

**MSBA REAL ESTATE DISCUSSION GROUP  
THE 2003 REAL ESTATE CASE HIT PARADE**

by

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This report attempts to gather all cases decided by the Maryland courts in the past calendar year in the area of "traditional" real estate law. Detailed treatment is given to cases with something interesting or amusing to say. Cases in the areas of zoning, land use, insurance and torts are generally not included. The year 2003 was marked by several important discussions of areas which have not been talked about for many years, as well as a number of cases of first impression. The Lewis case led to extended discussion around the State of the Critical Areas Law and threats to the Chesapeake Bay. It even got a lead article in The City Paper in Baltimore. This report does not discuss the Lewis case, since so many others have commented on it. However, before coming to your own conclusion on how serious a threat Lewis is to the future of the Bay, be sure to read the Court's decision on the Motion for Reconsideration, beginning at p. 607 of 833 A.2d. The Court attempts to answer the contentions made by various prophets of doom, and points out what the original decision did not say. Just like the original decision, the denial of reconsideration came on a 4-3 vote.

The obligation of a commercial landlord to mitigate damages was discussed in detail in the Circuit City case. The liability of a landlord for criminal acts occurring on leased premises was further refined in the Hemmings case. Special aspects of tenancy in common and joint tenancy can be found in the cases. The flood of easement cases continued unabated. It seems that people are more ready to fight about easements than almost any other subject. The Conrad/Dommel case contains an important discussion of riparian rights, the Maryland law of deeds of trust, and condominium expansion rights. Anyone practicing in those areas needs to read this case.

My selection of hits follows:

1. **PLEASE THROW ME IN THAT BRIAR PATCH – *Roper v. Camuso***, 376 Md. 240, 829 A.2d 589 (Harrell, J.) (July 30, 2003) – adjoining land owners filed suit against each other to enforce various covenants burdening lots in a subdivision. Camuso owned a lot expressly covered by the covenants. Roper owned an adjoining lot not expressly covered by the covenants, and objected to some trees planted by Camuso. Camuso argued that Roper did not have standing to enforce the covenants because her lot was not expressly subject to them. Roper argued that under the doctrine of implied negative reciprocal covenants, her lot was covered by the covenants and therefore she had standing to enforce them against Camuso's lot. Although the doctrine of implied negative reciprocal covenants is usually invoked by lot owners seeking to enforce the covenants against the original Grantor who retains ownership of some of the land, the doctrine may be employed by a Grantee who seeks to enforce the covenants against another

Grantee. The covenants generally are intended to benefit both the original Grantor and the whole community. Ms. Roper proffered evidence that she believed she was subject to the covenants, that she abided by some of the covenants, that she purchased her lot based on the belief that all of the lots in the community, including hers, were subject to the covenants, and that the developer also acted as if her lot were subject to the covenants. This evidence was sufficient to establish that her lot was intended to be subject to the covenants and she had standing to enforce the covenants against Camuso. Camuso also defended on the grounds that Roper had unclean hands because she had trespassed onto Camuso's lot to cut down parts of trees which Roper believed were planted in violation of the covenants. Because the case was decided on motion, the case was remanded the Circuit Court to determine whether or not Roper had unclean hands.

2. **I'LL HUFF AND PUFF AND BLOW YOUR HOUSE DOWN – *Murrell v. Mayor and City Council of Baltimore*, 376 Md. 170, 829 A.2d 548 (July 30, 2003)(Eldridge, J.), and *Smith v. City of Cambridge*, Ct. of Spec. Appeals No. 2253, Sept. Term, 2002 (July 18, 2003)(Krauser, J.)** – there were a couple of cases resulting from the increased willingness of local governments to demolish properties. In the Murrell case, Baltimore City had already demolished several houses owned by Mr. Murrell and contested his right to appeal to the Court of Special Appeals because it appears that § 12-301 of the Courts and Judicial Proceedings Article does not allow an appeal from a judgment of a trial court in reviewing the decision an administrative agency. In the Smith case, the City of Cambridge had issued a demolition order, but the Smiths did not know of it until they completed settlement of their purchase of the property. The administrative agency found that the value of the structure was \$8,000, although Mr. Smith submitted evidence that the property sold for \$300,000.00 in 1990. The appellate courts showed willingness to help the property owners. In Murrell, the Court of Appeals found that the procedural failings of the Baltimore City Department of Housing and Community Development called for a remedy in the nature of mandamus, from which appeal is permitted. In the Smith case, the Court of Special Appeals found that the procedures followed by the City official did not amount to a proper hearing and remanded the case for further proceedings. These cases are probably symptomatic of a problem in local administrative agencies when there is a desire to raze a property. The value of the Murrell case is that Judge Eldridge surveyed in detail the law relating to judicial review of administrative decisions, going back to a railroad condemnation case in 1837, and studying later cases in great detail, finding that the rule which is now reflected in § 12-302(a) of the Courts and Judicial Proceedings Article was based upon the Court of Appeals' 19<sup>th</sup> century aversion to entertaining statutory causes of action not in accord with "the forms and course of the common law". It is important to be aware of this statutory problem in Maryland, and the case points out the importance of trial preparation and good trial practice at the Circuit Court level. If you lose there when seeking review of an administrative decision, there may be no further appeal.

3. **LESS THAN USELESS – *Campbell v. Lake Hallowell Homeowners Association*, 152 Md. App. 139, 831 A.2d 465 (June 30, 2003) (Marvin H. Smith, J.)** – this is the first reported case interpreting the law relating to the homeowners association depository, § 11B-113(c) of the Real Property Article. Here, a homeowners association in 1994 adopted a resolution authorizing the HOA to recover attorney's fees incurred in enforcing homeowner compliance with the HOA documents. The resolution was filed in the HOA Depository in

accordance with § 11B-113 of the Maryland Homeowners Association Act. In 2001, the HOA started enforcement proceedings against Campbell for various violations and obtained a temporary restraining order and later a permanent injunction. The Association incurred attorney's fees of \$33,000.00 and the trial court awarded \$12,500.00 against Campbell. On appeal, after finding that the issue on the injunction was moot because Campbell had moved from the community, the Court of Special Appeals found that the resolution authorizing recovery of attorney's fees was in the nature of an amendment to the declaration and therefore needed to be recorded among the land records. Placing it in the Homeowners Association Depository was not sufficient and therefore the award of the attorney's fees was reversed. This points out a dilemma facing many attorneys practicing in the area of community associations. No one has ever really been sure of the function or purpose of the HOA Depository. What is the point of having to file the same paper in two places in the Record Office? It now seems that if an action of an HOA is in the nature of an amendment to the declaration, it must be recorded in the land records. Quaere, if it must also be placed in the HOA Depository.

4. **NICE TRY BUT . . .** – *NVR Homes v. Clerk for Anne Arundel County*, see CSA No. 2548, Sept. Term 2001 (March 18, 2003, cert. denied 376 Md. 51) – this case involved a claim for refund of recordation and transfer taxes paid on individual home conveyances by NVR Homes during and after the pendency of its Chapter 11 Bankruptcy case over several years. Bankruptcy Code § 1146(c) grants an exemption from transfer taxes for an instrument of transfer “under a [confirmed] plan” of reorganization. The 4th Circuit held that the Bankruptcy Code exemption applied only to transfers that occurred after confirmation of the NVR reorganization plan on July 22, 1993. NVR's Chapter 11 Petition was filed on April 6, 1992, and the company emerged from bankruptcy on September 30, 1993. During that seventeen month period, NVR Homes transferred 5,571 homes and paid transfer and recordation taxes to Maryland and Virginia of \$8.3 million! The case would be noteworthy for those numbers alone. However, the Maryland Tax Court held that there was no exemption because the transfers to individual home buyers were not contemplated under the plan of reorganization, nor were they necessary to consummation of the plan. The Circuit Court and the Court of Special Appeals agreed with the Tax Court and cert. was denied by the Court of Appeals. The case is useful for its teaching of the meaning of the Bankruptcy Code exemption from local transfer taxes.

5. **THE STRAIGHT AND NARROW** – *Miller v. Kirkpatrick*, 377 Md. 335, 833 A.2d 536 (October 9, 2003) (Harrell, J.) – Imagine that a new client gives you the following facts: she holds a written easement over a neighbor's property for a 20 feet wide ingress and egress easement. The neighbor has erected barbed wire fences in the easement area narrowing the useable area to 12 feet, repeatedly put obstacles on the road that damaged your client's farm equipment, and on one occasion approached your client with a rifle, poked your client with it in the chest, and threatened bodily harm if your client continued to do maintenance work and other things within the right of way beyond the fences. Would you predict any problem in winning a case seeking a court declaration to quiet title to the easement and to order the neighbor to remove the fences? Well, don't count your chickens . . . The trial judge found that Kirkpatrick was not interfering with the easement. He also denied a request to prohibit Kirkpatrick from threatening Miller with firearms, because such actions did not interfere with the right to use the driveway. He also found that the fences narrowing the driveway from 20 feet to 12 feet did not interfere

with the use of the driveway. After the Court of Special Appeals affirmed this extraordinary and totally wrong decision, the Court of Appeals granted cert. and reversed. The owner of a servient tenement may not unilaterally narrow an express easement. The trial judge based his decision on a finding that there was no unreasonable interference with the easement. But this is the wrong approach. Any permanent interference within an express right-of-way for ingress and egress "is unlawful as a matter of law and should be ordered removed".

Maryland hews to the traditional law of easements. It looks like Professor Susan French and the crew proposing a new Restatement of Servitudes which would allow the owner of a servient tenement to relocate easements will not find a receptive audience at the Maryland Court of Appeals.

6. **HOW TO WIN AND LOSE AT THE SAME TIME – *Circuit City Stores, Inc. v. Rockville Pike Joint Venture Limited Partnership*, 376 Md. 331, 829 A.2d. 976 (August 1, 2003)(Wilner, J.)** – This case is one of the most interesting commercial lease cases to be decided in a number of years. Circuit City closed its store in the Wintergreen Plaza Shopping Center on Rockville Pike. The landlord then exercised its rights to terminate the lease for default and sought to recover damages under the survival clause, providing that even in a case of termination, Circuit City must continue to pay rent for the balance of the lease term, less a credit for amounts received by the landlord from reletting. After Circuit City had paid the landlord \$700,000 under this clause, the landlord re-let the Circuit City space together with 3 adjoining small stores to Food Lion, and demolished the Circuit City store as well as the other stores. Food Lion then built a new store on that site. Circuit City claimed that this action effected a surrender of the lease which excused Circuit City from any further obligations for future rent payments, or, in the alternative, that the demolition of the Circuit City building and the combining of its area with three adjoining stores made it impossible to calculate the rent received by the landlord from reletting, and therefore, the credit available to Circuit City could not be determined. Because of this, damages would be impossible to calculate.

The Court of Appeals gave a succinct summary of the landlord's remedies when a tenant abandons commercial premises before the lease expires. The landlord may accept a surrender of the lease and terminate the tenancy; or, the landlord may reenter the premises as agent of the tenant and attempt to re-let the property for the tenant's benefit; or, finally, the landlord can do nothing and hold the tenant liable for the rent payable for the remainder of the term as it comes due. Here, the landlord accepted a surrender of the lease when Circuit City moved out, and it was seeking damages under the provision in the lease making the tenant liable for the rent reserved in the lease for the balance of the term. This is a contract right, not a property right, and contract principles of mitigation apply. Citing Friedman on Leases § 16.303, the Court of Appeals said that after a lease is terminated, the law of contracts becomes applicable and the landlord must endeavor to re-let and minimize his damages. The Court of Appeals found that the calculation of damages in this case would be difficult but not impossible, and remanded the case for a determination of the net economic benefit flowing to the landlord from the new tenant. With regard to the demolition of the adjoining stores, the Court of Appeals said that if the trial court determines that the landlord's efforts to re-let and its arrangement with the new tenant were

not reasonable, it could find a breach of the obligation to mitigate damages that would relieve Circuit City of the obligation to make further rent payments.

7. **THE CURRENT STANDARD OF LEGAL PRACTICE – *Attorney Grievance Commission of Maryland v. McClain*, 373 Md. 196, 817 A.2d. 218 (February 24, 2003)(Bell, C.J.)** – For Maryland attorneys who want to speak well of the Maryland Bar, this is an alarming case. Judge Lombardi in the Circuit Court for Prince George’s County, as well as the Court of Appeals, found no incompetence in the way that attorney McClain handled a foreclosure case on behalf of the lender. The evidence showed that he failed to order a title search on the property prior to the sale, failed to notify the IRS of the sale even though there was a federal tax lien filed, failed to notify the holder of the second Deed of Trust, failed to obtain waivers from junior lien holders, failed to report the sale within a reasonable time after its conclusion, and withdrew money from the buyer’s deposit for his own purposes before the audit was ratified. The buyers at the sale were represented by Carlton Green, a well respected and expert real estate attorney from Prince George’s County. Of course, he would not go through with the purchase because of the many defects in the foreclosure proceeding. Carlton was so startled by the nature of McClain’s errors, that he reported the matter to the Bar Counsel in accordance with his duty under Section 8.3 of the Maryland Rules of Professional Conduct. One would think this was an open and shut case of incompetence. One would be wrong! Both the trial court and the Court of Appeals found that this shocking display of professional incompetence was not incompetent. One of the expert witnesses said that over the course of his practice, he had made the same mistakes (one would hope not all in one case). The Court grasped this comment as grounds for saying incompetence was not proved. Chief Judge Bell pointed out that there is no rule requiring a title search before foreclosure sale. “There is also no requirement that a lawyer must consult Gordon on Foreclosures, no matter how prudent this might be. . . . The Court cannot say the AGC has presented clear and convincing evidence that McClain was incompetent under these circumstances to trigger the sanctions of Rule 1.1 . . .”. For anyone with any pretense to professionalism, this is a dismaying and disappointing decision.

**END**

## 2003 REAL ESTATE CASES

<u>DATE</u>	<u>CASE NAME</u>	<u>HISTORY / COMMENTS</u>	<u>SUBJECT</u>
12/19/03	Jenkins v. City of College Park, 379 Md. 142, 840 A.2d 139 (Cathell, J.)	Reversing 150 Md. App. 254, 819 A.2d 1129	Quiet title action – necessary parties
12/17/03	Washington Land Co. v. Potomac Ridge Development Co., CSA No. 2795, Sept. Term, 2002 (Krauser, J.)		Easement – Utilities – Right of neighbor to connect
12/17/03	Yu and Yu, L.L.P. v. Parkway Pawn Shop, Inc., CSA No. 2121, Sept. Term, 2002 (Adkins, J.)		Rescission – Lease – Scrivener's error
11/24/03	Brooks v. Greenbriar Condominium Phase I Council of Unit Owners, CSA Nos. 1858 & 2464, Sept. Term, 2001 (Marshall Levin, J.)	104 pp. opinion, argued 9/13/02	Condominium Lien – detailed review of law and procedure
11/18/03	Pak v. Hoang, 378 Md. 315, 835 A.2d 1185 (Cathell, J.)		Md. Lease Security Deposit Law – Attorney's fees to collect judgment awarded
11/13/03	Park Station L.P. v. Bosse, 378 Md. 122, 835 A.2d 646 (Eldridge, J.)		Right of first refusal – Not triggered by gift to charity
11/10/03	Carter v. Md. Mgmt. Co., 377 Md. 596, 835 A.2d 158 (Wilner, J.) (5-2)		Landlord & Tenant – Low income tenant – lease may be terminated only for cause
11/7/03	McGlaughlin v. Lewis, CSA No. 1392, Sept., 2002 (Krauser, J.)		Lease – Right of first refusal to purchase – ambiguous
10/14/03	Tracey v. Buccini, CSA No. 894, Sept., 2002 (Salmon, J.)		Adverse possession – Fence line
10/14/03	Amelito, Ltd. v. Ganderco, Ltd., 377 Md. 469, 833 A.2d 1013 (per curiam)	Remanded to CSA, full opinion No. 973, Sept. Term 2002 (Sonner, J.)	Lease – Reformation – fixtures clause
10/10/03	Academy Heights Civic Assn., Inc. v. Stevens, CSA No. 1421, Sept., 2002 (Alpert, J.)		Restrictions – Architectural control enforceable by association
10/9/03	Miller v. Kirkpatrick, 377 Md. 335, 833 A.2d 536 (Harrell, J.)		Easement – No right to unilaterally narrow it

<u>DATE</u>	<u>CASE NAME</u>	<u>HISTORY / COMMENTS</u>	<u>SUBJECT</u>
10/8/03	Bern-Shaw Ltd. Partnership v. Mayor & City Council of Baltimore, 377 Md. 277, 833 A.2d 502 (James R. Eyster, J.)		Eminent Domain – Owner's original purchase price irrelevant – no jury view in quick – take cases
10/7/03	Hughes v. Insley, CSA No. 558, Sept., 2002 2003 Md. App. LEXIS 125 (Salmon, J.)	Reconsideration denied w/opinion (3/8/04)	Adverse possession – tacking – change of use
9/30/03	Vaughan v. Bierman, CSA No. 0184, Sept., 2002 (Rodowsky, J.)		Foreclosure – Sale on 9/11/01 – valid. Inability to file bond before sale not fatal
9/5/03	White v. Simard, 152 Md. App. 229, 831 A.2d 517 (Adkins, J.)	Cert. granted, 378 Md. 617 (12/18/2003); argued 4/8/04	Foreclosure - Ad may provide for surplus on resale to go to lender
8/28/03	Salisbury Mall Associates, L.L.C. v. B. Green & Co., CSA No. 2064, Sept., 2001 (Greene, J.) (2-1)	61 pp. decision, Salmon, J. dissenting. Argued 1/14/03	Sublease or Assignment – Duty of main landlord – failure to repair
8/28/03	County Comm'rs of Kent County v. Claggett, 152 Md. App. 70, 831 A.2d 77 (Deborah S. Eyster, J.)	Cert. granted <u>sub nom.</u> Worton Creek Marina v. Claggett, 378 Md. 614, argued 3/9/04	Riparian Rights – Conflict of local law with State law on duck blinds
8/27/03	Remsburg v. Montgomery, 376 Md. 568, 831 A.2d 12 (Harrell, J.)		Trespass – hunting – duty of guide to protect land owner
8/27/03	Helinski v. Harford Mem. Hosp., Inc., 376 Md. 606, 831 A.2d 40 (Harrell, J.)		Joint Tenancy – Not severed until sheriff actually executes on judgment
8/15/03	Southern Management Corp. v. Kevin Willes Construction Co., CSA No. 2366, Sept., 2001 (Murphy, C.J.)	Cert. granted 12/11/2003; argued 4/8/04	Mechanic's Lien – Should notice be given to condo unit owners or manager?
8/7/03	Will v. Horner, CSA No. 2085, Sept., 2001 (Hollander, J.)		Implied Easement – Intent of grantor not proved
8/1/03	Circuit City Stores, Inc. v. Rockville Pike J.V. Ltd. Partnership, 376 Md. 331, 829 A.2d 976 (Wilner, J.)		Lease – duty to mitigate damages – calculation of damages
7/31/03	Lewis v. Md. Dept. of Nat. Resources, 377 Md. 382, 833 A.2d 563 (Cathell, J.) (4-3)	Reconsideration denied (4-3) w/opinion (10/19/03)	Critical Areas Law – standards for administrative agency
7/30/03	Roper v. Camuso, 376 Md. 240, 829 A.2d 589 (Harrell, J.)		Implied Negative Reciprocal Easement – standing to enforce

