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Recent Developments

Renee Boyd

RECENT DEVELOPMENT

BALTIMORE CITY POLICE DEPARTMENT V. POTTS: UNDER THE LOCAL GOVERNMENT TORT CLAIMS ACT, BALTIMORE CITY IS LIABLE FOR THE JUDGMENT AGAINST ITS OFFICERS THAT RESULTED FROM THEIR TORTIOUS ACTS COMMITTED WITHIN THE SCOPE OF EMPLOYMENT.

By: Renee Boyd

The Court of Appeals of Maryland held that the actions of the police officers involved in this case were in furtherance of the Baltimore City ("City") Police Department's ("Department") business under the Local Government Tort Claims Act (LGTCA). *Baltimore City Police Dep't v. Potts*, 468 Md. 265, 320, 227 A.3d 186, 219 (2020). The court also held that the actions of the officers were incidental to conduct authorized by the Department, and thus were in scope of employment under LGTCA. *Id.* Therefore, the City and the Department are liable for the judgment against the officers. *Id.* at 320, 227 A.3d at 219.

There are two cases which question whether the actions of the police officers were within the scope of their employment. In the first case, Ivan Potts was stopped without probable cause on September 2, 2015 by three police officers who were members of the Department's Gun Trace Task Force (GTTF). When he did not consent to a search of his person, the officers slammed Potts to the ground, kicked him, beat him, and handcuffed him. The officers produced a handgun never seen by Potts and tried to put it in Potts' hands so his fingerprints would be on the gun. Potts was so badly injured that the booking unit refused to process him until he was taken to a hospital to be treated. Potts was convicted for possession of a firearm and sentenced to eight years in prison. By the time his conviction was vacated, he was in custody for a total of nineteen months. Potts subsequently filed suit against the officers, the Department, the Mayor, and the City Council of Baltimore.

On August 18, 2016, in the second Baltimore City case, three police officers, also members of the GTTF, stopped William James' car without probable cause. Although the officers lacked any reasonable suspicion that James had committed, or was committing a crime, they informed James they would let him go only if he produced the name of a person who possessed guns or drugs. When James informed the officers, he didn't know of any such person, they advised James that he would be imprisoned for possession of a gun. The officers then produced a weapon saying it belonged to James and arrested him. James spent more than seven months in custody awaiting trial. He sued the officers, the Department, and the City.

In both cases, the arresting officers and the plaintiffs agreed to a settlement of $32,000. Potts and James' estate filed supplemental complaints

in their cases, seeking payment of the settlement from the City.

While motions for summary judgment were pending in Potts in federal court, the parties filed a joint motion to the Court of Appeals of Maryland to certify a question of law. In *James*, the circuit court held that the officers had acted within the scope of employment and that the City was required to compensate the estate. While the case was pending in the Court of Special Appeals, the City petitioned for a *writ of certiorari.* The question in the writ of certiorari and the certified question of the law were identical: whether the judgments sought to be enforced by the plaintiffs were based on "tortious acts or omissions [that were] committed by the [officers] within the scope of [their] employment with the [City]."

The court first examined the conduct under the LGTCA. The LGTCA states that a government is liable for judgments against its employees for damages that result from tortious acts or omissions committed by the employees within the scope of their employment with the local government. *Potts*, 468 Md. at 282-83, 227 A.3d at 196-97 (citing *Md. Code Ann., Cts. & Jud. Proc. §§* 5-301 to 5-304 (West 2013)). The LGTCA, however, does not define scope of employment. *Potts*, 468 Md. at 271, 227 A.3d at 190. Instead, the court looks to Maryland case law to define the term. *Id.* In *Sawyer v. Humphries,* the court used a two-prong test to determine if the employee acted within the scope of employment. *Id*. at 271, 227 A.3d at 190 (citing *Sawyer v. Humphries,* 322 Md. 247, 255, 587 A.2d 467, 470 (1991)). The first prong is whether the employee's actions "were in furtherance of the employer's business" and the second prong is whether the employer "authorized" the employee's actions. *Id.* The Court of Appeals of Maryland examined these two issues. *Id.*

Based on the first prong of the test, the Court of Appeals of Maryland held that, in both cases, the actions of the officers were in furtherance of the Department's business because there was no evidence or indication that the officers acted to protect their own interests. *Potts,* 468 Md. at 306, 227 A.3d at 211. The Court also held that the actions of the officers were at least partially motivated by a purpose to serve the Department. *Id.*

Police activities include stopping, searching and arresting individuals. Therefore, officers who engage in these activities are acting within the scope of employment. *Potts,* 468 Md. at 306, 227 A.3d at 211. Here, the court acknowledged the misconduct of the officers was egregious but held that even though the conduct was wrongful, the officers' actions were still in the scope of employment. *Id*. at 305, 227 A.3d at 210. Making arrests, even when officers engage in egregious conduct, is still acting within the scope of employment. *Potts*, 468 Md. at 306, 227 A.3d at 211 (citing *Cox v. Prince George's Cty*., 296 Md. 162, 171, 164, 460 A.2d 1038,1043 (1983)).

The court also held that an arrest is still in the scope of employment even if the arrest is not supported by probable cause. *Potts*, 468 Md. at 307, 227 A.3d 211 (citing *Houghton v. Forrest,* 412 Md. 578, 583-84 , 989 A.2d 223, 226-27(2010)). Using excessive force during the arrest does not render the

arrest outside the scope of employment. *Id*. at 308, 227 A.3d at 212 (citing *Prince George's Cty. v. Morales,* 230 Md. App. 699, 702-03, 149 A.3d 741,742-43 (2016)). Lastly, the court held that fabricating and planting evidence on a suspect does not render the officer's actions outside the scope of employment. Potts, 468 Md. at 308, 227 A.3d at 212 (citing *Titan Indem. Co. v. Newton,* 39 F. Supp.2d 1336, 1342 (N.D. Ala. 1999)).

After assessing the second prong of the test, the court concluded that the officers' misconduct was authorized by the Department because it was "incident[al] to the performance of duties" that the Department entrusted to its employees. *Potts,* 468 Md. at 312, 227 A.3d at 214 (quoting *Sawyer*, 322 Md. at 253, 587 A.2d at 469-70). The court based the conclusion on its analysis of the ten factors set forth in *Sawyer* for determining whether an employee's actions are incidental to those that the employer authorized. *Potts*, 468 Md. at 312, 227 A.3d at 214. Here, the actions were of the type that the officers were hired to routinely perform, the conduct occurred while they were on-duty in the jurisdiction they were authorized to serve, and the misconduct appeared to further the Department's routine business of making arrests. *Id.* at 313, 227 A.3d at 215.

The Court of Appeals of Maryland held that while the officers did engage in unlawful actions, their conduct resulted in arrests that were deemed to be lawful. *Potts*, 468 Md. at 315, 227 A.3d at 216. Some of the officers' actions consisted of misconduct, but others were actions that the officers were entrusted to perform. *Id.* The end result was that the officers' actions constituted lawful police activity. *Id.* The court held that the officers' actions were within the scope of employment under LGTCA because their actions were in furtherance of Department business and were incidental to authorized conduct. *Id.*

The Court of Appeals of Maryland ultimately held that the actions of the police officers involved in this case were in furtherance of the Baltimore City Police Department's business under the Local Government Tort Claims Act. The City argued that the conduct of the officers was so corrupt and egregious that it should not be held liable to pay the victims. But if these rogue officers are convicted and are serving time, the victims may never receive the money from the settlements they are due. With no income during incarceration, it is unlikely that the officers will ever pay.

The misconduct in the GTTF was undoubtedly egregious and unprecedented. The cases brought forth by Potts and James set precedent, refusing to provide the City with blanket immunity that would have been binding on future cases. There was a unanimous ruling that the City should have known of the misconduct and must now cover Potts' and James' judgments. So, while the court made it clear it was not making a blanket ruling for all future GTTF lawsuits, the ruling clearly demonstrated that the ultimate responsibility for the officers' misconduct rests with the governmental entities that employed and supervised them. The ruling will pave the way for future lawsuits, and while each future case will need to

stand on its own merits, victims of the GTTF's misconduct now have precedent to hold the City liable for the officers' actions.

RECENT DEVELOPMENT

GABLES CONSTR., INC. V. RED COATS, INC.: A THIRD-PARTY WHICH HAS SIGNED A WAIVER OF SUBROGATION WITH THE INJURED PARTY CANNOT BE CONSIDERED A JOINT TORTFEASOR UNDER THE UCATA AND IS THEREFORE NOT LIABLE FOR CONTRIBUTION.

By: Alexa Mellis

The Court of Appeals of Maryland held that a third-party who is not liable in tort to an injured party as a result of a contractual waiver cannot be held liable for contribution pursuant to the Maryland Uniform Contribution Among Joint Tort-Feasors Act ("UCATA"). *Gables Constr., Inc. v. Red Coats, Inc.,* 468 Md. 632, 671, 228 A.3d 736,759 (2020). A waiver of subrogation in a contract prevents the third-party from being liable in tort to the injured party and as a result the injured party may not bring a claim against it. *Id.* at 657, 228 A.3d at 750-51. Accordingly, a third-party who is not liable in tort to the injured party cannot be held liable for contribution because the UCATA requires that the joint tortfeasor be liable to the injured party. *Id.* at 645, 228 A.3d at 743.

On August 2, 2012, Upper Rock II, LLC ("Upper Rock") entered into a contract ("the Prime Contract") with Gables Construction, Inc. ("GCI") under which GCI would serve as the general contractor for the construction of an apartment building. Both Upper Rock and GCI waived the right to subrogation on the condition that Upper Rock purchased property insurance for the construction project. Consequentially, GCI could not be held liable by Upper Rock for any fire damage. In January 2014, GCI's parent company hired Red Coats, Inc. ("Red Coats") to provide security and fire watch services for the apartment project. Red Coats was to provide security at night after GCI personnel walked through the jobsite ensuring no hazards were present upon completion of each workday. On March 31, 2014, both GCI personnel and the Red Coats security officer failed to perform a sweep of the building. That night, a fire ignited and destroyed the building, causing $17.6 million in damages.

In November 2014, Upper Rock filed an action in the Circuit Court for Montgomery County against Red Coats. Upper Rock alleged that the failure to perform an adequate fire watch arguing it was the proximate cause of the March 31st fire. Upper Rock was granted a partial summary judgment motion on the issues of duty and breach. Thereafter, Red Coats and Upper Rock entered into a settlement agreement where Red Coats would pay $14 million to Upper Rock. In August 2015, Red Coats filed a third-party complaint for contribution against GCI. The jury ultimately determined that the contractual waiver did not shield GCI from liability for contribution to Red Coats. GCI

subsequently appealed the circuit court's judgment. The Court of Special Appeals of Maryland affirmed the lower court's ruling, finding GCI to be a joint tortfeasor pursuant to the UCATA because the waiver of subrogation had no bearing on the relationship between the parties. The Court of Appeals of Maryland granted GCI's petition for certiorari.

The question before the court, an issue of first impression, was whether a defendant could be liable for contribution under the UCATA despite the defendant not being liable to the injured party by virtue of a contractual waiver. *Gables Constr., Inc.*, 468 Md. at 644, 228 A.3d at 743.

The Court of Appeals of Maryland first addressed the issue of whether GCI was considered a joint tortfeasor under the UCATA. *Gables Constr., Inc.* 468 Md. at 665, 228 A.3d 755. The court noted that Red Coats claim against GCI could only succeed if GCI satisfies the definition of a joint tort-feasor. *Id.* at 651, 228 A.3d 747. The court relied on the statutory interpretation of "joint tort-feasor" under the UCATA. *Id.* at 657, 228 A.3d at 751. The UCATA defines a joint tort-feasor as "two or more persons jointly or severally liable in tort for the same injury to person or property." *Id.* at 651, 228 A.3d at 747 (quoting Md. Code Ann., Cts.& Jud. Proc. §3-1401 (West 2020)). The Court of Appeals of Maryland evaluated the meaning of "liable in tort" in several previous cases, ultimately concluding that direct liability of the third party to the injured party is required for the right of contribution to be available. *Gables Constr., Inc.* 468 Md. at 657-62, 228 A.3d at 751-53. In reviewing those holdings, the court found that the defenses which precluded the injured party from directly suing the third-party acted as a complete bar to recovery. *Id.* at 662, 228 A.3d at 754. Accordingly, to bring a claim for contribution against a third-party, there must be legal responsibility to the injured party, not mere culpability. *Id.* at 657, 228 A.3d at 751.

The Court of Appeals of Maryland also addressed whether the waiver of subrogation in the Prime Contract prevented Upper Rock from bringing a claim against GCI. *Gables Constr., Inc.*, 468 Md. at 655, 228 A.3d at 749. In reviewing the Prime Contract, the court reaffirmed that a contractual waiver of subrogation is sufficient to waive a right to a claim of subrogation. *Id.* at 654, 228 A.3d at 749 (citing *John L. Mattingly Constr. Co. v. Harford Underwriters Ins. Co.,* 415 Md. 313, 999 A.2d 1066 (2010)). The waiver in the Prime Contract indicated that Upper Rock and GCI mutually agreed to not hold the other party liable should any damages result from a fire, so long as Upper Rock purchased property insurance for the value of the project. *Gables Constr., Inc.* at 657, 228 A.3d at 750. This agreement shifted the risk of loss to the insurance company, a common practice within the construction industry. *Id.* at 653, 228 A.3d at 749. The court ultimately found that Upper Rock and its insurer were precluded from bringing a claim against GCI for the damage sustained in the fire. *Id.* at 653, 228 A.3d at 749.

After establishing that GCI was not liable in tort to Upper Rock, the Court

of Appeals of Maryland then evaluated whether the contractual waiver acted as a complete bar to recovery by Red Coats for contribution. *Gables Constr., Inc.*, 468 Md. at 663, 228 A.3d at 754. Red Coats took the position that the contractual waiver did not preclude its claim for contribution, relying on *Parler & Wobber v. Miles & Stockbridge, P.C.* *Id.* at 665, 228 A.3d at 755. In *Parler*, the court balanced the right to contribution and public policy considerations originating from the attorney-client privilege. *Id.* (citing *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 681, 756 A.2d 526, 531 (2000)). However, the *Parler* court declined to find a compelling reason to recognize the defense of attorney-client privilege as an exception to the right to contribution pursuant to the UCATA. *Id.* at 666, 228 A.3d at 756. The Court of Appeals of Maryland in the instant case found *Parler* to be inapposite, holding that the defense of attorney-client privilege was not a defense to a direct suit by an injured party. *Id.* at 665, 228 A.3d at 756 (citing *Parler*, 359 Md. 671, 756 A.2d 526).

In the present case, the Prime Contract waiver of subrogation was sufficient for Upper Rock to waive liability against GCI creating a defense to the direct suit. *Gables Constr., Inc.* 468 Md. at 655, 228 A.3d at 749 (citing *Mattingly Constr. Co.,* 415 Md. 313, 999 A.2d 1066 (2010)). Liability for contribution is predicated on the liability to the injured party, not a common relationship between the injured party and the joint tortfeasors. *Gables Constr., Inc.*, 468 Md. at 669, 228 A.3d at 758.

The decision in *Gables Constr., Inc.* reinforces the role of subrogation waivers in construction contracts in the financial risks that accompany construction work. To find that the waiver is an insufficient defense to a claim for contribution would be to needlessly increase costs and litigation expenses for the parties and insurance companies alike. Despite this compelling justification, the court limited the analysis to American Institute of Architects ("AIA") standard form contracts, which are the most commonly used forms throughout the construction industry. The court's analysis did not venture into the implications of this ruling on other types of construction contracts that may be less commonly used. Accordingly, Maryland practitioners should be cautious in applying this decision to other standard construction contracts where a joint tortfeasor may have contractually waived a right to subrogation, as this holding was limited to AIA contracts only.

RECENT DEVELOPMENT

LEWIS V. STATE: THE ODOR OF MARIJUANA IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR A SEARCH INCIDENT TO ARREST, AND THEREFORE EVIDENCE OBTAINED AS A PRODUCT OF THAT SEARCH IS NOT ADMISSIBLE.

By: Rebecca Guay

The Court of Appeals of Maryland held that the odor of marijuana alone is not sufficient to meet the burden of probable cause to perform a search incident to arrest, and therefore any evidence retrieved is inadmissible as the product of an illegal search. *Lewis v. State*, 470 Md. 1, 27, 233 A.3d 86, 101-102 (2020). The court further held that the odor of marijuana cannot determine the amount, if any, of the contraband. *Lewis*, 470 Md. at 23, 233 A.3d at 99. A search or seizure made by law enforcement officers based on the odor of marijuana is unlawful as it violates a person's Fourth Amendment protections from unreasonable searches. *Id.* at 26, 233 A.3d at 101. Consequently, a search by police without probable cause cannot produce evidence admissible in court. *Id.* at 17, 233 A.3d at 95.

On February 1, 2017, Officer David Burch ("Burch") of the Baltimore City Police Department received a tip about a potentially armed person. Burch notified the monitors at CitiWatch, which identified a person matching the description entering Bag Mart. Burch was familiar with the area known as an "open air drug market" and knew Bag Mart as a regular distribution market for marijuana.

Six officers responded and entered the crowded store which smelled like marijuana. When Rasherd Lewis ("Lewis"), who matched the description, passed immediately in front of Burch, the officer smelled marijuana coming from Lewis's person. Burch testified that he stopped Lewis because of the tip and the odor of marijuana. After stopping him, Burch's colleague, Officer Curtis, grabbed Lewis's hands and handcuffed him. Once handcuffed, Burch made a complete search of Lewis, first searching Lewis's bag where he located a handgun. Then, he searched Lewis's person and found marijuana in a sealed, one-inch plastic baggie inside his pocket.

At a suppression hearing, the Circuit Court of Baltimore City denied Lewis's motion to suppress the handgun, marijuana, and other items seized during the arrest and subsequent search. Lewis contended the police lacked probable cause to believe he either committed a felony or was committing a felony. The state argued that the odor of the drug was enough to establish the necessary probable cause because, although decriminalized, marijuana in any amount is evidence of a crime. The court determined that the odor of marijuana was enough to establish the belief that Lewis carried evidence of a crime and therefore denied his motion to suppress.

At trial, the Circuit Court for Baltimore City found Lewis guilty of possession of a handgun. The Court of Special Appeals of Maryland affirmed the ruling. The majority agreed with the circuit court that the odor of marijuana emanating from a person, similar to the odor coming from a vehicle was sufficient to establish probable cause to perform a search incident to arrest. The dissent drew a distinction between the types of searches noting that there are several benign reasons one might smell like marijuana without having the contraband on their person. Lewis, on appeal, argued that his arrest, based solely on the smell of marijuana on his body, lacked probable cause and made the handgun found upon search of his person inadmissible. The Court of Appeals of Maryland granted certiorari to examine whether probable cause existed to allow a search incident to arrest based solely on the odor of marijuana.

The Court of Appeals of Maryland framed the analysis within the recent decriminalization for possession of less than 10 grams of marijuana. *Lewis*, 470 Md. at 9, 233 A.3d at 91 (citing MD. Code Ann., Crim. Law § 5-601(c)(2) (West 2014)). The court then highlighted the established rights of citizens "to be secure in their person" against unreasonable searches and seizures afforded by the U.S. Constitution's Fourth Amendment. *Lewis*, 470 Md. at 17-18, 233 A.3d at 96 (citing U.S. Const. amend. IV). A warrantless search is deemed unconstitutional if determined to be unreasonable. *Lewis*, 470 Md. at 18, 233 A.3d at 96. To withstand the scrutiny of the Fourth Amendment guarantees, the character of a reasonable search is based on the totality of circumstances surrounding that particular search and seizure. *Lewis*, 470 Md. at 18, 233 A.3d at 96 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). This protection from unreasonable searches is subject to a small number of exceptions. *Lewis*, 470 Md. at 18-19, 233 A.3d at 96 (quoting *Grant v. State*, 449 Md. 1, 16-17, 141 A.3d 138, 146 (2106)).

These exceptions include vehicle searches and search incident to arrest. *Lewis*, 470 Md. at 18-19, 233 A.3d at 96. A vehicle is subject to a search if police have "probable cause to believe the automobile contains either contraband or evidence of a crime." *Lewis*, 470 Md. at 19-20, 233 A.3d at 97 (quoting *State v. Johnson*, 458 Md. 519, 533, 183 A.3d 119, 127 (2018)). The justification for this exception lies in the mobility of the car coupled with a diminished expectation of privacy in one's vehicle. *Lewis,* 470 Md. at 20, 233 A.3d at 97 (citing *California v. Carney*, 471 U.S. 386, 391 (1985)). Probable cause to justify a search incident to arrest must be based on the belief the person has either committed, or is committing, a felony. *Lewis*, 470 Md. at 20, 233 A.3d at 97 (citing *Maryland v. Pringle*, 540 U.S. 366, 369-70 (2003)). This exception is grounded in the need to confiscate weapons and prevent the destruction of evidence. *Lewis*, 470 Md. at 20-21, 233 A.3d at 97-98 (citing *Riley v. California*, 573 U.S. 373, 383 (2014)). The odor of marijuana that permits the search of one's car does not apply to

search incident to arrest. *Lewis*, 470 Md. at 25, 233 A.3d at 100. Although similar in respect, the prerequisites for the two search exceptions diverge. *Id.* at 21, 233 A.3d at 98. The distinct difference is founded on a person's constitutional protection to be secure in their body, in contrast to limited privacy rights afforded to one's automobile. *Id.* at 22, 233 A.3d at 98.

The relevant exception in this case is the search incident to arrest. *Lewis*, 470 Md. at 18, 233 A.3d at 96. Lewis argued on appeal that the search was unlawful because the police, at the time of the arrest, did not have probable cause to believe Lewis had committed a felony or was in the act of committing a felony. *Id.* at 12, 233 A.3d at 93. When determining if probable cause exists for a search incident to arrest, the court must look to the likelihood law enforcement believed the arrestee committed a felony. *Lewis*, 470 Md. at 22, 233 A.3d at 98 (citing *Pacheco v. State*, 465 Md. 311, 325, 214 A.3d 505, 513 (2019)).

With regard to marijuana, law enforcement agents must have probable cause the arrestee is in possession of a criminal amount of the drug prior to the search. *Lewis*, 470 Md. at 22-23, 233 A.3d at 99 (citing *Pacheco*, 465 Md. at 332-33, 214 A.3d at 517-18). The court determined that the odor of marijuana does not make it possible to conclude the amount of marijuana present and therefore law enforcement officers cannot be sure a criminal amount is present. *Id* at 23, 233 A.3d at 99. Without the certainty of the actual amount of marijuana present, law enforcement cannot be sure an attempted felony, felony, or misdemeanor has occurred and therefore the court held that they lack probable cause for a search incident to arrest. *Id.*

The Court of Appeals of Maryland held that the inability of an officer to determine if a criminal amount of marijuana exists – based solely on odor – does not constitute probable cause to perform a search incident to arrest. Following this decision, courts must deny admissibility of evidence produced by a search based solely on the odor of marijuana emanating from a person. It is unclear what the immediate impact of this decision will be. Historically, courts have developed measures to balance the rights of citizens against the reach of law enforcement officers to apprehend suspects. This decision tilts in favor of the protection afforded to individuals from unreasonable searches and seizures by the Fourth Amendment. While the shift to narrow the state's ability to collect evidence may increase Fourth Amendment protections for citizens, it simultaneously eliminates the arguably legitimate suspicion of criminal behavior – based on the odor of a marijuana – from the toolbox of trained police officers. This limitation on law enforcement may have unintended consequences in their attempt to decrease drug related crimes.

RECENT DEVELOPMENT

NATIONWIDE MUT. INS. CO. V. SHILLING: A BREACH OF CONTRACT OCCURS IN AN UNDERINSURED OR UNINSURED MOTORIST CLAIM WHEN AN INSURER DENIES AN INSURED'S REQUEST OF BENEFITS UNDER THE COVERAGE, TRIGGERING THE STATUTE OF LIMITATIONS PERIOD.

By: Markisha Dobson

The Court of Appeals of Maryland held that an injured party's underinsured motorist claim against their insurance company will not be time-barred if the insurer fails to deny the insured's claim for recovery benefits. *Nationwide Mut. Ins. Co. v. Shilling*, 468 Md. 239, 260-61, 227 A.3d 171, 183 (2020). The court elaborated that underinsured and uninsured motorist claims must be viewed as contract law actions. *Id*. at 259-60, 227 A.3d at 183. Thus, when the insurer denies an insured's claim for benefits in an underinsured and uninsured motorist claim, the contract is breached and the statute of limitations begins to run. *Id*. at 248, 227 A.3d at 176. Therefore, courts must turn to contract law to determine when the statute of limitations begins to run for underinsured and uninsured motorist claims. *Id*. at 259-60, 227 A.2d at 183.

On April 19, 2011, Margaret Shilling ("Shilling") was involved in a car accident in Odenton, Maryland with Barbara Gates ("Gates"), who was underinsured and at fault. Shilling was injured following the accident and required extensive medical treatment over three years. Gates' liability coverage with Agency Insurance Company ("Agency") was for $20,000 which did not cover the total amount of Shilling's damages. Shilling was insured by Nationwide Mutual Insurance Company ("Nationwide"), which provided up to $300,000 per person in bodily injury compensation. Shilling's insurance coverage included protection from paying for damages when a tortfeasor was uninsured or underinsured. Shilling and Agency reached a settlement agreement in which Shilling received $20,000. After Nationwide and Shilling agreed to release all claims against Gates, Shilling continued to seek relief for unpaid medical bills from Nationwide. On January 26, 2015, Shilling sent a demand letter to Nationwide for the underinsured motorist benefits from her insurance policy. Nationwide confirmed receipt of the demand letter and reached out to Shilling's attorney four different times, but never denied Shilling's claim for underinsured benefits.

On September 23, 2016, Shilling filed an action against Nationwide in the Circuit Court for Anne Arundel County for unpaid damages not covered under Gates' insurance policy. Nationwide filed a motion to dismiss Shilling's claim alleging that the three-year statute of limitations period had

expired. Ultimately, the Circuit Court for Anne Arundel County granted Nationwide's motion to dismiss because it determined that the statute of limitations began to run on April 23, 2013 which was the settlement date with Agency. Next, Shilling filed an appeal to the Court of Special Appeals of Maryland. Before trial, the Court of Special Appeals granted the parties' motion to stay an appeal, thereby remanding the case back to the circuit court. The Circuit Court for Anne Arundel County, upon remand, held again that Shilling's claim was time-barred as the statute of limitations began to run on April 23, 2013, when the Agency policy was exhausted. Shilling then filed several motions which the Court of Special Appeals of Maryland granted to determine the accuracy of the circuit court's decision in this matter.

The Court of Special Appeals of Maryland reversed the circuit court's decision. The court held that her claim was not time-barred because the earliest possible date that the statute of limitations period could have started was February 3, 2014, which was the date that Shilling executed the release. Nationwide petitioned the Court of Appeals of Maryland for a writ of certiorari, which was granted.

Nationwide asked the court to determine when the statute of limitations started in cases that concern underinsured motorist benefits. *Nationwide*, 468 Md. at 247-48, 227 A.3d at 176. The Court of Appeals of Maryland examined the statute of limitations provision the Maryland Code and reviewed two Maryland cases that analyzed the statute of limitations in uninsured and underinsured motorist claims. *Id*. at 255, 227 A.3d at 180.

First, the Court of Appeals of Maryland applied the statute of limitations provision in civil cases to uninsured and underinsured motorist cases. *Nationwide,* 468 Md. at 259, 227 A.3d at 182. The provision states, "[a] civil action at law shall be filed within three years from the date it accrues." *Nationwide*, 468 Md. at 259, 227 A.3d 182 (quoting Md. Code Ann., Cts. & Jud. Proc. § 5-101 (West 2014)). Then the court reviewed two cases: *Lane* and *Pfeifer*. In *Lane v. Nationwide Mut. Ins. Co.*, the court held that an insured's actions against an insurer will be ruled by contract law principles. *Nationwide*, 468 Md. at 260, 227 A.3d at 183 (citing *Lane v. Nationwide Mut. Ins. Co.*, 321 Md. 165, 170, 582 A.2d 501, 503 (1990)). In contract law, the statute of limitations starts whenever the terms of the contract are breached. *Nationwide*, 468 Md. at 260, 227 A.3d at 183. Therefore, if the insurer does not deny insured's benefits claim, then the statute of limitations does not begin to run. *Nationwide*, 468 Md. at 257, 227 A.3d at 181 (citing *Lane,* 321 Md. at 176-77, 582 A.2d at 506-07).

On the other hand, in *Pfeifer*, the court held that the statute of limitations period did not begin until the exhaustion date of the tortfeasor's coverage occurred. *Nationwide*, 468 Md. at 259, 227 A.3d at 182 (citing *Pfiefer v. Phoenix Ins. Co.*, 189 Md. App. 675 at 694-95, 985 A.2d 581 at 593 (2010)). The Court of Appeals of Maryland overruled *Pfeifer* because it inaccurately

held that the statute of limitations period began to run prior to an insurer's denial of paying out the requested benefits to an insured. *Nationwide*, 468 Md. at 264, 227 A.3d at 185.

Therefore, the statute of limitations in underinsured motorist claims starts when an insurer denies an insured's request because this action breaches the insurance agreement. *Nationwide*, 468 Md. at 248, 227 A.3d at 176. As a result, when Shilling demanded recovery of the underinsured motorist benefits from Nationwide, the statute of limitations period never started since Nationwide failed to formally deny Shilling's claim of benefits. *Id*. at 261, 227 A.3d at 184.

The Court of Appeals of Maryland affirmed the decision of the Court of Special Appeals of Maryland ruling that Shilling's claim was not time-barred. *Nationwide*, 468 Md. at 247, 227 A.3d at 175. Although the Court of Special Appeals of Maryland stated that "the earliest date for commencing contract limitations [was] February 3, 2014," the Court of Appeals of Maryland disagreed. *Nationwide*, 468 Md. at 247, 227 A.3d at 175 (quoting *Shilling v. Nationwide Ins. Co.*, 241 Md. App. 261, 274-75, 209 A.3d 802, 811 (2019)). The Court of Appeals of Maryland held that there could not have been a definitive date set for the statute of limitations period to begin since Nationwide never actually denied Shilling's demand to recover underinsured motorist benefits. *Nationwide*, 468 Md. at 247, 227 A.3d at 176. Therefore, Shilling was able to pursue a claim against Nationwide in unpaid damages outside of Agency's coverage in the car accident. *Id*. at 261, 227 A.3d at 184.

In *Nationwide v. Shilling*, the Court of Appeals of Maryland concluded that if an insured files a claim against their insurance company pursuing recovery of underinsured or uninsured motorist claims, then that action is not time-barred if the insurance company fails to deny the claim. This holding ensures that the insured will not be taken advantage of by insurance companies, if the companies breach their contractual obligations within the insurance agreements. Although the insured has the opportunity to seek unpaid benefits from their insurers in such motorist claims, the insured is on notice that the statute of limitations period can potentially impact their chance to receive coverage if those benefits are not timely sought after their insurers deny their benefits. Alternatively, this also puts the insurance companies on alert when dealing with uninsured and underinsured claims. Insurance companies are also on notice that the statute of limitations begins when they deny a claim for benefits.

RECENT DEVELOPMENT

PETERSON V. STATE: DEFENDANTS FOUND GUILTY BUT NOT CRIMINALLY RESPONSIBLE ARE NOT ELIGIBLE FOR RELIEF UNDER THE UNIFORM POST-CONVICTION PROCEDURE ACT NOR BY WRIT OF CORUM NOBIS, BUT CIRCUIT COURTS MAY DETERMINE WHETHER NCR DEFENDANTS ARE ELIGBILE FOR HABEAS CORPUS RELIEF.

By: Meaghan Farnham

The Court of Appeals of Maryland held that a person convicted of a crime and found not criminally responsible ("NCR") is not eligible for post-conviction relief under the Uniform Post-Conviction Procedure Act ("UPPA") or through a Writ of Error *Corum Nobis*. *Peterson v. State*, 467 Md. 713, 739, 226 A.3d 246, 261 (2020). Since NCR defendants are not afforded similar post-conviction relief as criminally responsible defendants, the court found that NCR defendants may be entitled to *habeas corpus* relief following civil confinement or conditional release. *Id*. at 736, 226 A.3d at 259.

On March 6, 2007, two members of the Washington Area Vehicle Enforcement Team observed Mr. Peterson enter the roadway on Marlboro Pike in Prince George's County. Corporals Stakes and Aponte testified that they believed Mr. Peterson was pointing a silver rifle at an oncoming vehicle. As Mr. Peterson approached the oncoming vehicle, it appeared to the officers that Mr. Peterson was about to commit a carjacking. Corporal Aponte placed Mr. Peterson under arrest and discovered the rifle was in fact a silver calk gun. The circuit court found Mr. Peterson guilty of two counts of second-degree assault and determined that he was not criminally responsible. Mr. Peterson was committed to the Maryland Department of Health for inpatient treatment.

Relying on the Uniform Post-Conviction Procedure Act ("UPPA"), Mr. Peterson filed a *pro se* petition for post-conviction relief. After securing counsel, he then filed a Supplemental Petition for Post-Conviction Relief, which asserted: (1) Mr. Peterson's NCR plea was the "functional equivalent" of a guilty plea and was invalid because the record did not establish that he comprehended the nature of his charges, and that (2) Mr. Peterson's initial counsel was inadequate because he did not inform Mr. Peterson of the consequences of taking the plea. When the circuit court denied this petition, Mr. Peterson filed for a Petition for Writ of Error *Coram Nobis.* The court denied both the post-conviction relief request and the subsequent motion for reconsideration.

Mr. Peterson then appealed to the Court of Special Appeals of Maryland. The Court of Special Appeals of Maryland affirmed the circuit court, holding

that Mr. Peterson was not eligible for post-conviction relief under the UPPA nor under *coram nobis*. Mr. Peterson appealed and the Court of Appeals of Maryland granted *certiorari*.

The issues before the court were: (1) whether a defendant found NCR could receive post-conviction relief under the UPPA statute, (2) whether *coram nobis* relief was available to NCR defendants, and (3) whether NCR defendants could pursue *habeas corpus* relief. *Peterson*, 467 Md. at 719, 226 A.3d at 249.

The Court of Appeals of Maryland began its analysis by comparing the adverse consequences of guilty defendants found NCR from those who are found criminally liable. *Peterson*, 467 Md. at 726-33, 226 A.3d at 253-57. Unlike a criminally liable defendant, the NCR defendant could either be discharged from civil commitment or conditionally released once the court has determined that the defendant is not dangerous. *Peterson*, 467 Md. at 726, 226 A.3d at 253 (citing Md. Code Ann., Crim. Proc. § 3-114(b) (West 2020)). The fundamental differences between civil and criminal confinement is that punishment is the foundation for criminal confinement, whereas protection of the defendant and members of the community is the purpose of civil confinement. *Peterson*, 467 Md. at 730, 226 A.3d at 256 (citing *Harrison-Solomon v. State*, 442 Md. 254, 286, 112 A.3d 408, 428 (2015)).

By determining that Mr. Peterson's civil confinement is inherently different from that of criminal confinement, the Court of Appeals of Maryland held that the scope of the UPPA does not extend to defendants held NCR. *Peterson*, 467 Md. at 727, 226 A.3d at 254. The court looks to the language of the UPPA statute, which provides relief to a convicted person who is: "(1) confined under sentence of imprisonment, or (2) is on parole or probation." *Peterson,* 467 Md. at 727, 226 A.3d at 254 (citing Md. Code Ann., Crim. Proc. § 7-101 (West 2013)). The court held that the plain, non-ambiguous, meaning of "convicted," "parole," and "probation" within the statute does not apply to NCR defendants under civil confinement because the General Assembly "presumed to have meant what it said and said what it meant." *Peterson*, 467 Md. at 727, 226 A.3d at 254. With the exclusion of any language regarding civil confinement or conditional release within the statute, the court holds that NCR defendants are not eligible for relief under UPPA. *Id*.

Next, The Court of Appeals of Maryland addressed Mr. Peterson's petition for *coram nobis* relief. Peterson, 467 Md. at 733, 226 A.3d at 257. A writ of error c*oram nobis* requires a petitioner to satisfy five elements; the element in contention is whether Mr. Peterson has endured significant collateral consequences from his conviction. *Peterson*, 467 Md. at 733, 226 A.3d at 257 (citing *Jones v. State*, 445 Md. 324, 338, 126 A.3d 1162, 1170 (2015)). The court held that Mr. Peterson did not suffer significant collateral consequences from his conviction, but instead faced direct consequences

from his NCR plea. *Peterson*, 467 Md. at 733-35, 226 A.3d at 258-59. A direct consequence of a conviction is where the outcome has a "definite," "immediate," and "largely automatic effect" on the defendant's punishment. *Peterson*, 467 Md. at 734, 226 A.3d at 258 (citing *Yoswick v. State*, 347 Md. 228, 240, 700 A.2d 251, 256 (1997) (citing *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973)). Conversely, a collateral consequence is excluded from the court's judgment and is not a "definite," and "practical" result of the conviction. *Peterson,* 467 Md. at 734, 226 A.3d at 258 (quoting *Cuthrell*, 475 F.2d at 1366). The court ruled that Mr. Peterson's commitment to the Maryland Department of Health, his conditional release, and his re-commitments thereafter were direct consequences of his NCR conviction. *Peterson*, 467 Md. at 735, 226 A.3d at 259. Thus, without collateral consequences, Mr. Peterson is not entitled to *coram nobis* relief. *Id.*

Finally, as a matter of first impression, the Court of Appeals of Maryland addressed whether a defendant ruled NCR is eligible for *habeas corprus* relief. *Peterson,* 467 Md. at 735, 226 A.3d at 259. The Court of Appeals of Maryland ruled that a circuit court may determine whether *habeas corpus* relief is available to defendants that have been "committed, detained, confined, or restrained" in ways other than physical restraint or imprisonment. *Peterson*, 467 Md. 713 at 736, 226 A.3d at 259 (citing *Sabisch v. Moyer*, 466 Md. 327, 331, 220 A.3d 272, 274 (2019)).

The court held that civil confinement falls within the plain language of the Maryland *habeas corpus* statute. *Peterson*, 467 Md. at 736, 226 A.3d at 259 (citing Md. Code Ann., Cts. &Jud. Proc. § 3-702(a) (West 2020)). "Commitment" is defined as confining a person in a prison, a mental hospital, or other institutions. *Peterson*, 467 Md. at 737, 226 A.3d at 260 (citing *Commitment*, Black's Law Dictionary (11th ed. 2019)). Therefore, when a NCR defendant is civilly committed to a Department of Health facility for impatient treatment, such involuntary commitment results in a significant deprivation of liberty over which the state has no authority without due process of law. *Peterson*, 467 Md. at 737, 226 A.3d at 260 (citing *Addington v. Texas*, 441 U.S. 418, 245 (1979)).

In addition to civil commitment, a NCR defendant's conditional release is eligible for *habeas corups* relief because the restrictions placed on a defendant are viewed by the court as a potential deprivation of liberty. *Peterson*, 467 Md. at 737, 226 A.3d at 260. Where the Court of Appeals of Maryland previously found probation as a form of confinement, it now extends confinement to the conditional release of NCR defendants. *Id*. at 736-37, 226 A.3d 259-60.

Prior to the court's holding in *Peterson*, NCR defendants in civil confinement or on conditional release were not eligible to petition for post-conviction relief. The Court of Appeals of Maryland established a mechanism for NCR defendants to seek post-conviction relief by expanding *habeas corpus* to include civil commitment and conditional release. Moving

forward, NCR defendants may now petition for post-conviction relief under *habeas corpus* to the circuit courts, which may decide whether the defendant is entitled to relief.

RECENT DEVELOPMENT

PETTIFORD V. NEXT GENERATION TRUST SERV.: A TENANT IS NOT REQUIRED TO OBJECT TO PRESERVE THE RGHT TO APPEAL WHEN THERE WAS NO CONSENT JUDGMENT, IS ENTITLED TO RAISE THE DEFENSE OF WARRANTY OF HABITABILITY WITHOUT THE THREAT OF AN IMMEDIATE EVICTION, AND IS NOT LIMITED TO RAISING A RENT ESCROW DEFENSE BASED ON CERTAIN CONDITIONS OR THE TIME OF THE YEAR.

By: Craig Snyder

The Court of Appeals of Maryland held that where there is no consent judgment, a tenant is not required to object to its entry to preserve her appeal, but rather can just appeal. *Pettiford v. Next Generation Trust Serv.*, 467 Md. 624, 649, 226 A.3d 15, 29 (2020). The court held that a tenant is entitled to raise a defense based on the warranty of habitability during a summary ejectment proceeding without the threat of immediate eviction. *Id*. at 663, 226 A.3d at 37. The court held that a tenant is not limited to raising a rent escrow defense during certain times of the year. *Id*. at 667, 226 A.3d at 40.

First, on November 13, 2018, Next Generation Trust Services ("Next Generation") filed a complaint in the District Court of Maryland against Latisha Pettiford ("Pettiford"), alleging that Pettiford had failed to pay rent for five months and requesting repossession of the property. During trial, Pettiford asserted a defense based on the warranty of habitability. The court responded to Pettiford's defense by saying that if the property is uninhabitable, then Pettiford will be "out by midnight[.]" Pettiford's counsel responded that they could not move forward with the defense of warranty of habitability if Pettiford would be forced to vacate the property.

Next, Pettiford raised a rent escrow defense based on the heating issue with the property. Pettiford claimed that the last time that her heat worked was in February. Pettiford stated that she contacted maintenance personnel and the furnace was never fixed. The court informed Pettiford that she did not need heat through the months in question but that she could open an escrow for November.

After oral arguments, the parties discussed a possible resolution, but advised the court that they had not reached an agreement. The court asked if Pettiford owed the four months she did not pay, and she responded by saying "Mmm-hmm." The court then entered a consent judgment for Next Generation. Pettiford appealed to the Circuit Court of Baltimore.

On April 18, 2019, the circuit court affirmed the district court's judgment. Pettiford petitioned for a writ of certiorari on May 23, 2019, which the Court of Appeals of Maryland granted on August 26, 2019.

Fist, the court held that the district court's judgment was not a consent judgment, and Pettiford did not need to preserve her appeal by objecting. *Pettiford*, 467 Md. at 649, 226 A.3d at 29. Both parties advised the court that they had not come to an agreement to resolve the issue. *Id*. at 650, 226 A.3d at 30. The consent judgment was not a judgment entered at the consent of the parties, rather, it was initiated by the district court. *Id*. 467 Md. at 651–52, 226 A.3d at 30–31. No consideration was exchanged in the agreement because the parties never had an agreement. *Id*. at 652, 226 A.3d at 31. Additionally, Pettiford never gave a valid consent to the proposed judgment by the district court. *Id*. Pettiford's response of "mmm-hmm" falls short of a valid consent to a consent judgment. *Id*. at 652–53, 226 A.3d at 31.

Second, the court held that Pettiford is entitled to raise the defense of warranty of habitability during a summary ejectment proceeding without being threatened with immediate eviction. *Pettiford*, 467 Md. at 663, 226 A.3d at 37. The implied warranty of habitability states that a landlord's "premises shall not have any conditions which endanger the life, health[,] and safety of the tenants involving . . . lack of heat." *Id*. at 663, 226 A.3d at 37 (quoting PLL § 9-14.2(a)(4)). An action for breach of the implied warranty of habitability may be "maintained as a defense in an action of summary ejectment[.]" *Pettiford*, 467 Md. at 663, 226 A.3d at 37 (quoting PLL § 9-14.2(b)). The landlord must be given notice of the alleged breach and given reasonable time to repair the issue. *Pettiford*, 467 Md. at 664, 226 A.3d at 37–38 (citing PLL § 9-14.2(c)).

Pettiford was entitled to raise the defense of habitability. *Pettiford*, 467 Md. at 663, 226 A.3d at 37. Pettiford notified Next Generation that there was no heat on the premises since February. *Id*. at 634, 226 A.3d at 20. By trial, the heat had not been fixed for nine months. *Id*. Because Pettiford gave notice and a reasonable amount of time had passed, Pettiford was entitled to raise the defense of warranty of habitability. *Id*. at 665, 226 A.3d at 38. Therefore, the district court improperly threatened Pettiford with an immediate eviction and was required to consider the defense. *Id*. at 665, 226 A.3d at 38–39.

Third, the court held that Pettiford was allowed to raise a rent escrow defense because there were no temporal limitations requiring it to be filed at certain times of the year. *Pettiford*, 467 Md. at 667, 226 A.3d at 40. When a landlord, after a reasonable amount of time, has not repaired a defect or condition, the tenant may refuse to pay rent and raise the existing defect as an affirmative defense to a summary ejectment action. *Pettiford*, 467 Md. at 667, 226 A.3d at 40 (citing MD. CODE ANN., Real Prop. §8-211 (West 2020)).

The Court of Appeals of Maryland disagreed with the district court's dismissal of Pettiford's rent escrow defense. *Pettiford*, 467 Md. at 666–67, 226 A.3d at 39-40. Instead, this court found that the district court improperly stated that the rent escrow issue needed to be raised in a separate action. *Id*. at 666–67, 226 A.3d at 39. Specifically, the Court of Appeals of Maryland found that the district court's instruction asking Pettiford to go to the clerk's

office and open the escrow for November was evidence of the court's misunderstanding. *Id*. The district court was incorrect because a rent escrow affirmative defense can be raised against Next Generation's summary ejectment action. *Id*. at 668, 226 A.3d at 40.

The district court's decision is improper because Pettiford was permitted to raise a rent escrow defense for any month as long as there is evidence of the defect. *Pettiford*, 467 Md. at 667, 226 A.3d at 40. The district court reasoned that since heat would not be needed from June to September, Pettiford could not open a rent escrow until November. *Id*. at 667, 226 A.3d at 39. However, there is nothing in the rent escrow statute that sets forth a temporal limitation or states that the hazardous defect must impact the tenant during the months that rent was withheld. *Id*. at 667, 226 A.3d at 40.

The court's holdings in this case protects future tenants from landlord mistreatment and incentivizes landlords to repair hazardous defects or conditions. A tenant can now raise multiple defenses to fight summary ejectment actions brought by landlords. A tenant can raise a rent escrow defense for a defective condition not repaired by the landlord even when the condition is not immediately impacting the tenant. Most importantly, a tenant can raise the defense of implied warranty of habitability without being threatened of immediate eviction. The holdings in this case provide more protections to tenants and promote safety in rental properties.

RECENT DEVELOPMENT

WYNNE V. COMPTROLLER OF MARYLAND: THE MARYLAND GENERAL ASSEMBLY'S 2014 BUDGET RECONCILIATION FINANCING ACT WHICH LOWERED INTEREST RATES FOR OUT-OF-STATE TAX REFUNDS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

By: Curtis Paul

The Court of Appeals of Maryland held that a provision in the Maryland General Assembly's 2014 Budget Reconciliation and Financing Act ("BRFA") which lowered the interest rates accrued on tax refunds for out-of-state income did not violate the dormant Commerce Clause of the United States Constitution. *Wynne v. Comptroller of Maryland*, 469 Md. 62, 94, 225 A.3d 1129, 1148 (2020). The court further held that interest rates on tax refunds are too attenuated from interstate commerce to trigger dormant Commerce Clause protections, and that the 2014 BRFA interest rate provision did not discriminate against any interstate markets or industries. *Id*.

During the 2006 tax year, Maryland residents Brian and Karen Wynne ("the Wynnes") made a significant amount of combined income from their Maryland corporation's out-of-state business ventures that was taxed both in Maryland, and other states where income was generated. Under Maryland's tax law, the Wynne's out-of-state income allowed them to claim a refund from Maryland for the taxes paid on that same income that was taxed in other jurisdictions. As of 2006 however, Maryland taxed income both at the state and county level, but only applied a refund to out-of-state taxes for the state portion of the Maryland income tax. The result was that the Wynnes paid double income tax in Maryland: first at the state level and again at the county level for their out-of-state income, without a reciprocal refund for the county tax.

In 2014 the Wynnes sought a remedy for the disproportionate tax treatment with the Maryland Tax Court and subsequent judicial review with the Circuit Court for Howard County. The Court of Appeals of Maryland, [and ultimately, the United States Supreme Court] held that the absence of a tax credit for the county portion of the Maryland income tax discriminated against interstate commerce and violated the dormant Commerce Clause. The Supreme Court further held that extending a tax credit to the county portion of the Maryland income tax for out-of-state derived income would be a sufficient remedy for the constitutional violation.

In 2014, as the Wynne's case was pending in the Supreme Court, the Maryland General Assembly drafted a Budget Reconciliation Financing Act ("BRFA") that would require the Comptroller to lower the interest rate on tax refunds for income derived from out-of-state, if the Supreme Court found in

favor of the Wynnes. Because the Supreme Court did indeed find in favor of the Wynnes, the General Assembly's 2014 BRFA was enacted, and the Comptroller lowered the interest rate to be paid on the out-of-state refunds. The effect of the Comptroller's order reduced the Wynnes' accrued interest on their tax refund for their out-of-state income by approximately $14,000.00.

The Wynnes objected to the Comptroller's order and sought review with the Maryland Tax Court, arguing that the reduced interest rate on tax refunds for their out-of-state income violated the dormant Commerce Clause. The Tax Court found in favor of the Wynnes under the same logic of the dormant Commerce Clause violation which was found in the prior Supreme Court litigation. The Comptroller then sought judicial review with the Circuit Court for Anne Arundel County. The Circuit Court reversed the Tax Court's decision and the Wynnes filed a petition for a writ of certiorari to the Court of Appeals of Maryland, which was granted.

The Court of Appeals of Maryland examined whether the 2014 BRFA provision that lowered the interest rate on tax refunds for out-of-state income violated the dormant Commerce Clause. *Wynne*, 469 Md. at 80, 225 A.3d at 1140. The court began by stating that the 2014 BRFA was part of the remedy created by the General Assembly in the wake of the prior Supreme Court litigation, and the State was permitted to consider its own interests in fiscal planning when issuing the Supreme Court's mandated remedy. *Id*. at 82, 225 A.3d at 1140-41.

The court then applied the doctrine of the dormant Commerce Clause by first examining whether the relevant portion of 2014 BRFA regulates interstate commerce. *Wynne*, 469 Md. at 83, 225 A.3d at 1141. The court recited Supreme Court precedent that there are three categories of activities that can be regulated under the Commerce Clause: the channels, instrumentalities, and activities of interstate commerce. *Wynne*, 469 Md. at 85, 225 A.3d at 1142 (citing *United States v. Lopez,* 514 U.S. 549, 558-59 (1995)). The court stated that interstate activities such as product pricing regulation and favorable in-state tax treatment were industry regulations that were unlike the 2014 BRFA provision which concerned only the rate of interest on tax refunds. *Wynne*, 469 Md. at 86, 225 A.3d at 1143.

The court compared tariff taxation, which is the primary example of interstate commerce discrimination, to the 2014 BRFA provision which was aimed only at interest rates on tax refunds and is not itself a tax. *Wynne*, 469 Md. at 86, 225 A.3d at 1141. The court stated that "there is a fundamental difference between a tax and the rate of interest that may be paid on a tax refund." *Id*. at 86, 225 A.3d at 1143. The court further reasoned that this fundamental difference made it unlikely that individuals engaged in interstate commerce would even consider tax refunds in their decision making. *Id*. at 87, 225 A.3d at 1144. The court thus concluded that the 2014 BRFA was neither favorable in-state tax treatment, nor a regulation on interstate activity, and was too attenuated from an individual's interstate decision making to have an effect

on interstate commerce. *Id*. at 87, 225 A.3d at 1144. The court therefore held that the 2014 BRFA did not regulate interstate commerce or violate the dormant Commerce Clause. *Id*. at 87, 225 A.3d at 1144.

While the court found that the 2014 BRFA did not regulate interstate commerce, the court still examined whether the 2014 BRFA provision discriminated against interstate commerce. *Wynne*, 469 Md. at 88, 225 A.3d at 1144. The court stated that discrimination of interstate commerce requires that there be a "comparison of substantially similar entities" and therefore examined whether the 2014 BRFA provision was aimed at comparable markets for interstate investment or industry. *Wynne*, 469 Md. at 89, 225 A.3d at 1145 (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 342 (2008)). The court first stated that the interest rate on tax refunds in the current case was dissimilar from the previous litigation, in that the current 2014 BRFA was a cure for the prior constitutional defect. *Wynne*, 469 Md. at 90, 225 A.3d at 1146. The court further found that the Wynnes had failed to provide any evidence of an interstate market, or competition between markets, that would be affected by the 2014 BRFA provision. *Id*. at 91, 225 A.3d at 1146. The court rejected the Wynnes' arguments that the 2014 BRFA discriminated in effect against out-of-state business investments and disincentivized income generating activities in other states because individuals who were not engaged in interstate commerce could also have the interest rates on their tax refunds reduced by the 2014 BRFA. *Id*. at 93, 225 A.3d at 1147-48. The court concluded, that absent evidence to the contrary, the 2014 BRFA provision did not discriminate against any comparable interstate markets or industries, and therefore did not discriminate against interstate commerce or violate the dormant Commerce Clause. *Id*.

The Court of Appeals of Maryland held that the interest rate to be paid on out-of-state tax refunds, as set forth in the 2014 BRFA, did not violate the dormant Commerce Clause of the United States Constitution. *Wynne v. Comptroller of Maryland* is an important case as it is the most recent and comprehensive Maryland Court of Appeals decision concerning the dormant Commerce Clause. The case will be of great use to scholars seeking the latest Maryland ruling on the dormant Commerce Clause, as well as to law practitioners seeking guidance on the legal standards for dormant Commerce Clause regulation and interstate tax law matters. Finally, *Wynne v. Comptroller of Maryland* will be an invaluable case to the Maryland General Assembly when drafting new legislation that concerns interstate commerce, taxation, and market regulation.