and disqualifications the same - - as reducing the number of members of a governmental body required to take official action to those “entitled” or “qualified” to vote, regardless of statutory language requiring the votes of “all,” “the whole number of” or “the entire” body. Asserting that the appellees’ position was unreasonable, the Court looked to a 2005 change to the Federal Rules of Appellate Procedure providing that a disqualified judge was not included in determining the number of judges required to order a case to be heard en banc in a federal appellate court. The federal rule change eliminated the possibility that the purpose of recusal would be defeated by counting a disqualification as opposing rehearing and by leaving a majority of the court helpless to overturn a panel decision with which it disagrees.

Finally, the Court embraced dicta in *Department of Human Resources v. Howard*, 397 Md. 353, 365, n. 16 (2007), which indicated that even if seven members of the in banc Court were disqualified, four of the remaining six judges could decide the case.

Thus, the Court held that all that was required under CJP §1-403(c) was a majority of the nine judges “qualified to act” in the case, not a majority of thirteen as appellees had argued.

Harold William Purnell, et al. v. Beard & Bone, LLC, No. 1861, September Term 2009, filed March 1, 2012. Opinion by Sharer, J. Frederick (Retired, Specially Assigned).

<http://mdcourts.gov/opinions/cosa/2012/1861s09.pdf>

EASEMENT BY IMPLICATION OR NECESSITY – LANDLOCKED PROPERTY – ADVERSE POSSESSION OF EASEMENT NOT YET LOCATED, DEVELOPED, OR USED

Facts:

Beard & Bone purchased a landlocked parcel of land at public auction. At the time of purchase, Beard & Bone knew that the parcel, which was located in Worcester County, was landlocked. Following purchase, Beard & Bone sought an easement by necessity over and across the properties owned by Cantwell and the Purnells, both of which bordered a public road.

The properties owned by Beard & Bone, Cantwell, and the Purnells, was once held as a single tract of land by James Givens, who transferred the entire tract to Orlando and George Harrison. On July 19, 1918, the Harrisons divided the tract, selling off the Purnell property to the Purnells' predecessor in title and the Cantwell property to Cantwell's predecessor in title. The Harrisons retained what is now the Beard & Bone property. The deeds conveying the Purnell and Cantwell properties were executed and dated the same day, July 18, 1918, but the deed for the Purnell property was recorded first in the deed book.

The Circuit Court for Worcester County found that an easement by necessity, by implied reservation, had been created in 1918 and that the easement still existed. The circuit court rejected the Purnells and Cantwell's defenses of abandonment, adverse possession, and laches.

Held: Affirmed.

Only the Purnells appealed and claimed that because their predecessor in title's deed was recorded first in the deed book, their property was first conveyed. As a result, the Purnells alleged, the circuit court erred in finding an easement by necessity over both the Purnell and Cantwell properties. Instead, they asserted, the easement should run over only the Cantwell property. We rejected this argument because it is the intent of the common grantor that controls in determining whether an easement by necessity exists. There was no showing of an intent to establish a priority in recordation, as opposed to a mere whim of the recording clerk.

We also concluded that the circuit court did not err in finding the prerequisites to the creation of an easement by necessity: initial unity of title of the parcels, severance of unity of title by conveyance of one of the parcels, and the easement must be necessary in order for the grantor or

grantee to gain access to the land, both at the time of severance and at the time of exercise of the easement. The circuit court did not err in finding that the conveyance by the Harrisons on July 19, 1918, severed unity of title.

The easement by necessity was not extinguished by adverse possession or abandonment. The Purnells could not adversely possess the easement until Beard & Bone sought to locate, develop, and use the easement. Only after Beard & Bone sought to open the easement, and the Purnells denied the use, could the prescriptive period begin to run. Even though a predecessor in title had previously gained access to the Beard & Bone via a neighbor to the north, there was no evidence of any intention or action by Beard & Bone or any its predecessors in title to abandon the easement.

The doctrine of laches did not apply because there was no evidence of any negligence or unreasonable delay on the part of Beard & Bone or any of its predecessors in title. This is so because there was no evidence that the easement was needed until Beard & Bone purchased the property in 2007.

Theodore I. Sandler, et al. v. Executive Management Plus, Nos. 0732 & 0752, September Term 2010, filed on March 1, 2012. Opinion by Hotten, J.

<http://mdcourts.gov/opinions/cosa/2012/0732s10.pdf>

REAL PROPERTY LAW – LANDLORD-TENANT – REMEDIES & RIGHTS – EVICTION ACTION

REAL PROPERTY LAW – LANDLORD-TENANT – REMEDIES & RIGHTS – DAMAGES

CIVIL PROCEDURE – JURY TRIALS – MOTION FOR JUDGMENT AS A MATTER OF LAW

Facts:

On August 26, 2008, appellants, Theodore I. Sandler and Abbie L. Fields, entered into a one year residential lease for a single family home in Potomac, Maryland with appellee, Executive Management Plus. The lease contained a renewal clause, but according to appellants, a “dispute arose” between the parties regarding whether appellants properly exercised the renewal clause to extend the lease for another year. Appellee asserted that appellants modified the original lease, creating a counter-offer for the renewal term, which appellee did not accept.

On September 29, 2009, appellee served appellants with a “Notice to Vacate.” On November 4, 2009, in the District Court of Maryland for Montgomery County, appellee filed a “Complaint and Summons against Tenant Holding Over” (“THO”), seeking possession of the property.¹ *See* Md. Code (1974, 2003 Repl. Vol., 2009 Supp.), § 8-402 of the Real Property Article (“R.P.”). On November 6, 2009, in the District Court, appellants filed a “Petition in Action of Rent Escrow [and] for Injunction.” Appellants’ claim under the 1975 Rent Escrow Act alleged the presence of certain “conditions and defects in the leased premises,” including “mold, flaking paint, Building Code violations, [and] Environmental Dept. violations.” Appellants sought an “[i]njunction against harrassment [sic]” and damages “for breach of the covenant of quiet enjoyment or warranty of habitability in the amount of \$3[,]744 x 4 Mos. Rent.” *See* R.P. § 8-211; *see generally* *Neal v. Fisher*, 312 Md. 685 (1988) (discussing Rent Escrow Act).

The rent escrow case came before the District Court on December 9, 2009. Because the THO case had not been called, the District Court continued both cases to December 16, 2009. In the interim, appellants asked about moving for a jury trial. On that same date, apparently after the hearing, appellants filed a written jury trial demand. On December 16, 2009, the District Court sent both cases to the circuit court for jury trials.

¹ The same complaint was later filed in the circuit court on December 22, 2009.

On February 22, 2010, appellants moved to consolidate both cases, which the circuit court granted by order on March 10, 2010. The clerk entered the order the next day. On March 24, 2010, the consolidated cases went before another circuit court judge for a hearing on several motions and for trial. The court reversed the consolidation order and granted appellee's motion to strike the jury trial demand.

The cases each went to trial before yet another circuit court judge on May 12 and 13, 2010. In each case, the court granted appellee's motions for directed verdicts, which were essentially motions for judgment. *See* Md. Rule 2-519. Appellants timely appealed both decisions, and we consolidated the appeals for our consideration.

Held: Affirmed.

At the time these cases commenced, Articles 5 and 23 of the Maryland Declaration of Rights, § 4-402(e) of the Courts and Judicial Proceedings Article ("C.J."), and Maryland Rule 3-325 guaranteed the right to a jury trial when the case was based in law, rather than equity, and the amount in controversy exceeded \$10,000.² On appeal, appellants contended that the circuit court erred by denying their right to a jury trial based on the implied value of their lease and their legal claim arising from appellee's actions.

Regarding the THO action, the Court held that a tenant holding over action is "an action . . . by a landlord to recover possession of his premises, [and] is an action at law to which the right to a jury trial has always attached in this State." *Carroll v. Housing Opportunities Commission*, 306 Md. 515, 521 (1986) (quoting *Bringe v. Collins*, 274 Md. 338, 346-47 (1975)). Therefore, "the claims of the parties, for money damages or for the right to possession, determine the amount in controversy" unless "the amount stated in the complaint is not claimed 'in good faith.'" *Id.* at 523-24. In *Carroll*, the tenant's claim to continued possession exceeded the then-jurisdictional amount of \$500. *Id.* at 518. Here, appellant's written jury demand did not reference an amount, but it was apparent that their claim of entitlement to continued possession under the lease, the terms of which included more than three monthly rent payments in excess of \$3,700, demonstrated an amount in controversy greater than the then-jurisdictional amount of \$10,000 to justify a trial by jury.

With respect to appellant's complaint for damages from the breach of the covenant of quiet enjoyment and warranty of habitability in the rent escrow action, appellants would also have been entitled to a jury trial.³ The Court noted that R.P. § 8-211 outlined the procedure a District

² The amount in controversy requirement has since been increased to \$15,000. *See* 2010 Laws of Maryland, Chap. 224 (effective December 1, 2010).

³ The Court noted that though the jury request was possibly untimely, appellants were acting in reliance on a comment by a District Court judge that they could file the request on December 9, 2009 after the first hearing.

Court shall follow in considering a pure rent escrow claim. *See also* C.J. § 4-401(7)(i) (“[T]he District Court has exclusive original civil jurisdiction in . . . a petition of injunction filed by . . . [a] tenant in an action under [R.P.] § 8-211 . . . or a local rent escrow law.”). Therefore, if appellants’ claim was based solely on a rent escrow claim, they would not have been entitled to a jury trial. However, appellants also alleged damages in excess of the then-jurisdictional amount based on breach of the covenant of quiet enjoyment and warranty of habitability, and “if a case presents any legal issues, even if those issues are outweighed by equitable issues, the case is to be tried to a jury unless ‘the use of the jury trial itself will in some way obstruct a satisfactory disposition of the equitable claim.’” *Mattingly v. Mattingly*, 92 Md. App. 248, 256 (1992) (citations omitted); *see also* *Nationwide Mut. Inc. Co. v. Regency Furniture, Inc.*, 183 Md. App. 710, 734 (2009).

However, regardless of whether appellants were entitled to a jury trial, the Court held that any error in dismissing appellants’ jury trial request was harmless. Appellants were unable to demonstrate prejudice as a result of any error. *See Barksdale v. Wilkowsky*, 419 Md. 649, 662 (2011). Specifically, the circuit court granted appellee’s motions for judgment in both cases, rendering legal determinations on the adequacy of appellants’ claims. The circuit court ruled that appellants were holding over because a new lease had not been executed, as appellants returned a “marked-up” lease to appellee, constituting a counter-offer. Additionally, the circuit court ruled that appellants did not present sufficient evidence, as a matter of law, to support their complaint under the Rent Escrow Act or for damages arising out of the alleged breach of the covenant of quiet enjoyment and warranty of habitability. The Court did not find error in the circuit court’s legal rulings, rendering any error in striking the jury trial demands harmless. *See, e.g., United States v. 243.22 Acres of Land*, 129 F.2d 678, 684 (2d Cir. 1942) (When a trial court would have been required to direct a verdict or grant a motion for judgment as a matter of law, “[t]here is no constitutional right to have twelve men [or women] sit idle and functionless in a jury-box.”).

Yiannis Yiallouros, et al. v. John Tolson, No. 2773, September Term 2010, filed March 2, 2012. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2012/2773s10.pdf>

MOTION FOR NEW TRIAL – STANDARDS OF REVIEW – ADMISSION OF
EXPERT TESTIMONY – MD. RULE 5-702 – SUFFICIENT FACTUAL
BASIS – NON-ECONOMIC DAMAGES

Facts:

Appellant filed suit against appellee, alleging liability in negligence for damages, including pain and suffering, medical expenses, loss of present and future earnings, and loss of consortium. The jury found in favor of appellant and awarded \$32,000.88 for past medical expenses, \$35,191.80 for past lost wages, \$409,787.00 for loss of future wages, \$224,010.16 for pain and suffering, and \$224,010.16 for loss of consortium. The court granted appellee’s motion for new trial on the grounds that it had erred when it admitted appellant’s expert in vocational rehabilitation because the expert’s opinion lacked a sufficient factual basis, and because the jury’s non-economic damages award was excessive. At the new trial, the court held a hearing to determine the proffered expert’s witness qualifications. The witness testified, as she had during the first trial, that she earned a master’s degree in rehabilitation counseling, had over twenty years of experience in that field, and that she researched the labor market to determine whether a subject can be employed. The court admitted her as an expert, and at the conclusion of trial, the jury found that appellant was contributorily negligent and awarded no damages.

Held:

The Court of Special Appeals reversed the order for new trial on liability and economic damages, but affirmed the order for new trial on non-economic damages and remanded the case for further proceedings. The trial court held that the testimony it had admitted as expert opinion lacked a sufficient factual basis because it contradicted certain medical expert testimony, but the scope of that medical testimony concerned only appellant’s physical capabilities. Because the vocational expert’s opinion that appellant was permanently unemployable took into account additional factors—her evaluation of appellant’s mental capabilities and the relevant labor market demand for appellant’s combination of physical and mental capabilities—it did not contradict the medical expert opinion of appellant’s physical capabilities and the trial court erred when it granted a new trial on those grounds. The question of non-economic damages was an independent factual matter, and the presiding judge drew from his many years of experience as a lawyer and a jurist, as well as his immediate observations of the relevant evidence, to conclude that the non-economic damages awarded were grossly excessive. Additionally, the jury awarded precisely \$224,010.16 in damages both for pain and suffering and for loss of consortium. That amount, when added to appellant’s economic damages, brought the total award to the round

figure of \$925,000.00, implying that the jury determined its award for economic damages and then awarded non-economic damages as an exercise in arithmetic guesswork, failing to consider what amounts would actually compensate appellant for his pain and suffering, as a matter separate and distinct from any alleged loss of consortium. Therefore, the trial court did not err in awarding a new trial as to non-economic damages, and the case must be remanded for that purpose.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated March 9, 2012, the following attorney has been
disbarred:

STEPHEN JOSEPH TROESE

*

By an Order of the Court of Appeals dated March 16, 2012, the following attorney has been
disbarred:

LAWRENCE MICHAEL HAMMOND

*

By an Order of the Court of Appeals dated March 16, 2012, the following attorney has been
suspended from the practice of law for three years effective January 13, 2011:

ANDREW J. KLINE

*

By an Order of the Court of Appeals dated March 26, 2012, the following attorney has been
reprimanded:

WILLIE JAMES MAHONE