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Recent Developments: Campbell v. Montgomery County Bd. of Educ.: Female Minor Does Not Assume Risk of Sexual Assault When Impermissibly Entering Boys' Locker Room

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In contrast, Mr. Newkirk presented a psychiatrist who testified that in the best interest of the children, they should be placed in the custody of their father. It was the psychiatrist's opinion that it was natural for the teenagers to prefer living with Derek, who is closer to their age, than with a parent of a different generation. He also stated that the children felt bound to fulfill their mother's wish for Derek to take care of them. *Newkirk*, at 595, 535 A.2d at 950.

In awarding the children to Derek, Chancellor Levin considered the reports presented to the court and additionally indicated that he feared the estranged relationship that developed between Mr. Newkirk and his adopted sons would repeat itself if the father was given the custody of James and Meghan. The chancellor also gave sufficient weight to the children's desires to live with Derek. Md. Fam. Law Code Ann. § 9-102 (1984) and Md. Est. & Trusts Code Ann. § 13-702 (1974) allow minors, who have attained the ages of 16 and 14 respectively, to petition for or designate their prefered guardians. *Newkirk* at 595, 535 A.2d at 950-51.

Reviewing this decision, the Court of Special Appeals of Maryland could not conclude that the chancellor was clearly erroneous in his findings nor that he abused his judicial discretion in giving Derek custody of the children.

The Appellant next contended that the chancellor erred in admitting into evidence evaluative reports by the Juvenile Services Administration and the circuit court's Mental Hygiene Consultation Service. Mr. Newkirk alleged that "the children never waived their respective privileges (of non-disclosure) nor were they advised of the existence thereof." *Id.* at 596, 535 A.2d at 951. The court, again, found no merit to this contention.

Both reports were ordered by officers of the court to aid in evaluating the emotional stability of the children, as well as the capacity of the two litigants to provide for James and Meghan. The court further indicated that the Appellant failed to raise this issue below and therefore, it had been waived under Md. Rule 1085.

Richard Newkirk's final averment was that there was no basis in fact or in law for the judgment entered against him for retroactive child support and continued weekly support payments. *Id.* The court of special appeals held that by an order effective prior to Patricia Newkirk's death, Richard Newkirk had a continuing obligation to provide for the support of his children until modification of the order, and that the judgment for arrearages was proper.

The decision handed down by the Court of Special Apeals of Maryland in *Newkirk* makes it clear that the presumption that a biological parent is always the best custodian of a child can be rebutted. The courts must thoroughly evaluate each custody dispute situation if the best interests of children are to be served. This important evaluative process attempts to ensure that Maryland's minors have a person at home who has the capacity, as well as desire, to care for them.

—Jonathan C. Levy

Campbell v. Montgomery County Bd. of Educ.: FEMALE MINOR DOES NOT ASSUME RISK OF SEXUAL ASSAULT WHEN IMPERMISSIBLY ENTERING BOYS' LOCKER ROOM

In *Campbell v. Montgomery County Board of Education*, 73 Md. App. 54, 533 A.2d 9 (1987), the Court of Special Appeals of Maryland recently held that a junior high school student did not assume the risk of sexual assault, as a matter of law, when she entered the boys' locker room. As a result, the court confirmed the importance that the fact-finder decide issues of contributory negligence and assumption of the risk.

On a late October day in 1983, Dawn Campbell was at her junior high school in Montgomery County, Maryland. That day, Dawn was excused from her physical education class because she had a broken finger. While her physical education class was in session, Dawn wandered onto the athletic field. According to Dawn, she was ordered by the boys' physical education teacher, Steven Rubinstein (Rubinstein), back into the building because she was disrupting his class. Rubinstein claimed that he told Dawn and a friend to find their own physical education class that was also on the field. Rubinstein said that he watched them begin walking toward their class and then returned to his own.

Instead of joining her class, Dawn reentered the building and proceeded to the boys' locker room with Georgia, another student. Dawn entered the boys' locker room but evidently Georgia did not follow. At trial, Dawn testified that she had been in the boys' locker room four other times in the preceding two months. Each

time, she did so without permission.

As soon as Dawn entered the locker room, she heard someone coming. Believing it was a teacher, Dawn hid in an old shower area which she had discovered on a prior visit because she did not want to be found in the locker room. Matt Stoulberg, a student, however, had followed Dawn into the old shower area where they began kissing. When another student, Rudy Crutchfield, entered the shower area, Dawn and Matt stopped kissing. Rudy grabbed Dawn, pulled her onto his lap and began molesting her. About fifteen boys arrived while Dawn was screaming and trying to get away from Rudy. The group of boys grabbed her and "pulled off her sweat shirt and brassiere, and sexually molested her by groping and fondling her breasts and 'between ... her legs.'" *Id.* at 58, 533 A.2d at 11. After a few minutes, a second group of students joined in the assault. Dawn testified that Clarence Turner, a part of the second group, said that he wanted to rape her. This statement was confirmed by two other students that were present. When Dawn screamed for help, several boys covered her mouth and one student hit her to make her remain quiet. The entire assault lasted for approximately thirty minutes, ending when the bell rang.

When Rubinstein entered the boys' locker room shortly after the bell rang, he heard a noise from the old shower area. He yelled for whoever was in the area to get out. Three to five male students exited the restricted area and were reprimanded for being there. Rubinstein did not ask them why they had been in the old shower area. He listened for ten to fifteen seconds and yelled "there better not be anybody else," and listened again. *Id.* at 59, 533 A.2d at 12. He testified that he was confident no one else was in the restricted area. Rubinstein decided not to enter the area because he would not have fit through the opening and was afraid of ripping his shirt. Rubinstein remained in the locker room for five or six more minutes, until the end of the period, and did not hear any noise from the old shower area.

After the bell rang, Dawn gathered her clothes and left the locker room aided by two boys. When she returned to the gym, a substitute teacher, noticing her flustered appearance, inquired as to the reason. Dissatisfied with Dawn's answer, the teacher took her to the principal's office. Dawn then related the preceding events to the principal because she was suspended for entering the boys' locker room.

Subsequently, Dawn and her mother sued the Montgomery County Board of Education (the Board), Rubinstein, and several students, in the Circuit Court for Montgomery County. Before the case was submitted to the jury, the trial judge entered judgment in favor of Clarence Turner. The jury returned verdicts in favor of Dawn against the Board, Rubinstein and a student; in favor of her mother against the Board and Rubinstein; and in favor of mother and daughter against a student for punitive damages. Subsequently, the trial judge struck the verdicts against the Board and Rubinstein. The verdict against the student was allowed to stand.

The first issue addressed by the court of special appeals was whether there was sufficient evidence of the negligence of either Rubinstein or the Board to allow the case to go to a jury. At trial, Dr. Stephens, the Assistant Principal of Sligo Junior High School, testified about the standard of care Rubinstein was held accountable for as a public school teacher. She testified that teachers would be expected to at least glance at all areas of the locker room where students could be found after a gym class. Dr. Stephens agreed that gym teachers were responsible for preventing male students from sexually assaulting female students. *Id.* at 61, 533 A.2d at 13.

Rubinstein confirmed that he knew of his duty to supervise students in all parts of the building during his duty hours. These duties were enumerated in the Policies and Regulation Handbook for Montgomery County Public Schools. *Id.* at 61-62, 533 A.2d at 13.

To begin its analysis, the court of special appeals noted that Maryland is very strict about taking cases from the jury in negligence actions. "The rule has been stated as requiring submission if there be any evidence, however slight, *legally sufficient* as tending to prove negligence, and the weight and value of such evidence will be left to the jury." *Id.* at 62-63, 533 A.2d at 13-14 (*quoting Fowler v. Smith,* 240 Md. 240, 246, 213 A.2d 549, 554 (1965)). The court found that the jury could reasonably have found from the evidence that Rubinstein was negligent in performing his duties as an agent of the Board. Therefore, the issue should have been submitted to the jury. *Id.* at 63, 533 A.2d at 14.

Next, the court of special appeals addressed whether the trial judge was correct in granting a motion for judgment notwithstanding the verdict in favor of Rubinstein and the Board. Resolution of this issue was predicated on whether Dawn was, as a matter of law, contributorily negligent and assumed the risk of a sexual assault.

The question of whether a plaintiff is contributorily negligent or assumes a risk is one for the trier of fact. If either defense is proven, the plaintiff is barred from recovery. *Id.* at 64, 533 A.2d at 14.

Contributory negligence exists when the plaintiff fails to act in a way that is consistent with his or her knowledge of the danger that could result from his or her conduct. A case cannot be taken from the jury on the grounds of contributory negligence unless there is no possibility that a reasonable person would find contributory negligence existed. The court of special appeals found that a reasonable person could have found that in spite of Dawn's prior visits to the boys' locker room, Dawn did not anticipate the danger she encountered there in October, 1983. *Id.* at 64-65, 533 A.2d at 14-15.

According to Maryland law, a person assumes "the risk as a matter of law only when the undisputed facts permit but one reasonable determination." *Id.* at 65, 533 A.2d at 15 (*quoting Hooper v. Mougin,* 263 Md. 630, 635, 284 A.2d 236, 239 (1971)). In this case, the court decided that there was no reason for Dawn to expect to be sexually assaulted when she entered the boys' locker room. *Id.*

Since the court held that the trial judge improperly invaded the discretion of the jury when he granted the j.n.o.v., they vacated that judgment and remanded the case to the Circuit Court for a determination of whether the Md. Educ. Code Ann. § 4-105 (1985) limitation of $100,000 applies to the judgment against the Board and Rubinstein. *Campbell,* 73 Md. App. 54, 66, 533 A.2d 9, 15 (1987).

The court also declared that the trial judge invaded the jury's fact-finding func-

tion by entering a judgment in favor of one of the students. The general rules according to which the sufficiency of evidence is tested on appeal are the same for a directed verdict as for a judgment n.o.v. *Id.* at 66-67, 533 A.2d at 15-16.

Through its holding in *Campbell*, the Court of Special Appeals of Maryland effectively restrained a trial judge's authority, while ensuring that a plaintiff is not simply subjected to the prejudices of the trial judge. The defenses of assumption of the risk and contributory negligence were preserved as viable options for plaintiffs.

—*Stephanie A. Babb*

Cobey v. State: CHROMOSOME VARIANT ANALYSIS INADMISSIBLE TO MATCH ALLEGED RAPIST TO VICTIM'S ABORTED FETUS

In a case of first impression, the Court of Special Appeals of Maryland in *Cobey v. State*, 73 Md. App. 233, 533 A.2d 944 (1987), has held that results acquired by a technique known as Chromosome Variant Analysis (C.V.A.) cannot be used as evidence to support the possibility that an alleged rapist fathered the victim's fetus.

On the evening of September 4, 1985, a woman drove her 1985 blue Subaru automobile to Northwest Branch Park. After parking her car, she went for a walk on a trail. While she was walking, the woman heard someone coming from behind and stepped aside. A man grabbed her, threw her off the trail into the woods and threatened to kill her if she screamed. He forced her to have oral sex with him, raped her, and then had anal sex with her, all against her will. Afterwards, he took the keys to her car and drove off.

On September 27, 1985, Appellant, Kenneth S. Cobey was ordered by the police to pull over and stop at a traffic observation checkpoint on Kennedy Street in the District of Columbia. Although Appellant had a valid Maryland driver's license he failed to produce the registration. The police impounded the car and after issuing the appellant two traffic tickets they allowed him to leave. Further investigation by a police auto theft unit revealed that the car appellant had been driving was the victim's 1985 blue Subaru which had been taken from Northwest Branch Park 23 days earlier. On September 30, 1985, Appellant was arrested by Montgomery County Police.

During the early part of October, 1985, the victim learned that she was pregnant and testified at trial in the Circuit Court for Montgomery County that the only possible source of her pregnancy was the rape. On October 21, 1985, the victim procured an abortion and with her permission, the police took possession of the aborted fetus. The fetus and blood samples from the victim and Appellant were flown to Dr. Susan Olson, a cytogeneticist at the Oregon Health Sciences University. There she performed a technique known as Chormosome Variant Analysis (C.V.A.) to determine whether Appellant might be the man who fathered the fetus.

Appellant was brought to trial in July of 1986. Although this resulted in a mistrial, the judge had denied Appellant's motion to exclude Dr. Olson's testimony before the mistrial was declared. At Appellant's second trial, the judge once again declined to relitigate the issue and permitted Dr. Olson to testify concerning the results of the C.V.A. *Cobey*, 73 Md. App. at 236, 533 A.2d at 946.

In *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978), the Court of Appeals of Maryland adopted the holding of *Frye v. United States*, 293 F. 1013 (D.C. Cir., 1923) which created the *Frye-Reed* test. The test requires that "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field." *Id.* at 237, 533 A.2d at 946 (quoting *Reed v. State*, 283 Md. 374, 381, 391 A.2d 364, 368 (1978)). Appellant contended that C.V.A. had not been generally accepted as reliable in the relevant scientific community; therefore, the testimony derived from the results of C.V.A. were inadmissible. Under the *Frye-Reed* test, the proponent of a new scientific test bears the burden of producing evidence to establish the general acceptance of the technique. *Id.* at 238, 533 A.2d at 946 (citing *Thompson v. Thompson*, 285 Md. 488, 497, 404 A.2d 269, 274 (1979)). At trial, the court held that the State had met its burden under the *Frye-Reed* test and it was this determination that was at issue before the appellate court.

In reviewing the trial court's admissibility of evidence established by C.V.A., the court had to resolve two threshold issues: first, whether the court is bound to consider only evidence in the record which was before the trial court, and second, what standard of review should be applied to the trial court's decision. Although the court in *Reed*, did not address the issue of whether appellate review should be limited to materials specifically set forth in the record, the court's holding indicated that available legal and scientific commentaries could be taken into consideration even if not part of the record. *Id.* at 238, 533 A.2d at 947.

In *Cobey*, the Court of Special Appeals of Maryland also concluded that the standard of review applicable to the trial court's finding of general acceptance is whether the finding was against the weight of the evidence as opposed to whether it was clearly erroneous. The court based its conclusion on the fact that the court of appeals in *Reed* conducted its own examination of the evidence and concluded that spectrography was not generally accepted as reliable, seeming to place no weight on the trial court's contrary finding. *Id.* at 239, 533 A.2d at 947.

At trial, the judge held a hearing out of the jury's presence to determine whether Dr. Olson would be allowed to testify