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About This Update

The Department of Legislative Services, Office of Policy Analysis, reviews the opinions issued by the Court of Appeals of Maryland and reports on those decisions of significance to the General Assembly. The project is led by Douglas R. Nestor. George H. Butler, Jr., Amy A. Devadas, John J. Joyce, Karen D. Morgan, and Effie C. Rife assisted in the preparation of this edition. Warren G. Deschenaux provided editorial direction.

In this edition, the following cases are summarized:

- *Allen v. State*, No. 16, and *Diggs v. State*, No. 17 (Sept. Term 2014) (Opinions filed November 26, 2014): Section 2-510 of the Public Safety Article requires a party seeking to admit a deoxyribonucleic acid (DNA) database "match" into evidence at trial to ensure that additional testing of the DNA samples is completed to confirm the validity of the match. This requirement applies equally to a criminal defendant. Page 2.

- *State v. Goldberg, et al.*, 437 Md. 191 (2014): Legislation that retroactively replaced the process of ejectment with a lien-and-foreclosure procedure in cases of lessees defaulting on ground leases unconstitutionally extinguished the right of re-entry, a part of a bundle of vested rights held by ground rent holders. Page 3.

- *Williams, et al., v. Peninsula Regional Medical Center, et al.*, No. 18 (Sept. Term, 2014) (Opinion filed November 21, 2014): Absent allegations of bad faith or unreasonable grounds, State law provides immunity against negligence suits based on involuntary-admission decisions. Although § 10-618 of the Health – General Article is written in terms of the decision to admit a patient against his or her will, it is sound public policy and consistent with legislative intent to apply the section to decisions against involuntary admission. Page 4.

- *Department of Public Safety and Correctional Services v. John Doe* and *Hershberger v. John Roe*, 439 Md. 201 (2014): The retroactive registration of a sex offender that would otherwise be unconstitutional under the Maryland Declaration of Rights may not be compelled by the independent retroactive registration requirement contained in the federal Sex Offender Registration and Notification Act (SORNA) in light

of language in SORNA providing guidance for the resolution of conflicts between federal law and state constitutions. Page 6.

- *Motor Vehicle Administration v. Deering*, 438 Md. 611 (2014): Even if a suspected drunk driver is denied the opportunity to consult with counsel before deciding whether to take a requested test of blood alcohol concentration, the driver may not avoid the administrative license suspension that could occur from a failing test result or test refusal. The administrative license suspension may be imposed even if, in a subsequent criminal proceeding, the test refusal or test results are excluded from evidence. Page 8.

- *Blackburn Limited Partnership d/b/a Country Place Apartments, et al., v. Paul*, 438 Md. 100 (2014): With respect to child trespassers, a property owner's duty to comply with State pool safety regulations supersedes the common law doctrine that a property owner owes no affirmative duty of care to a trespasser. Page 11.

Criminal Law – DNA Collection Act – Admissibility of DNA Match Evidence

Case: *Allen v. State*, No. 16, and *Diggs v. State*, No. 17 (Sept. Term 2014) (Opinions filed November 26, 2014).

Decision: Under § 2-510 of the Public Safety Article, before evidence of a deoxyribonucleic acid (DNA) database "match" may be admitted at trial, the party seeking its admission bears the burden of ensuring that additional testing of the DNA samples is completed to confirm the validity of the match. This requirement applies equally to a criminal defendant offering evidence of a DNA match to another individual.

Background and Summary: State law requires a DNA sample to be taken from any individual charged with specified crimes of violence or felony burglary, with the exception of mayhem. In addition, DNA samples are collected from individuals convicted of a felony, fourth degree burglary, or breaking and entering a vehicle. The State Police Crime Laboratory stores and maintains each DNA identification record in the statewide DNA database. Section § 2-510 of the Public Safety Article provides that "[a] match obtained between an evidence sample and a database entry may be used only as probable cause and is not admissible at trial unless confirmed by additional testing."

Petitioners and co-defendants, Traimne Martinez Allen ("Allen") and Howard Bay Diggs ("Diggs"), were convicted in the Circuit Court for Montgomery County of attempted first degree murder, first degree burglary, robbery with a deadly weapon, attempted robbery with a deadly weapon, conspiracy to commit robbery, two counts of first degree assault, and two counts of using a handgun in the commission of a crime of violence, stemming from an alleged home invasion and robbery at the residence. During their investigation, police officers took DNA samples from two black bandanas, a baseball hat, a black t-shirt, and an orange juice bottle recovered from the scene of the incident. Although the Montgomery County Crime Laboratory determined that Allen

was the major contributor of DNA to the baseball hat, a DNA sample taken from the bloodied black bandana produced a "match" to a DNA profile of an individual named Richard Debreau, which had been previously uploaded to the Combined DNA Index System (CODIS) by the crime laboratory, and a sample taken from the orange juice bottle produced a "match" to a DNA profile of an individual named Mohamed Bangora, which had been previously uploaded to CODIS by the Maryland State Police.

At the conclusion of its case-in-chief during the April 2010 trial, the State moved to prevent the defense from questioning Naomi Strickman, a forensic specialist employed by the Montgomery County Crime Laboratory, about the DNA profile matches to Debreau and Bangora. The State argued, in part, that § 2-510 of the Public Safety Article prohibits the admission of DNA matches at trial without additional confirmatory testing, which the defense had failed to request. The trial court granted the State's motion. After their conviction, the defendants appealed to the Court of Special Appeals, which affirmed the trial court's decision.

The Court of Appeals granted the defendants' petitions for a *writ of certiorari* and affirmed the decision. The Court observed that the statute is "rife with undefined terms," as the statute does not provide definitions for "match" or "additional testing" and is unclear whether the statute applies at any trial. Nevertheless, the Court held the plain language of the statute requires that before evidence of a DNA database "match" may be admitted at trial, the party seeking its admission bears the burden of ensuring that additional testing of the DNA samples is completed to confirm the validity of the match. This requirement applies equally to a criminal defendant offering evidence of a DNA match to another individual. The defendants failed to obtain this additional confirmatory testing, absent the apparent inability to do so, and therefore the DNA match evidence was inadmissible at trial. Moreover, the Court concluded that this restriction on the admissibility of evidence does not violate the accused's constitutional right to present a fair defense. The Court found that the statute imposes a reasonable restriction on the admission of DNA evidence, because it ensures the reliability of that evidence and does not preclude a defendant from admitting DNA evidence.

Due Process and Takings – Vested Rights – Ground Rents

Case: *State v. Goldberg, et al.*, 437 Md. 191 (2014).

Decision: Legislation that retroactively replaced the process of ejectment with a lien-and-foreclosure procedure in cases of lessees defaulting on ground leases unconstitutionally extinguished the right of re-entry, a part of a bundle of vested rights held by ground rent holders.

Background and Summary: In the 2007 session, in response to complaints generated by what were seen as abuses of the ground rent system, the General Assembly enacted two pieces of legislation that amended the law concerning ground rents. One of these statutes, Chapter 290, was declared unconstitutional by the Court of Appeals in *Muskin v. State Dep't of Assessments and Taxation*, 422 Md. 544 (2011). In *Muskin*, the court declared that Chapter 290's grant of authority to the State Department of Assessments and Taxation to issue certificates transferring the

reversionary interest from ground lease holders to ground rent tenants (should the holders fail to register the leases within a certain period) was an unconstitutional abrogation of the holders' vested rights in the leases.

The statute at issue in this case, Chapter 286 of the Laws of 2007, replaced ejectment with a lien-and-foreclosure process for a defaulting lessee of an existing ground lease when more than six months' rent is overdue. This statute was challenged by a group of plaintiffs-lessors on the grounds that the law abrogated their vested rights in the ground leases. The circuit court, relying on *Muskin*, determined that the General Assembly exceeded its powers and held Chapter 286 invalid. The State appealed to the Court of Special Appeals, arguing that the General Assembly is allowed to alter remedies by statute and that no vested property rights were involved in the case. Before the Court of Special Appeals decided the issue, the Court of Appeals granted *certiorari*.

Agreeing with the plaintiffs-lessors, the court's majority declared that the case "was settled effectively" by the *Muskin* decision and upheld the decision of the circuit court. The court pointed to a long line of cases stating that due process of law and the prohibition against governmental taking of property without just compensation does not allow the retrospective reach of a statute that would result in the taking of a vested property right. *Muskin* provides a two-part test to make this determination: (1) if a statute purports to apply retrospectively and (2) is found to abrogate a vested right or takes property without just compensation, it is unconstitutional. The court noted that Chapter 286 acted retrospectively to impair "a strand of the ground lease holder's bundle of rights," namely the right to reentry in the event of a default. To the State's arguments that no right was lost because ejectment and re-entry are merely alternate remedies to enforce payment and that the landlord's reversionary interest remained intact, the majority disagreed. The foreclosure-and-lien remedy did not provide the same safeguards for leaseholders as the prior ejectment remedy did, the court reasoned, since under the statute's foreclosure-and-lien remedy, the ground leaseholder would not be able to seek a judicial remedy to terminate the lease such that the leaseholder could regain the right to present possession of the property. Due to the unique nature of the property rights invested in ground rent leases, the court concluded, where the ground leaseholder's rights are bundled, the right of re-entry is vested. Therefore, the statute unconstitutionally impinged on this vested right.

Two judges dissented on the grounds that the right of re-entry was a mere remedy and that the General Assembly is generally allowed to alter remedies available at law, particularly, as here, where the right of reentry was merely contingent on a future default and therefore was a right that was not truly vested.

Medical Malpractice Liability – Involuntary Admissions – Statutory Immunity

Case: *Williams, et al., v. Peninsula Regional Medical Center, et al.*, No. 18 (Sept. Term, 2014) (Opinion filed November 21, 2014).

Decision: Absent allegations of bad faith or unreasonable grounds, State law provides immunity against negligence suits based on involuntary-admission decisions. Although § 10-618 of the

Health – General Article (HG) is written in terms of the decision to admit a patient against his or her will, it is sound public policy and consistent with legislative intent to apply the section to decisions against involuntary admission.

Background and Summary: In April 2009, Charles Williams, Jr., was brought by his mother to the Peninsula Regional Medical Center (PRMC) emergency room, as he was suffering from suicidal ideation and auditory and visual hallucinations. After evaluating him, health care providers decided not to admit him for psychiatric treatment and discharged him to the care of his mother. That same night, he was killed by law enforcement officers after inviting the officers to shoot him and then aggressively rushing them. Plaintiffs filed a wrongful death and survivorship action against PRMC and the health care providers in the Circuit Court for Wicomico County, alleging negligence for failure to admit Williams. The defendants filed motions to dismiss, arguing that they were entitled to statutory immunity. The Circuit Court granted the motions to dismiss, concluding that the defendants were protected from liability by statute. The plaintiffs appealed to the Court of Special Appeals, which affirmed the trial court's decision.

The Court of Appeals granted the plaintiffs' petition for a *writ of certiorari* and affirmed the decision. The court rejected the plaintiffs' narrow interpretation of § 10-618 of HG and § 5-623 of the Courts and Judicial Proceedings Article (CJP) that the statutory immunity provided by those provisions applies only to those individuals who apply for the involuntary admission of another and exclude those who perform the involuntary admission evaluation. Rather, the court held, the plain, unambiguous language of both provisions extends immunity to health care institutions and their agents who evaluate an individual as part of the involuntary admission process. Specifically, the court found that PRMC qualifies as a "facility" under § 10-618(b) of HG, and the health care providers qualify as agents or employees of a facility under § 10-618(c) of HG.

Alternatively, the plaintiffs suggested that the immunity provided under § 10-618 of HG and § 5-623 of CJP applies only if the patient is admitted to the hospital, not in instances in which the individual is evaluated and released. The plaintiffs maintained the titling of Title 10, Subtitle 6, Part III of HG captioned "Involuntary Admissions," and the caption of § 5-623 of CJP, "Admissions to mental health facilities," support their narrow interpretation of the statutes. However, the court noted that headings, captions, or labels are not deemed part of the law. Ignoring the section captions and reading the statutes in the entirety, the court concluded that the statutory scheme to which § 10-618 of HG belongs supports the application of the immunity provision to both when an individual is involuntarily admitted and when the decision is made not to admit him or her. The court observed that affording health care providers immunity both when they decide in favor of and when they decide against admittance of an individual amounts to sound public policy, consistent with the General Assembly's intent. Examining the legislative history of the provisions, the court noted that the General Assembly enacted legislation aimed at preventing excessive institutionalization and protecting the civil rights of patients. If the General Assembly's intention was to protect individuals from undue deprivation of liberty, the court reasoned, it would make little sense to give health care providers an incentive to err on the side of involuntary admittance in order to receive statutory immunity and avoid liability. Instead, the statutory scheme protects the discretion of health care providers tasked with deciding whether to involuntarily admit

an individual; this in turn safeguards the liberties of those subject to evaluation and possible involuntary admission.

Retroactive Registration of Sex Offenders – Unconstitutional

Case: *Department of Public Safety and Correctional Services v. John Doe* and *Hershberger v. John Roe*, 439 Md. 201 (2014).

Decision: The retroactive registration of a sex offender that would otherwise be unconstitutional under the Maryland Declaration of Rights may not be compelled by the independent retroactive registration requirement contained in the federal Sex Offender Registration and Notification Act (SORNA) in light of language in SORNA providing guidance for the resolution of conflicts between federal law and state constitutions.

Background and Summary: In 2006, John Doe pled guilty and was convicted in the Circuit Court for Washington County for child abuse of a former student during the 1983 to 1984 school year. In 1995, the General Assembly adopted the Maryland sex offender registration statute, which originally applied only prospectively to crimes committed after its effective date, October 1, 1995. In 2009, the statute was amended to apply retroactively to offenders who were convicted of their crimes on or after October 1, 1995. That same year, Doe challenged the requirement that he register on State and federal constitutional grounds. Following rulings upholding the constitutionality of the requirement by the circuit court and the Court of Special Appeals, the Court of Appeals, in 2013, held that the retroactive application of the registration law was a violation of the *ex post facto* prohibition contained in Article 17 of the Maryland Declaration of Rights.

On remand from the Court of Appeals, the circuit court ordered the removal of Doe's sex offender registration from all databases, including federal databases. The State filed a motion arguing that Doe was not entitled to relief due to his obligation to register as a sex offender under SORNA. The circuit court denied the motion. Subsequently, the Court of Special Appeals presented a certification to the Court of Appeals requesting the court to make a determination on the applicability of its earlier ruling (*Doe I*) to federal sex offender registration databases. The Court of Appeals granted the certification.

In 1997, John Roe pled guilty and was convicted of a third degree sex offense in the Circuit Court for Wicomico County for conduct with a minor that took place between December 1994 and January 1996. He registered as a sex offender and continued to register annually for a term that he believed would expire after 10 years. A 1999 amendment to the sex offender registration law, however, extended the registration requirement from 10 years to life, and the 2009 amendment applied the requirement retroactively. Under a 2010 amendment to the statute, Roe was classified as a Tier II offender and required to register for 25 years. In 2009, Roe filed a complaint challenging the applicability of the registration statute to him. After the circuit court found that Roe was required to register, Roe appealed to the Court of Special Appeals. In 2013, that court held that pursuant to the Court of Appeals decision in *Doe I*, the registration requirement could not

be applied retroactively to Roe and remanded the case to the circuit court. The State then filed a motion requesting the circuit court to declare that Roe must register under federal law notwithstanding the decision in *Doe I*. The circuit court nevertheless entered an order directing the State to remove Roe from sex offender databases. While the case was pending in the Court of Special Appeals, the Court of Appeals granted a petition for a *writ of certiorari* to consider whether the circuit court lacked the authority to require Roe's removal from the databases in light of the independent registration requirement imposed by federal law.

The Court of Appeals consolidated Doe and Roe's cases and also granted permission to a third individual to participate in the appeal as an amicus.

After addressing preliminary matters, the court turned to a discussion of SORNA and its applicability to sex offenders in Maryland. Enacted in 2006, the federal law replaced several earlier registration laws and was designed to "streamline and homogenize sex offender registration and notification systems throughout the states." The law establishes minimum national standards for registration and notification programs. While the standards are framed as requirements, the law also explicitly states that, in relation to states, they are actually conditions required to avoid the reduction in federal funding under the law. One of the standards is the retroactive application of the registration requirement. This standard was implemented in Maryland in 2009. In addition, SORNA places a separate requirement on sex offenders to register in the appropriate jurisdictions. In support of its contention that sex offenders are required to register in accordance with SORNA regardless of State law, the State relied on *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009) and similar cases. In *Gould* the court found that the defendant was required to register as a sex offender in Maryland even though the State had not yet implemented SORNA because the defendant had an independent obligation to do so under federal law.

Unpersuaded by the State's argument, the Court of Appeals distinguished the case from *Gould* because in *Gould* "the purported obstacle to registration was that Maryland had not yet implemented SORNA," whereas in this case the "asserted stumbling block is that the court has declared the retroactive application of Maryland's sex offender registry to be unconstitutional under the Maryland Declaration of Rights." The court pointed to language in SORNA which seemed to contemplate just the dilemma it faced. Specifically, SORNA expressly addresses the possibility of a conflict between its provisions and a state constitution and directs that in such a case the jurisdiction and U.S. Attorney General should collaborate to find "reasonable alternative procedures or accommodations" consistent with the purpose of SORNA. The court emphasized that it would be contrary to cannons of statutory construction to ignore this language or consider it mere surplusage. The court further reasoned that the language indicates that Congress intended under SORNA to give deference to a determination of unconstitutionality under state law. Thus, while the court agreed that SORNA does appear to impart an independent duty on a sex offender to register, the court also found that the "State cannot legally accept a sex offender's involuntary registration when that individual's registration is unconstitutional under Maryland law."

The court noted that only two other states, Missouri and Indiana, have addressed the issue of a conflict between SORNA's requirements and a state constitution. In *Doe I v. Keathley*, 290 S.W.3d 719 (Mo. 2009), the Supreme Court of Missouri found an independent registration

requirement under SORNA that operates irrespective of any state law that may be subject to the state constitutional ban on *ex post facto* laws. In contrast, the Court of Appeals in Indiana, highlighting the language in SORNA contemplating a potential conflict with state constitutional law, held in *Andrews v. State*, 978 N.E.2d 494 (Ind. Ct. App. 2012) that a sex offender could not be required to register under SORNA where the registration requirement was unconstitutional as applied retroactively to him. The Court of Appeals, citing this opinion approvingly, noted that "Marylanders, like Hoosiers, enjoy greater protection under the prohibition of *ex post facto* laws of the Maryland Declaration of Rights." The court went on to explain that the "language of SORNA expressly providing for a conflict between the federal law and state constitutions, as well as the available federal guidance on the topic, leads us to the conclusion that so long as Appellees are in Maryland, they cannot be required to register as sex offenders in Maryland, notwithstanding the registration requirements imposed directly on individuals by SORNA."

Finally, the court found that the circuit court's order in *Doe* directing the State to remove information from "federal databases" was incorrect. The court noted that the federal databases, including the National Sex Offender Registry, the National Crime Information Center, and the National Sex Offender Public Website, are managed by federal agencies but rely on information provided by the states. The State, explained the court, cannot remove information from these databases. Determining that the proper order would compel the State to remove all of its records relating to Doe's registration as a sex offender and to notify federal agencies of his removal from the Maryland registry, the court ordered the lower appeals court to modify the circuit court's order accordingly.

Implied Consent – Administrative *Per Se* Law – No Right to Consult with Counsel

Case: *Motor Vehicle Administration v. Deering*, 438 Md. 611(2014).

Decision: Even if a suspected drunk driver is denied the opportunity to consult with counsel before deciding whether to take a requested test of blood alcohol concentration (BAC), the driver may not avoid the administrative license suspension that could occur from a failing test result or test refusal. The administrative license suspension may be imposed even if, in a subsequent criminal proceeding, the test refusal or test results are excluded from evidence.

Background and Summary: The respondent, April Marie Deering, was detained for traffic violations by an officer of the Fruitland Police Department in Wicomico County shortly after midnight on May 3, 2012. Once stopped, the officer noticed that Ms. Deering smelled of alcohol and had slurred speech. The officer asked Ms. Deering to perform field sobriety tests, which she could not complete satisfactorily. Ms. Deering was then arrested for driving under the influence of alcohol.

Ms. Deering was transported to the Fruitland police station and advised of the consequences of taking a test with a result of 0.08 BAC or higher, or of declining to take the test. Ms. Deering asked if she could call an attorney, but the officer declined to let her make a call. Typically, the

Fruitland police do not consent to a driver's request to consult a lawyer because of the limited two-hour timeframe (as specified in § 10-303(a) of the Courts and Judicial Proceedings Article) for administering a breath test. In the Fruitland area, if a detained driver consents to take a breath test, the arresting officer must drive the person to the nearest State Police barracks, which is about 20 minutes from the police station.

About 45 minutes after the initial stop, Ms. Deering agreed to take a breath test. The first test failed. The second test was not completed until 1:56 a.m., about one hour and 50 minutes after the initial stop. At that time, her test result indicated a BAC of 0.16. The officer then issued an administrative suspension of 90 days because her test results exceeded 0.15 BAC, in addition to 0.08 BAC, which makes the driver subject to a more stringent administrative suspension. Ms. Deering requested an administrative hearing on the suspension order and asked that the administrative law judge (ALJ) take "no action," that is, refuse to impose the suspension. The ALJ declined Ms. Deering's request and concluded that she had violated the implied consent law (§ 16-205.1 of the Transportation Article), and her 90-day license suspension was upheld. To comply with venue requirements, Ms. Deering appealed the administrative decision to the Circuit Court for Somerset County.

The circuit court reversed the administrative decision and held that the denial of Ms. Deering's request to consult an attorney violated her right to due process under the Fourteenth Amendment of the U.S. Constitution. The Motor Vehicle Administration (MVA) filed a petition for a *writ of certiorari* to the Court of Appeals. The Court of Appeals granted *certiorari* to determine whether the ALJ properly imposed the suspension of Ms. Deering's driver's license, although her request to speak to an attorney before taking a breath test was denied.

When considering due process in an administrative context, the Court of Appeals stated that it must apply a balancing test among (1) the private interest in the right to drive; (2) the governmental interest in deterrence of drunk driving and protection of the public from drunk drivers; and (3) the likelihood that a driver subject to administrative sanctions will suffer an erroneous sanction due to the inability to consult an attorney. The court determined that the likelihood of an erroneous administrative sanction is minimal or nonexistent. While advice of counsel may help a driver to decide between the certain license suspension for refusing a test or the risk of a different suspension for taking a test, this advice does not affect whether the basis for the sanction was erroneous. Furthermore, the State has the right to sanction a driver who refuses to take a requested test, even if it is later determined that the driver had not consumed an illegal quantity of alcohol, because the effectiveness of the implied consent law largely depends on the willingness of drivers to take a requested test.

The circuit court reversal of the ALJ decision in *Deering* was mostly based on a previous decision of the court, *Sites v. State*, 300 Md. 702 (1984). In this case, the Court of Appeals ruled that while there was no right to consult with an attorney before taking a breath test based on the Sixth Amendment or conferred by the implied consent law, a due process right to consult with counsel *was conferred* by the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. The *Sites* court opined that a driver's license is an entitlement that cannot be taken from a person without a reasonable chance to consult with an attorney before deciding whether to submit

to a breath test due to suspicion of drunk driving. However, this right to consult with counsel is limited by the exigencies of each case. Thus, the right exists, as long as the attempted consultation will not interfere substantially with the administration of the test. As a result, great deference should be given to the officer's assessment about whether the consultation will interfere with administration of the test. In *Deering,* the court observed that the ruling in the *Sites* case was arrived at without significant analysis, as the several U.S. Supreme Court decisions referenced were not on point. Not only was there scant federal judicial authority for the ruling in *Sites,* but a number of other state high courts had reached the opposite conclusion. The courts that recognized a pre-test right to counsel had tethered that authority not to the U.S. Constitution, but to specific state constitutional provisions, statutes, or rules. The *Deering* court did not specifically overrule the *Sites* case, but said it may still retain vitality since its linkage to Article 24 of the Maryland Declaration of Rights may confer the right to consult with counsel, even if the U.S. Constitution does not confer such a right.

Once determining that there may be a right to consult with counsel before deciding whether to submit to a test due to suspicion of drunk driving, the court analyzed whether the violation of that right affects the imposition of an administrative license suspension authorized under the implied consent law. The court then considered two other cases that it had decided previously: *Richards v. State*, 356 Md. 356 (1999) and *Nafari v. Motor Vehicle Administration,* 418 Md. 164 (2011). These cases, in rulings and in opinion (referred to as dicta) provided the basis to give due consideration to the issue presented in the *Deering* case.

In the *Richards* case, a circuit court declined to uphold an ALJ administrative license suspension based on refusal to take a breath test because the police violated the Fourth Amendment by not having adequate justification for the initial traffic stop. The Court of Appeals decided to hear the appeal to determine whether the exclusionary rule (evidence obtained in violation of the Fourth Amendment protection against unreasonable searches and seizures may be excluded in a criminal proceeding) would operate to bar evidence of the test refusal from a subsequent criminal proceeding. The *Richards* court found that the Maryland legislature made a deliberate effort to keep administrative and criminal proceedings separate with regard to drunk driving enforcement. For example, the constitutionality of the initial stop is not an issue that may be considered at an administrative hearing that contests an administrative license suspension. As MVA is wholly separate from the police, application of an exclusionary rule would have little deterrent effect. Also, courts have historically been reluctant to extend the exclusionary rule beyond criminal proceedings. The *Richards* court ruled that even if an initial traffic stop violated the Fourth Amendment, the exclusionary rule should not be applied to prohibit the sanctions imposed by an administrative agency.

In the *Nafari* case, a driver detained on suspicion of driving under the influence of alcohol asked to speak to an attorney while detained at the police station. The driver was given a cellphone and a phone directory, but he could not successfully contact an attorney. He refused to take a breath test and appealed the administrative 120-day license suspension because he contended he was denied a reasonable chance to contact an attorney. The ALJ held that for an administrative hearing, a police officer is not required to allow a driver to contact counsel. However, even if there is such a requirement, the accommodation of providing a cellphone and directory was sufficient to satisfy

it. On appeal, the circuit court upheld the ALJ decision because the court agreed that Nafari was given a reasonable chance to contact an attorney. The Court of Appeals then decided to hear the case and observed that denial of a right to counsel may be subject to remedy in a criminal case, but in an administrative context, similar remedies do not exist. However, the *Nafari* court did not directly rule on the issue of whether a due process right to counsel exists in an administrative context, but instead agreed with the circuit court and the ALJ that the driver had an adequate chance to consult an attorney before deciding whether to take a breath test due to suspicion of drunk driving.

In considering the cases of *Sites*, *Richards*, and *Nafari*, the *Deering* court stated that it is possible that no violation of a right to consult counsel, to the extent conferred by *Sites*, occurred for Ms. Deering, given the severe time constraints to administer a breath test and the deference to the officer's assessment of whether a consultation would interfere with timely administration of the test. However, the ALJ stated that the chance to consult a lawyer was *not necessary* in the administrative context. Accordingly, the ALJ found that an administrative license suspension may be imposed in spite of the denial of a chance to consult an attorney. The court agreed and affirmed the dicta in the *Nafari* decision by ruling that violation of the right to consult an attorney before deciding whether to take a breath test requested due to suspicion of drunk driving does not require suppression of the test result or refusal in administrative proceedings.

Child Trespassers – State Pool Regulations Supersede Common Law

Case: *Blackburn Limited Partnership d/b/a Country Place Apartments, et al., v. Paul*, 438 Md. 100 (2014).

Decision: With respect to child trespassers, a property owner's duty to comply with State pool safety regulations supersedes the common law doctrine that a property owner owes no affirmative duty of care to a trespasser.

Background and Summary: Three-year-old Christopher Paul and his 10-year-old brother, Andre, were playing outside of their parents' apartment in Burtonsville on the morning of June 13, 2010. The two boys eventually became separated, and a search for Christopher commenced after Andre inquired into his younger brother's whereabouts. Alicia Paul, the boys' mother, spotted Christopher's clothing and shoes near the apartment complex's pool. After an unsuccessful attempt to open the pool gate, Ms. Paul asked the lifeguards, who had just arrived on the scene, to unchain the gate. Ms. Paul discovered Christopher submerged in the water soon after entering the pool area. The lifeguards and paramedics began rescue efforts on Christopher, who was transported to a local hospital. As a result of nearly drowning in the pool, Christopher sustained severe brain injuries, which have rendered him largely unresponsive and dependent on others for his basic needs and functions. Doctors do not expect his medical condition to improve.

Ms. Paul sued the companies that owned the apartment complex, managed the apartment complex, and operated the pool at the complex ("the companies") in the Circuit Court for Montgomery County. The complaint alleged negligence and negligence *per se* and sought

compensatory damages for medical expenses in the amount of $15,000,000, plus costs and interest. Ms. Paul's negligence complaint alleged that the companies breached their duty of care to maintain reasonably safe conditions at the pool for all of the apartment complex's residents, particularly children. Ms. Paul's negligence *per se* complaint alleged that the companies failed to comply with specified State and local pool safety laws and regulations. One requirement under the regulations is that a fence contain no gaps wider than four inches, since according to federal guidelines, small children can pass through wider openings. The fence at the pool had several larger openings.

The companies' filed motions for summary judgment, based primarily on the argument that because Christopher was a trespasser at the time of the incident, their only duty was to refrain from willfully and wantonly injuring him. The motions also argued that Christopher's unsupervised play was the intervening, superseding cause of his injuries.

The circuit court granted the companies' motions for summary judgment, holding that (1) Christopher's status as a trespasser meant that the companies only had a duty "to avoid willful and wanton misconduct or entrapment"; (2) any violation of pool safety regulations and laws would only be relevant if there was a judicial finding that the companies owed Christopher a higher duty; (3) the alleged violations did not establish a *prima facie* case of negligence because the companies were not obligated to comply with pool safety regulations that took effect 19 years after the pool was built; and (4) there was no evidence as to how Christopher got past the fence, which would be required to establish that the companies' failure to comply with the regulations proximately caused Christopher's injuries in a *prima facie* case of negligence.

Ms. Paul appealed to the Court of Special Appeals, which reversed the circuit court's decision and held that (1) the companies' were required to comply with the 1997 State and local regulations and the 1997 Montgomery County statutes and (2) the existence of a common law duty of care is not a prerequisite for using statutory and regulatory violations as evidence of negligence. The intermediate court also disagreed with the circuit court's holdings regarding the lack of evidence as to how Christopher bypassed the fence and the proximate cause of his injuries.

The companies appealed to the Court of Appeals, which affirmed the judgment of the Court of Special Appeals. The court held that even though the companies could not be held liable under the common law rule because of Christopher's status as a trespasser, they could still be found liable for negligence as a result of regulatory violations. In its analysis, the Court of Appeals used the Statute or Ordinance Rule, under which a plaintiff can demonstrate *prima facie* evidence of negligence if the plaintiff can show that (1) the defendant violated a statute or ordinance that was designed to protect a specific class of persons, including the plaintiff and (2) the violation proximately caused the plaintiff's injuries. The court further clarified that the Statute or Ordinance Rule may be used to establish *evidence* of negligence, not negligence *per se*. Negligence *per se* applies when a statute specifically states that violations of its provisions constitute negligence *per se*.

The court focused its discussion and analysis on the applicable State pool safety regulations. After analyzing all of the applicable regulatory language, including documents incorporated by reference in the regulations (particularly the Model Barrier Code for Residential Swimming Pools) and

specified exemptions to the regulatory requirements (including "grandfathering" provisions), the court determined that (1) the apartment complex's pool and barrier were required to comply with the pool safety regulations, even though the regulations took effect 19 years after the pool was built and (2) the regulations were aimed at protecting young children under the age of five, a group to which three-year-old Christopher belonged.

Thus, the court held that if the violations could be proven, then the companies' failure to comply with the regulatory pool safety requirements could establish that the companies breached a duty to Christopher, regardless of his legal status as a trespasser at the time of the incident.

The court also determined that based on Ms. Paul's allegations and the evidence presented, a trier of fact could find that the companies had a duty to Christopher under the Statute or Ordinance Rule, breached that duty, and that the pool safety violations were the cause of Christopher's injuries.