Maryland Impact

By Andrew H. Baida, Esq.

Okay, I'll admit that the MSBA Litigation Section/Appellate Practice Committee's program which took place in the Maryland Court of Appeals courtroom on March 19, 2015, "Recent Impact Decisions of the Maryland Appellate Courts," had a slightly inaccurate title. I'll also admit that I did not change the title to reflect more precisely the subject matter of the program, even though I knew in advance not only that the esteemed speakers would discuss significant Maryland appellate cases decided over the course of the last year, but also that one of them would address several new Maryland Rules concerning judgments and attorneys' fees which either will take effect July 1, 2015, or have already gone into effect.

I admit all of this, okay? So sue me. Next time I'll get it right. Or maybe not. Anyway, here's what you missed if you were unable to attend what was truly a great event.

The program began with remarks from Judge Alan Wilner. Most people know who Judge Wilner is, and if you're one of those people, good for you and proceed to the next paragraph. But if you don't know who he is because you're a newly admitted member of the Maryland bar or a visitor from another planet, or perhaps both (in which case, really good for you), here's what you need to know. He has sat on both of Maryland's appellate courts for close to forty years; he currently heads the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure; and he's a lock to be an inaugural inductee of the Maryland Judges Hall of Fame as soon as it is established.

Judge Wilner began the program by discussing *Hiob v. Progressive Amer. Ins. Co.*, 440 Md. 466 (2014), in which the Court of Appeals held that a line of dismissal did not satisfy the "separate document" requirement of Rule 2-601 and did not trigger the time for filing a notice of appeal. Following this discussion, Judge Wilner addressed several amendments to Rule 2-601 and other Rules which take effect July 1, 2015. Perhaps the most significant is the amendment made to Rule 2-501, which changes summary judgment practice. Currently, a motion for summary judgment can be made orally or at trial. The amendment to Rule 2-501(a) provides that such a motion must be in writing and "may not be filed: (A) after any evidence is received at trial on the merits, or (B) unless permission of the court is granted, after the deadline for dispositive motions specified in the scheduling order entered pursuant to Rule 2-504(b)(1)(E)."

Judge Wilner discussed changes to other Rules, including Rule 2-521(d), governing juror communications, and Rule 8-606, concerning the issuance of mandates following the disposition of appeals. The reader is encouraged to read the Court of Appeals's March 2, 2015 Rules Order setting forth these and many other exciting Rule changes which become effective this summer and can be found at www.courts.state.md.us/rules/rodocs/ro186supp.pdf. Judge Wilner also addressed the never-ending attorneys' fees dispute in a wage payment case, *Friolo v. Frankel*, 438 Md. 304 (2014), and the relatively new Rules 2-701 through 2-706 governing attorneys' fees claims which became effective in January of 2014.

The other two speakers spoke about a number of recent Maryland appellate court decisions involving a range of topics. Professor Renée Hutchins of the University of Maryland Francis King Carey School of Law discussed *Pearson v. State*, 437 Md. 350 (2014), which held that a trial court need not ask prospective jurors during *voir dire* whether they have been a crime victim, but must ask, if requested, whether they have been a member of a law enforcement agency where all of the State's witnesses are law enforcement agency members or the basis for a conviction is reasonably likely to be the testimony of such individuals. Professor Hutchins also talked about several cases decided in the span of two days, *Nalls and Melvin v. State*, 437 Md. 674 (2014), *Szwed v. State*, 438 Md. 1 (2014), and *Morgan v. State*, 438 Md. 11 (2014), in which the Court of Appeals addressed the circumstances in which a jury trial waiver is knowing and voluntary; *State v. Payne*, 440 Md. 680 (2014), which held, among other things, that the trial court erred in allowing a police officer, who was not qualified

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Remands...

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function pending the remand."[24] "'This type of remand is thus 'nothing more than a brief delay in the ongoing review' of the agency decision," and "there is a strong potential, bordering on certainty, that the issue at hand … will be back for determination by the circuit court."[25]

Practitioners should take note. When a remand order is entered by a Circuit Court before conducting judicial review, the general rule is that the Circuit Court's review has not concluded, and therefore an appeal from the remand order is premature.

We will have to wait to see whether the clear line that the Court attempted to draw in *Milburn* stays clear. The Court itself, in a footnote, noted an exception to the rule it just created, stating that "[a] remand prior to judicial review based on a statute that requires remand and termination of the circuit court proceedings in specific circumstances is a final judgment."[26] Therefore, to fully analyze whether a remand order to an administrative agency is final, one must carefully examine the statutory scheme to determine whether the case is akin to *Milburn*, or whether there is a statutory basis to determine that a pre-judicial review remand is a final and appealable order.

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Endnotes

[1] *Metro Maintenance Systems South, Inc. v. Milburn*, __ A. 3d __, 2015 WL 1412639 (Md. 2014), at 1.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 2.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* The other two attributes are, "unless the court acts pursuant to Maryland Rule 2-602(b) to direct the entry of a final judgment as to less than all the claims or all of the parties, [the order] must adjudicate or complete the adjudication of all claims against all parties" and the order "must be set forth and recorded in accordance with Rule 2-601." *Id.* (citations omitted).
[17] *Id.* at 3 (citation omitted).
[18] *Id.*
[19] *Id.*
[20] *Id.* at 4-5.
[21] *Id.* at 5-6.
[22] *Id.* at 6.
[23] *Id.* at 6 (quoting from *Anne Arundel County v. Rode*, 214 Md.App. 702, 715 (2013).
[24] *Id.* at 8.
[25] *Id.*
[26] *Id.* at 8 fn16.

Impact...

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as an expert, to testify about the location of cell phone towers through which the defendants' cell phone calls were routed; *Roy v. Dackman*, 219 Md.App. 452 (2014), in which the Court of Special Appeals held that the trial court properly excluded the proffered testimony of the plaintiffs' pediatrician because he was not qualified as an expert to testify that their injuries resulted from lead paint exposure; and *Donati v. State*, 215 Md.App. 686 (2014), which held that the trial court did not abuse its discretion in accepting a Montgomery County police detective as an expert in digitial forensic examinations even though he did not have post-graduate degrees in computer science and had not testified previously as an expert.

The program's third speaker, Bruce Marcus of MarcusBonsib, LLC, discussed a case decided by the Court of Appeals which was pending before the U.S. Supreme Court on a certiorari petition as of the time this article was written. The petitioner in *Kulbicki v. State*, 440 Md. 33 (2014), was convicted in 1995 of first-degree murder based, in part, on the testimony of an FBI agent who relied on a Comparative Bullet Lead Analysis to link a bullet found in the victim to a bullet fragment found in Kulbicki's truck and a bullet recovered from a handgun found in Kulbicki's home. On post-conviction review, the Court of Appeals held that Kulbicki was entitled to a new trial because his attorneys rendered ineffective assistance of counsel by failing to cross-examine the State's expert about flaws underlying the science which formed the basis of his opinion when those flaws were discoverable through a report that the expert co-authored four years prior to trial. After prevailing in the Court of Appeals, Kulbicki tried to duck Supreme Court review by waiving his right to respond to the State's cert. petition, but the Supreme Court declined the waiver and requested a response, which is due by May 6, 2015.

Mr. Marcus also discussed *Attorney Grievance Comm'n v. Frost*, 437 Md. 235 (2014), which held that an attorney's knowingly false statements concerning the integrity and qualifications of several judges and public legal officers were not entitled to protection under the First Amendment to the U.S. Constitution and constituted a violation of Rule 8.2(a) of the Maryland Rules of Professional Conduct. Mr. Marcus mentioned Judge McDonald's concurring and dissenting opinion, which expressed discomfort with disbarring the attorney based on a "limited record for what appears to be largely an expression of opinion, misguided though that opinion may be."

Each of the speakers was phenomenal and had a lot more to say than what I've covered here, but you get what you pay for. This program was a lot of fun and a pleasure for the Litigation Section and Appellate Practice Committee to present.